Berkeley Journal of African-American Law & Policy

Volume 8 | Issue 1 Article 2

April 2013

The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in Brown versus Board of Education

Hans J. Hacker

William D. Blake

The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in *Brown versus Board of Education*[*]

Dr. Hans J. Hacker[†] and William D. Blake[‡]

I.
INTRODUCTION

Perhaps the question most animating debate among constitutional historians involves two vilified Supreme Court decisions—*Plessy v. Ferguson*[1] and *Lochner v. New York*.[2] What strange logic allowed the United States Supreme Court within a nine-year period to sustain state interference with private rights of association (typified by its decision in *Plessy*) and strike down state regulation of economic associative rights (typified by its decision in *Lochner*)? In sustaining state regulation intended to separate the races, the Court appeared to defend states' concern for public welfare over a private associative right. However, in striking down state legislation regulating working conditions by imposing maximum work hour and minimum wage requirements, the Court appeared to do exactly the opposite. It defended an economic associative right over the states' concerns for public health and welfare.

A cursory examination of the two cases seems to indicate that they are concerned with fundamentally different constitutional issues: *Plessy* with civil rights and *Lochner* with economic liberties. However, while scholars dispute the connections between them,[3] these two cases share an important

[*] The authors wish to acknowledge Professors Gordon Wood, Larry Kramer and other participants in the 2003 Supreme Court Historical Society Summer Seminar for their comments and critique of this work. Further, Lawrence Baum, David Bernstein, Howard Gillman and Kermit Hall reviewed versions of this project and likewise made valuable comments.

† Assistant Professor, Department of Political Science & Geography, Stephen F. Austin State University.

‡ B.A. College of William & Mary, 2004.

1. 163 U.S. 537 (1896).

2. 198 U.S. 45 (1905).

3. For a detailed review of the literature cataloging doctrinal similarities and differences of *Plessy* and *Lochner* (as well as the debate among constitutional scholars over the intellectual and doctrinal bases for the decisions), see David Bernstein, Plessy *versus* Lochner*: The Berea College*

jurisprudential trait. Namely, the Court considered the implications of state interference in private associations among individuals. Such consideration required that in both cases the Court determine if state action violated the principle of government neutrality.

The principle of government neutrality requires that government policies as enacted may not promote the interest of one class over another. Government may only interfere with individual liberty (or alter an existing social order) to promote a general purpose such as public health, safety, and morality. Such actions are taken under state police powers such as the government's power to promote the general public good. As Howard Gillman notes, in the absence of a general purpose "government power could not be used to gain special privileges or to impose special burdens on competing groups."[4] Thus, government could not intervene to advantage or disadvantage a particular class unless the public good justified such intervention.

The Court typically applied the principle when evaluating whether a state violated a substantive economic right. Neutrality was sometimes described in relation to substantive due process,[5] a term usually applied to the *Lochner* era.[6] However, the neutrality principle is steeped in Federalist, Jeffersonian and Jacksonian traditions as a means of reducing the influence of political factions that might take away individual rights, especially to property.[7] This principle was first articulated by the Supreme Court in *Calder v. Bull* when it stated that "a law that takes property from A and gives it to B [] is against all reason and justice, for a people to entrust a Legislature with SUCH powers."[8] However, until the Court began to review state economic regulation through the Due Process Clause of the Fourteenth Amendment, state courts were generally responsible for applying the doctrine to ensure that whenever state legislatures acted, they did so in the public interest.[9]

The connection between economic liberties and government neutrality is clear. It also explains state court economic rights jurisprudence before the ratification of the Fourteenth Amendment, the U.S. Supreme Court's interpretation of post-Civil War economic conflicts,[10] and its decisions on workers' rights at the turn of the century.[11] When reviewing a state economic

---

Case, 25 J. SUP. CT. HIST. 93, 93-94 (2000). *See also infra* Part II.

4. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 12 (1993).

5. *See, e.g.*, James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 967 (1998).

6. This is the era marked out by the Court's decision in the *Slaughter-House Cases*, 83 U.S. 36 (1872) and its rejection of police powers jurisprudence in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

7. GILLMAN, *supra* note 4, at 22-45.

8. Calder v. Bull, 3 U.S. 386, 388 (1798).

9. GILLMAN, *supra* note 4, at 53-60.

10. *See* The Slaughter-House Cases, 83 U.S. 36 (1873); GILLMAN, *supra* note 4, at 174.

11. *See* Morehead v. New York, 297 U.S. 702 (1936); Adkins v. Children's Hospital, 261

regulation, the Court demanded that the regulation as enacted address some issue of public concern (defined, as noted above, as enhancing public health, safety, welfare, or morality).[12] On the other hand, if the Court determined that the purpose of such a regulation was for the benefit of only some members of society, it would view the regulation as class legislation and strike it down.[13]

Government neutrality reached its high water mark as a jurisprudential principle in *Lochner v. New York*.[14] *Lochner* involved a challenge to a maximum work hour law for bakers, which its proponents justified on grounds of protecting workers' health. Opponents of the New York law maintained that it was an unreasonable restriction on freedom of contract because it gave a special benefit to employees at the expense of bakery owners.

Traditionally, scholars have argued that the Court abandoned government neutrality after the "Revolution of 1937" when it succumbed to New Deal economic and political pressure to free government from this doctrinal constraint. In that year, the Court upheld a minimum wage law in *West Coast Hotel v. Parrish*.[15] The case marked a sea change in the Court's view of state regulation of market conditions. According to the traditional view, after 1937, the Court abandoned the neutrality principle and its support of laissez faire economics in favor of pervasive state intervention in market relations.[16]

Many scholars view the neutrality principle and laissez faire economics as synonymous.[17] Others contend that the *Lochner* era featured rampant judicial activism, which promoted that economic vision.[18] However, a new wave of scholarship has emerged that characterizes the Court's use of government neutrality as a means of emphasizing "equal rights and the dangers of legislating special privileges for particular groups and classes."[19] Rather than using government neutrality as a thinly veiled excuse for enforcing a particular economic philosophy, the Court employed it as a means to achieve the founding vision of both equality in economic power and liberty to conduct economic exchange. This was a vision that was eroded by changing social and economic circumstances. Considering the strong ties between neutrality and equality, a larger question arises about government neutrality's role outside of economic rights.

Although we adopt this revisionist view, the purpose of this paper is not to reprise the debate over government neutrality as an economic jurisprudence

---

U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

12. GILLMAN, *supra* note 4, at 8-11. *See also* Holden v. Hardy, 169 U.S. 366 (1898).

13. *See, e.g.*, *Lochner*, 198 U.S. 45.

14. *Id.*

15. 300 U.S. 379 (1937).

16. *See* GILLMAN, *supra* note 4, at 3-6.

17. *See, e.g.*, ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (7th ed. 1991).

18. *See, e.g.*, WILLIAM M. WIECEK, LIBERTY UNDER LAW (1988).

19. GILLMAN, *supra* note 4, at 7.

doctrine. Instead, we extend the reach of the doctrine by exploring a connection between government neutrality and the Court's civil rights jurisprudence. In the first half of this paper, we describe the tension existing between economic associative and civil associative rights doctrine by posing two questions. First, are *Plessy* and *Lochner* jurisprudentially congruous? Second, why was the Court sometimes willing to back away from *Plessy* before the New Deal despite the overwhelming popularity of segregation at the time? In the second half, we explore how the Court resolved these doctrinal inconsistencies within the context of civil rights era litigation. Did the Revolution of 1937 extinguish government neutrality or did the doctrine survive in a new form as the foundation for modern standards of due process and equal protection? Finally, what was government neutrality's influence on the Court's logic in *Brown v. Board of Education*?[20]

In Part II, we argue that the debate among scholars over the congruity of the Court's decisions in *Plessy* and *Lochner* is irresolvable. Each case can be rationalized as either reinforcing a "natural" social order, or protecting a personal associative right.[21]

We focus instead on the jurisprudential inconsistency that the Court must face. For example, what would happen if a case presented both a freedom of contract claim (consistent with *Lochner*) and a civil right of free and equal association (which would run contrary to *Plessy*)? The Court in such a situation would potentially be forced to reaffirm *Lochner* at the expense of *Plessy* or vice versa.

In Part III, we consider two such cases. *Berea College v. Kentucky*[22] featured a freedom of contract challenge to an education segregation law as applied to a private, racially integrated college. The Court tackled this issue again in *Buchanan v. Warley*,[23] which involved a challenge to the

20. 347 U.S. 483 (1954).

21. The Court's decisions in *Plessy* and *Lochner* can be viewed as leading to either jurisprudentially congruent or incongruent outcomes depending largely on how one defines the central issues in each case. Generally, scholars cluster around one of two views on the central issues–either reinforcing a preexisting social order (*i.e.*, maintaining the advantages of business owners in *Lochner* and white citizens in *Plessy*) or upholding a right of association (*i.e.*, the capacity of workers to contract in *Lochner* and the right of the races to remain separate if they so desire in *Plessy*). If the Court's decisions are viewed as reinforcing the dominance of politically and economically powerful social classes, then they appear to be congruent. Furthermore, we can understand the Court's use of social scientific evidence in each case as a tool to rationalize its decisions–striking down a law favoring an underclass (the bakers) and upholding a law favoring a dominant class (whites in Louisiana). If the central issues are viewed in terms of a right of association, then *Plessy* appears to be out of step with traditional governmental neutrality jurisprudence. For example, some commentators argue that the *Plessy* Court overlooked (for reasons of deep racial bias that were not present in *Lochner*) the economic impact of preventing the races from privately electing integrated or segregated travel. Elements of the cases support either view, and also support multiple interpretations within each. *See infra* Part II.

22. 211 U.S. 45 (1908).

23. 245 U.S. 60 (1917).

constitutionality of a residential segregation ordinance. While the Court reasserted *Plessy* as good law, it decided *Buchanan* on a modified version of the *Lochner* holding. It ruled that under the Fourteenth Amendment, all citizens have contract and property rights that must, necessarily, be free from arbitrary government interference regardless of race.

In Part IV, we reevaluate the traditional assumption that the neutrality principle died in *West Coast Hotel* in 1937. Specifically, we find evidence that the Court applied the neutrality principle in *Shelley v. Kraemer*.[24] *Shelley* is most often viewed as an endorsement of a private right of association among the races through a clever application of the state action doctrine. However, the Court based its decision not on a civil right of association, but on the common law understanding of property rights asserted in *Buchanan*—the right to use and dispose of property.

Finally, in Part V we argue that government neutrality played a role in the Court's logic in *Brown v. Board of Education*. Although *Brown* was decided on equal protection grounds, the opinion reads like a substantive due process case. We posit that the holding of the case is narrow in that its condemnation of the separate but equal regime applies only to education. In his opinion, Chief Justice Earl Warren asserted that education is a *substantive* right "which must be made available to all on equal terms."[25] By framing the issue in terms of the right to education rather than a more sweeping vision of equal protection, we contend that the Court was, in part, applying government neutrality in a new realm of law.

Viewed in this light, our analysis of economic and civil associative rights strikes a middle ground between the traditionalist and revisionist views of the civil rights movement. David Bernstein, a revisionist, argues that the neutrality principle *could* have led to a major civil rights victory if the Court simply refused to accept the public purpose justification of segregation laws.[26] We claim that the doctrine of government neutrality actually *did* supply the Warren Court with crucial jurisprudential logic forcing government to remain neutral on race. Once the Court rid itself of the notion that segregation was needed to prevent racial amalgamation, it treated segregationist policies as class-based legislation denying blacks equal protection of the law.

On the other hand, the traditionalist interpretation of *Brown* is only partially correct. Bruce Ackerman argues that the Court abandoned *Lochner* in order to arrive at *Brown* because the neutrality principle was used to justify minimalist government and protect the interests of politically powerful classes. On this view, the more activist government under the New Deal and the

24. 334 U.S. 1 (1948).
25. *Brown*, 347 U.S. at 493.
26. DAVID BERNSTEIN, ONLY ONE PLACE OF REDRESS 108-09 (2001).

commitment to minority rights in *United States v. Carolene Products Co.*[27] were necessary preconditions for desegregation.[28] We agree that the evolution of compulsory schooling during the New Deal was necessary for the Court to declare education a substantive right. Furthermore, we agree that the Court had to abandon the public purpose justification for segregation. However, with these two changes, the Court poured new wine in old bottles by maintaining the jurisprudence of government neutrality.

II.
SETTING THE STAGE: *LOCHNER*, *PLESSY*, AND JURISPRUDENTIAL CONFLICT

A. Lochner v. New York

As discussed above, *Lochner v. New York* challenged a maximum work-week law for bakers. In justifying passage of the law, New York claimed that it was necessary to control the intrastate economy and that it was a reflection of community standards. The law protected both consumers and the health of bakers who often worked in squalor.[29] The state therefore argued the law fell under the "health, safety, and morals" justification of its police power. Critics of New York's position reasoned that the state intended to benefit rival bakeries, whose unionized workers already worked less than ten hours a day. Forcing all bakeries to abide by a maximum work-week law would eliminate the advantage enjoyed by non-unionized bakeries.[30]

The Court, in a five-to-four decision, struck the statute down as a violation of freedom of contract.[31] Justice Peckham, writing for the majority, stated that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[32] Justice Harlan, authoring one of two dissents, argued that determining the legitimate exercise of the police power should be left, in large part, to the legislative branch.[33] Finally, Justice Holmes assailed the Court's apparent bias toward enhancing laissez-faire capitalism, writing that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[34]

Obviously, government neutrality greatly influenced the principles

27. 304 U.S. 144, 152 & n.4 (1938).

28. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 63-67, 142-50 (1991).

29. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 573 (4th ed. 2003).

30. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 108 (1992).

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

32. *Id.* at 57.

33. *Id.* at 65.

34. *Id.* at 75. *See also* GILLMAN, *supra* note 4, at 131 (explaining why no single member of the *Lochner* majority took to the bait of Holmes' indictment).

underlying the Court's decision in *Lochner*. Since the Court found no public purpose for the legislation, it could only be viewed as "a purely labor law."[35] In other words, the law was an exercise of government power to advance the interests of one class (the bakers) over those of another (the bakery owners). If bakers did not wish to work long hours, the Court reasoned, they should simply bargain for more suitable terms of employment.[36]

The case also demonstrated the ongoing battle over the acceptability of sociological jurisprudence,[37] which holds that

> the purpose of law is to achieve social aims.... Sociological jurisprudes... believed that judges should not strictly rely on traditional analytical tools... when deciding constitutional cases with social import. Instead, judges should consider the public interest and modern social conditions or "social facts" when interpreting the Constitution.[38]

Ironically, the only sociological evidence of the effects of working conditions on bakers was submitted to the Court in Lochner's own brief. Perhaps if New York had offered counterevidence of harmful health and working conditions, government neutrality would have steered the Court to the opposite conclusion in *Lochner*. Both dissents offered in the case relied heavily on sociological jurisprudence; Harlan's writing is more "scientific," yet Holmes' dissent became much more famous.[39] The use of sociological jurisprudence, as discussed below, was an important weapon for both allies of segregation and integration.

B. Plessy v. Ferguson

Nine years before *Lochner*, the Court issued a similarly well-known decision in the case *Plessy v. Ferguson*.[40] Homer Plessy, whom the courts classified as black even though he was seven-eighths white, challenged a Louisiana segregation law that prohibited blacks and whites from traveling together on railroad cars.[41] By a vote of seven to one,[42] the Court upheld the statute as an acceptable exercise of police power.[43] In a sweeping majority

35. *Lochner*, 198 U.S. at 57.

36. *See* GILLMAN, *supra* note 4, at 62-63 (discussing whether this attitude was realistic given the changing nature of the American economy at the turn of the 20th century).

37. *See also* Muller v. Oregon, 208 U.S. 412 (1908); Holden v. Hardy, 169 U.S. 366 (1898).

38. David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 811-12 (1998).

39. *Id.* at 818.

40. 16 U.S. 537 (1896).

41. Although one tends to associate Jim Crow laws with Southern states (indeed, consider the geographical origins of most of the cases in this analysis), many segregation laws began in the North. Frederick Douglass, for example, rode in segregated rail cars when he lived as a free man in New Bedford, Massachusetts. JIM CULLEN, THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION 114 (2003).

42. Justice Brewer did not hear oral arguments or take part in the decision.

43. *Plessy*, 16 U.S. 537.

opinion, Justice Brown declared that states had the right to require segregation in any sphere under the public purpose justification of police power, so long as the law in question was reasonable.[44]

In order to justify segregation as a reasonable exercise of the police power, Justice Brown relied on sociological jurisprudence. The Court reasoned that when determining whether a segregation measure is reasonable, courts should give deference to state legislatures. Justice Brown wrote, "[The legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[45] Deferring to the legislature, although not an inherent part of sociological jurisprudence, became associated with the doctrine to further social aims.[46] Furthermore, Brown based his opinion on the notion that "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[47] Under this view courts may only enforce political equality, such as in *Strauder v. West Virginia*,[48] as opposed to social equality.[49] Thus, the Court grounded the constitutionality of a segregation measure not on a fundamental notion of rights, but rather upon prevailing public sentiment. Michael Klarman notes, "The outcome of *Plessy* is mainly attributable to the virulent racism of the Gilded Age."[50]

But Justice Brown left the door open to racial integration: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[51] It seems that the *Plessy* Court might have had no difficulty with private, voluntary association between the races because that was the only appropriate vehicle for advancing social rights. As we discuss below, the Court would soon have to deal with such a case.[52] Blacks and whites occupying the same railcar, on the other hand, was an involuntary association between the races, which the state had the right to prevent in the name of public safety and morals.

In an eloquent and impassioned dissent, Justice Harlan advanced two lines of argument—that the Louisiana law was caste legislation and that it was class

44. *Id.* at 550.
45. *Id.*
46. Bernstein, *supra* note 38, at 813-14.
47. *Plessy*, 16 U.S. at 551.
48. 100 U.S. 303 (1879).
49. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 938 (1998).
50. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 787 (1992).
51. *Plessy*, 163 U.S. at 551.
52. See the discussion of *Berea College v. Kentucky* below.

legislation.[53] Harlan argued that the segregation measure violated the Thirteenth Amendment guarantee against involuntary servitude. His broad interpretation of that amendment rested on the belief that it went beyond a prohibition of owning people as slaves. He stated that the Thirteenth Amendment also "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude."[54] He then concluded that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[55] Harlan took an extreme interpretation of the majority's reasoning by questioning where the Court could draw the line against an unreasonable segregation statute. He asked whether it would be permissible for the state to require that blacks and whites walk on opposite sides of the street, or whether the state could require separate railcars for Catholics and Protestants.[56]

Despite his powerful rhetoric on Thirteenth Amendment issues, it was Harlan's claim of a violation of government neutrality that placed the largest obstacles before the majority. He argued that the intended purpose of the segregation statute was not to keep white people from riding in cars intended for black people, but rather to keep blacks from riding in cars intended for whites. He began his opinion by citing many railroad regulation cases to support his contention that railroads are common carriers, which all citizens have the right to enjoy. He maintained that this was an important distinction because the right to travel freely was viewed as fundamental, dating from the times of Blackstone.[57] Richard Epstein writes, "The racial discrimination mandated by the Louisiana statute was clearly at odds with the common law's hostility toward discrimination by common carriers. The whole purpose of the statute was to introduce the invidious forms of racial classifications that were not allowed at common law."[58]

Harlan then cited *Strauder v. West Virginia*,[59] an 1879 case holding that blacks must be allowed to serve on juries. In that case, the Court stated "that the law in the States shall be the same for the black as for the white...."[60] This

53. Mark V. Tushnet, *Progressive Era Race Relations Cases in Their 'Traditional' Context*, 51 VAND. L. REV. 993, 996 (1998).

54. *Plessy*, 163 U.S. at 555.

55. *Id.*

56. *Id.* at 557-58.

57. On the other hand, the availability of other public benefits, such as education "was generally viewed as a matter of governmental grace." Earl M. Maltz, *'Separate but Equal' and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 RUTGERS L.J. 553, 567 (1986) (providing an excellent account of other common carrier segregation cases).

58. Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the 'Progressive' Era*, 51 VAND. L. REV. 787, 791-92 (1998). *See also* EPSTEIN, *supra* note 30, at 116-29.

59. 100 U.S. 303 (1879).

60. *Id.* at 307.

language is strikingly similar to what Harlan himself wrote in the 1909 case *Adair v. United States*.[61] In a 6-2 majority opinion, the Court ruled that a federal law banning "yellow dog" contracts was an unconstitutional restriction of the freedom of contract.[62] Harlan wrote that "[t]he employer and the employe [*sic*] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[63] The Court thus seemed to have contradictory opinions on the application of government neutrality. In purely economic rights cases, the Court vigorously asserted government neutrality against what it deemed unequal treatment. However, on racial issues, using the same jurisprudence, Justice Harlan went from being in the majority to being in the minority. The Court was willing to uphold the political rights of African Americans, as in *Strauder*, but nothing more.

Harlan also revealed a contradiction in Justice Brown's reasoning that further supported his government neutrality argument. In writing that "legislation is powerless to eradicate racial instincts"[64] Brown implied that a law requiring the integration of the races would be futile. However, that was clearly not the type of law before the Court. Bernstein writes, "One can easily forget when reading Justice Brown's opinion in *Plessy* that the plaintiff was not asking for 'enforced commingling of the races,' but for a ban on government compelled segregation."[65] Harlan pointed out, "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."[66] The extension of this argument is that the doctrine of government neutrality protects the right of liberty from the state's arbitrary infringement.

Several constitutional law scholars have articulated a third potential government neutrality concern that was not touched upon in any of *Plessy's* opinions. Although the Court managed to frame *Plessy* in terms of a civil right of association, there was another issue in the case—the right of the railroad company to make contracts with customers willing to ride on integrated railcars. Mark Tushnet writes, "If *Lochner* involved a labor law pure and simple because neither side to the transaction lacked common law capacity to contract, so we might say that *Plessy* involved a race law pure and simple, for exactly the same reason."[67] Supporters of the Louisiana law justified their position on the basis of protecting freedom of association, through a perverse

61. 208 U.S. 161.
62. *Id.*
63. *Id.* at 175.
64. *Plessy*, 163 U.S. at 551.
65. Bernstein, *supra* note 38, at 825.
66. *Plessy*, 163 U.S. at 557.
67. Mark V. Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245, 249 (1997).

logic of guarding against forced interaction between the races. Ironically, however, the law had the opposite effect on the issues of freedom of association because it precluded a contractual relationship between the railroad and willing customers.[68]

The analogy between *Plessy* and *Lochner* (as well as other economic rights decisions of the epoch) is quite strong. In *Lochner*, there were three groups of actors involved in the controversy: employers, bakers who agreed to the conditions of employment, and bakers who were dissatisfied with the proposed arrangement. Similarly, in *Plessy* there were three groups involved: rail providers, passengers (both white and black) who consented to integration, and passengers (presumably white) who were not interested in riding on integrated cars. The doctrine of freedom of contract would hold that bakers who want higher wages or fewer hours should look elsewhere for such conditions. If that same philosophy were applied to *Plessy*, disgruntled passengers would have gone to other railroad providers to bargain for segregated service.[69]

In the years before *Plessy*, railroad companies often found it more profitable to offer integrated service, and many transportation providers actively resisted the implementation of railroad segregation,[70] although some segregated rail service existed in Louisiana at the time.[71] In fact, the railroad company on which Homer Plessy was riding may have quietly encouraged him to challenge the segregation law.[72] Prior to segregation laws, railroad companies were able to provide seating efficiently on a first come first served basis. Segregation forced railroad companies to provide excess seating in order to ensure segregated access to both races,[73] which left seats unfilled and caused economic losses for the companies.

Instead of finding a market-based solution, the white citizens of Louisiana chose to utilize the legislative process to achieve their goal. From an economic perspective this made sense, because it was less costly to use the superior political power of their race, as opposed to paying higher ticket prices. However, this strategy used the power of government to advance the interests of one class at the expense of another. Describing this violation of government

68. EPSTEIN, *supra* note 30, at 107.

69. Tushnet, *supra* note 67, at 247-48.

70. Jennifer Roback, *The Political Economy of Segregation: "The Case of Segregated Street Cars,"* 46 J. ECON. HIST. 893, 893-917 (1986). Roback has collected evidence supporting this claim from Augusta, Georgia; Atlanta, Georgia; Houston, Texas; Jacksonville, Florida; Mobile, Alabama; and Memphis, Tennessee. *Id.* In Atlanta, it appears that streetcar companies did not enforce segregation through at least 1898, two years after *Plessy*. *Id.* *See also* EPSTEIN, *supra* note 30, at 102.

71. CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 17 (1987).

72. CULLEN, *supra* note 41, at 104.

73. EPSTEIN, *supra* note 30, at 102-03.

neutrality, Tushnet writes, "The legislation upheld in *Plessy* allowed white riders to short-circuit the bargaining process, just as the law in *Lochner* allowed bakery employees to short-circuit the same process."[74]

Unfortunately, neither the attorneys for Homer Plessy nor Justice Harlan in his dissent advanced this argument. The majority found that the statute's public purpose, based on racist pseudo-science, rebutted the economic rights argument as well as Harlan's appeals to personal liberty and consistency with *Strauder*. We argue that the Court's clumsy approach to *Plessy* demonstrates an internal conflict over the application of government neutrality, a conflict that in part put *Plessy* and *Lochner* at odds.[75] As Bernstein writes, "*Plessy* did not represent traditional jurisprudence of the type that carried the day in *Lochner*."[76] Finally, Epstein states even more strongly, "By no stretch do *Plessy* and *Lochner* represent different applications of a common jurisprudence. *Plessy* represented the expansionist view of the police power that *Lochner* repudiated."[77] This conflict in government neutrality jurisprudence would be placed before the Court three years after *Lochner* in the case of *Berea College v. Kentucky*.

III.
THE PROGRESSIVE ERA CASES

A. Berea College v. Kentucky*: The Clash is Exposed*

Founded in 1855 by an abolitionist minister "to promote the cause of Christ,"[78] Berea College was formed as a racially integrated university in Kentucky. In the years following the Civil War, Berea College admitted roughly an equal number of black and white students each year.[79] However,

74. Tushnet, *supra* note 67, at 249.

75. Klarman argues, "In the late twentieth century, we tend to think about equal protection in terms of a broad presumptive rule against racial classifications. But this is not how Reconstruction Republicans, with their trifurcation of rights into the categories of civil, political, and social, thought about race discrimination." Klarman, *supra* note 49, at 938. Even if the Court truly believed that the right to sit on a train car of one's choosing was a social right not protected by the Fourteenth Amendment, future cases before the Court make the choice between freedom of contract and segregation even more apparent.

76. Bernstein, *supra* note 38, at 804. Professor Bernstein defines traditional jurisprudence as the notion that "the Constitution had a fixed meaning and that the judiciary's role was to serve as an elitist institution that limits popularly controlled legislatures from exceeding constitutional boundaries." *Id.* To Bernstein, *Lochner* represents a prime example of traditional jurisprudence. *Id.*

77. Epstein, *supra* note 58, at 792.

78. ALEXANDER BICKEL & BENNO SCHMIDT, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 729 (1984).

79. For a history of Berea College's early years, see Paul David Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. NEGRO HIST. 13, 13-17 (1974) and Scott

the percentage of black students began to decline substantially beginning in 1892.[80] Feeling the intense racial pressures of the Jim Crow era, William Frost, the president at that time, changed the focus of the college to educating Appalachian whites.[81]

Despite this change, Carl Day, a member of the Kentucky House of Representatives, proposed a bill for racial segregation in higher education in 1904. Although the bill was worded neutrally, Berea College, the only integrated school in the state,[82] was clearly the target. Some legislators held private reservations about the bill because Berea College was not a public institution and its property rights were being restricted.[83] Frost aggressively lobbied the state legislature, demonstrating the community support for the college with a petition signed by eighty percent of the registered voters in Madison County where Berea College was located.[84]

Although Frost had managed to defeat a similar bill two years earlier,[85] he could not overcome the popularity of segregation, and the bill passed overwhelmingly.[86] The law prohibited individuals or corporations from administering an integrated school or college. Any teacher or pupil attending such a school would be subject to a fine. Anticipating that Berea College would react to the law by establishing separate and segregated schools right next to each other, Section Four of the law mandated that separate branches of the same school be located at least twenty-five miles apart.[87]

Berea College immediately challenged the constitutionality of the Day law by setting up a test case. The Madison County Circuit Court[88] and the Kentucky Court of Appeals[89] both upheld the Day law, issuing *Plessy*-style opinions. The Court of Appeals ruled that the segregation statute supports two important public purposes: stemming racial violence and preventing interracial

---

Blakeman, *Night Comes to Berea College: The Day Law and the African-American Reaction*, 70 FILSON CLUB HIST. Q. 3, 4-7 (1996).

80. Richard A. Heckman & Betty J. Hall, *Berea College and the Day Law*, 66 REGISTER KY. HIST. SOC'Y 35, 44 (1968).

81. Blakeman, *supra* note 79, at 6-8. Blakeman believes that Frost chose this new mission because it was more attractive to potential donors to the school. *Id. See also* Heckman & Hall, *supra* note 82, at 42-43 (agreeing that Frost did not wish to make Berea College all white).

82. JOHN A. HARDIN, FIFTY YEARS OF SEGREGATION: BLACK HIGHER EDUCATION IN KENTUCKY 13 (1997). The only other integrated college in the entire South was Maryville College in Tennessee, which like Kentucky was a border state. Blakeman, *supra* note 79, at 26 n.45.

83. Jennifer Roback, *Rules v. Discretion:* Berea College v. Kentucky, 20 INT'L J. GROUP TENSIONS 47, 53 (1990).

84. *Id.*

85. HARDIN, *supra* note 82, at 13-14.

86. *See* Bernstein, *supra* note 26, at 97.

87. Heckman & Hall, *supra* note 80, at 41.

88. Commonwealth v. Berea College, No. 6009 (Madison Cty. Cir. Ct. Feb. 7, 1905).

89. Berea College v. Commonwealth, 123 Ky. 209 (1906). The Court of Appeals was the court of last resort in Kentucky until 1976. *See* KY. CONST. §§ 109-11 (amended 1975).

marriage. The court reasoned that young people from both races going to school together would lead to racial violence.[90] In a seemingly contradictory assertion, the court also argued that interracial education could lead to interracial association, writing, "It is but a step to illicit intercourse, and but another to intermarriage."[91]

These public purposes allowed the Court to overlook the persuasive claim, offered by Berea, that voluntary and private association should be beyond government regulation. Demonstrating that even a Southern state court embraced *Lochnerian* principles, the court added, "Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of police power."[92]

Each party's brief to the Supreme Court foreshadowed the jurisprudential conundrum the Court would face in this case. As David Bernstein indicates, "Overall, Berea's brief is an excellent example of legal argument relying on traditional jurisprudential notions. By contrast, Kentucky's brief manifested the statist influence of Progressivism and sociological jurisprudence."[93] The opposing viewpoints in these briefs can be described as a difference between negative versus positive rights. Berea College maintained that the right to be free of arbitrary government intrusion is the linchpin of the Due Process Clause of the Fourteenth Amendment.[94] On the contrary, Kentucky contended that the Fourteenth Amendment does not guarantee a positive right of social equality.[95]

Berea cited various freedom of contract cases in support of its position, including *Allgeyer v. Louisiana*,[96] *Yick Wo v. Hopkins*,[97] *Lochner v. New York*,[98] and *Dartmouth College v. Woodward*.[99] Berea also cited the Magna Carta, which is commonly referenced as the origin of due process common

90. 123 Ky. at 222-23.

91. *Id.* at 225.

92. *Id.* at 220-21.

93. Bernstein, *supra* note 38, at 831.

94. Berea argued, "A state cannot, under the guise of police power, control voluntary attendance at a private school, with whose management and support the state has nothing to do, for the right of attendance is purely and exclusively private." Reply Brief of Plaintiff in Error at 1, Berea College v. Kentucky, 211 U.S. 45 (1908) [hereinafter Plaintiff Reply Brief].

95. Kentucky stated, "Social equality is not guaranteed by the fourteenth amendment, nor is voluntary association guaranteed to the races." Brief for Defendant at 35, Berea College v. Kentucky, 211 U.S. 45 (1908) [hereinafter Defendant Brief].

96. 165 U.S. 578 (1897) (holding for the first time that the liberty to contract was a right encompassed by the due process clause of the Fourteenth Amendment).

97. 118 U.S. 356 (1886).

98. 198 U.S. 45 (1905).

99. 17 U.S. 518, 655 (1819) (Washington, J., concurring) ("A College founded by an individual or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government."), *quoted in* Plaintiff Reply Brief, *supra* note 94, at 11.

law.[100] In a direct appeal to the Court's view of *Lochner*, Berea stated, "The right to maintain a private school is no more subject to legislative control than the right to conduct a store or a farm."[101] As an extension, the Day law denied teachers the right to pursue a lawful occupation.[102] Berea also contended that the Day law would cause the College to lose much of its property because its endowment was dedicated to interracial education.[103]

Berea also highlighted the Day law's abuse of police power, contending, "The sole province of the police power [doctrine] is to prevent one from exposing others, without their knowledge or against their will, to a danger."[104] Berea strenuously attempted to refute the public purpose justification offered by Kentucky. First, Berea pointed out that there was no evidence indicating that Berea students were causing any disruption to the surrounding community.[105] Second, Berea noted a portion of Section Three of the Day law, which exempts prisons and "houses of reform" from the provisions of the law. Berea asserted the law could not fulfill a public purpose since it did not apply universally. Instead, it targeted a specific segment of society and imposed a disadvantage on it alone, in violation of neutral government principles.[106] Finally, Berea reasoned that Kentucky would never be able to achieve its goal of eliminating voluntary association of the races because blacks and whites were free to interact in other areas of private life.[107] If the Court ruled that a government could ban all forms of voluntary association, then that principle would run afoul of the reasonability test set forth under *Plessy*.[108]

Berea also attempted to distinguish its case from *Plessy*, where the Court reasoned that traveling on train cars created a public or forced, as opposed to private, voluntary association between the races.[109] Justice Brown left the door

---

100. Brief for Plaintiff in Error at 21, Berea College v. Kentucky, 211 U.S. 45 (1908) [hereinafter Plaintiff Brief] (quoting The Magna Carta, "No freeman shall be taken or imprisoned or be disseized [sic] of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him but by lawful judgment of his peers, or by the law of the land.").

101. *Id.* at 10.

102. *Id.*

103. *Id.* at 5.

104. Plaintiff Reply Brief, *supra* note 94, at 6.

105. *Id.* at 14.

106. *Id.* at 9.

107. Plaintiff Reply Brief, *supra* note 94, at 5.

108. *Id.* at 11.

109. Klarman agrees with this conception of *Berea College*. He writes,

> By way of contrast, if a private college chose to integrate its student body, segregationists were free to take their custom elsewhere. For the state to demand segregation from a private institution enjoying no monopoly position thus raised distinct issues of liberty (rather than equality). Indeed, language in *Plessy* strongly suggested that the state had no business interfering with voluntary integration of the races, which is precisely what the Day law accomplished.

Michael Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 336 (1998).

open to voluntary association, stating, "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[110] Berea believed that its institution—a private college that the students voluntarily chose to attend—met the challenge posed in *Plessy*.[111] According to Berea, a restriction like the Day law should be struck down since individual private actions should only be restricted if they are "shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary."[112] As Berea asserted, since the Day law violated the exception outlined in *Plessy* it should have been overturned.

In contrast, the brief submitted by Kentucky hinged on sociological jurisprudence referenced in *Plessy*. Kentucky's brief was also strikingly similar in its philosophical and legal basis to the famous Brandeis Brief submitted to the Court in *Muller v. Oregon*[113] in that same year. Just as the "Brandeis Brief" disparaged the physical and social potential of women, Kentucky based its arguments on the fundamental inferiority of the African American race. The logical conclusion of this inequality was that the races must be kept separate to prevent racial amalgamation. Kentucky attempted to support its argument by emphasizing the role of God, writing, "It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix."[114]

To prove its contention of natural and eternal racial differences, Kentucky cited an array of scientific evidence.[115] Most notably, the state presented a study by Dr. Sanford B. Hunt that measured physical characteristics of racial groups. Hunt's analysis of brain weight indicated that an average African American's brain weighed five ounces less than the brain of an average white person, and the brain of an average mulatto weighed even less than the brain of an average African American.[116] In a shocking display of racism, Kentucky

110. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

111. Plaintiff Brief, *supra* note 100, at 24-25.

112. *Id.* at 25.

113. 208 U.S. 412 (1905). The case involved a challenge to a maximum work week law for women.

114. Defendant Brief, *supra* note 95, at 19 (quoting West Chester R.R. Co. v. Miles, 55 Pa. 209 (1867)).

115. *See* BICKEL & SCHMIDT, *supra* note 78, at 735. Benno Schmidt characterizes this type of evidence as "eugenic pseudo-science" used for an "unabashed exaltation of racism."

116. *See* Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 632 (1985). Hunt's finding is only relevant if one accepts the proposition that brain size is directly related to intelligence. However, at the time, the conclusion of this research was startling—that when breeding occurred between the two races, a less intelligent human would be produced. Since social Darwinism implied that species could not evolve except over long periods of time, these differences between the races were destined to be relatively eternal.

argued that this physical difference is "not the result of education, but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race."[117]

In evaluating the public purpose of a police power regulation, Kentucky made two arguments based on sociological jurisprudence. First, it maintained, "The welfare of the State and community is paramount to any right or privilege of the individual citizen."[118] On this view, even the right to property is subservient to police power.[119] Second, Kentucky contended that the determination of the public welfare ought to be left with the legislative branch,[120] a dangerous argument considering that the Court rejected this view three years prior in *Lochner*.[121] However, Kentucky believed the Day law, with its race neutral language, could not have violated government neutrality. The segregation statute, it argued, met the test posed in *Magoun v. Illinois Trust & Savings Bank,* which stated that "all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."[122]

On which side did the Court come down? Did it recognize the violation of the principle of government neutrality or did it affirm a racist social order? The answer is neither; the Court managed to find a third avenue and dodge the controversy.[123] In a seven-to-two decision, the Court upheld the Day law on the grounds that the Commonwealth of Kentucky had the right to alter the charter that governed Berea College. The legislation effectively amended the college's charter.[124] Justice Brewer, writing for the Court's majority, declared that even though Kentucky had not directly forbidden racial integration when Berea College received its charter, the distinction between the rights of corporations and the rights of individual people allowed for this ruling since the charter never specifically authorized the school's admissions policies.[125]

Justice Harlan, as he had done in the past in *Plessy* and the *Civil Rights Cases*, wrote an impassioned and vociferous dissent. He began by advancing

---

117. Defendant Brief, *supra* note 95, at 40.

118. *Id.* at 2.

119. *Id.* at 37.

120. *Id.* at 24-25.

121. 198 U.S. 45, 56 (1905).

122. 170 U.S. 283, 293 (1898) (involving a challenge to an Illinois inheritance tax), *quoted in* Defendant Brief, *supra* note 95, at 34..

123. The case is the best example of what we like to call "Oh, look...it's a bear!" jurisprudence. The Court is able to distract us from the controversy while running away as quickly as it can. *See also* Naim v. Naim, 350 U.S. 891 (1955) (per curiam).

124. Berea College v. Kentucky, 211 U.S. 45, 56 (1908).

125. *Id.* at 54-56. The Court did admit that the power to amend charters was subject to some limitations, namely, the state could not violate the original intent of the charter. Quoting from the charter, the Court said that the object of Berea College was "the education of all persons who may attend." *Id.* at 56. Thus, so long as the College could set up separate facilities for both races, it could fulfill its mission.

Berea's argument that the intent of the Day law went beyond only chartered schools to prohibit all interracial education. Thus, the intent of the legislation was not to amend Berea's charter, but rather to prevent black and white students from being integrated in the same school.[126]

Having dealt with the charter amendment issue, Harlan proceeded to consider whether the Day law was a violation of the substantive rights of the Fourteenth Amendment. He argued that the right of teachers to seek employment is both a property right and a liberty covered by the Due Process Clause, a view endorsed by the dissenters in the *Slaughter-House Cases*.[127] Harlan observed that the Court "has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties.'"[128]

The final portion of Justice Harlan's dissent is a moving criticism of the Court's apparent steadfast resistance to any social interactions between blacks and whites. By allowing Kentucky such unbridled discretion in regulating racial policies, Harlan pointed out a very slippery slope down which the state might proceed:

> So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church... Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?[129]

Overall, *Berea College* demonstrates the inherent conflict in jurisprudence between *Plessy* and *Lochner*. *Berea College* seemed to provide an answer to Justice Brown's challenge in *Plessy* for social equality to develop through the voluntary actions of private individuals.[130] The lawyers for Kentucky never advanced the argument that Berea College was a public facility that would fall under the logic of *Plessy*. Instead, the association of students from both races at Berea College was entirely voluntary and private. *Berea College* provided an even stronger example of segregation laws that interfered with private contract rights that should be protected by government neutrality. The Court must have taken notice of this quandary, which is probably why it decided to avoid facing this conflict.

Although *Berea College* was not a victory for advocates of civil rights, it

126. See *id.* at 62 (Harlan, J. dissenting).
127. 83 U.S. 36 (1872).
128. *Berea College*, 211 U.S. at 67-68.
129. *Id.* at 68-69.
130. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

cannot be viewed as a total defeat.[131] The holding applied only to corporations, and it did not extend the logic of *Plessy* to all private associations. As Andrew Kull notes, "Not two decades after *Plessy*, more than half the members of the Supreme Court had shown themselves to be uncomfortable with the reasoning of the case that was the leading authority for the legality of segregation under the Fourteenth Amendment."[132] Because of its limited scope, this ruling provided the opportunity for other cases to help resolve this jurisprudential conflict. The Court accepted such a case nine years later in *Buchanan v. Warley*.[133]

B. Buchanan v. Warley*: "On the Brink of Residential Apartheid"*[134]

Buchanan v. Warley involved a challenge to a Louisville, Kentucky ordinance that enforced racial segregation in residential neighborhoods. In Louisville, blacks and whites lived in close vicinity to each other for years before and after the Civil War. At the turn of the century, whites began to segregate their neighborhoods by refusing to sell properties to blacks. A black ghetto evolved near the city's business district. Wealthy black businessmen who wanted to avoid the crime and lack of city services of black neighborhoods began to buy houses in white neighborhoods.[135] As a result, many whites were afraid to be "trapped" in between black neighbors.[136] A local newspaper owner summarized the prevailing sentiment of the day: "Why should this migratory movement of whites from 'pillar to post' to avoid contact with the negro [*sic*] as a neighbor be continued when there is a remedy for such a condition?"[137]

In January 1914, the City Council unanimously passed a residential segregation law. According to the preamble of the ordinance, segregation acts:

> to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and

131. Bernstein, *supra* note 4, at 107-08.

132. Andrew Kull, *Post*-Plessy, *Pre*-Brown*: "Logical Exactness" in Enforcing Equal Rights*, 24 J. SUP. CT. HIS. 155, 166 (1999).

133. 245 U.S. 60 (1917).

134. BICKEL & SCHMIDT, *supra* note 78, at 792.

135. George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917*, 78 REG. KY. HIST. SOC. 39 (1980). *See also* A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS, 119-26 (1996) (recounting the history of similar segregation ordinances in other U.S. cities).

136. Bernstein, *supra* note 38, at 839.

137. Wright, *supra* note 135, at 42. We argue that statements like this are precisely what the architects of government neutrality sought to prevent. James Madison desperately wanted to control "the violence of faction." THE FEDERALIST NO. 10, at 45 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote, "Complaints are everywhere... that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." *Id.*

places of assembly by white and colored respectively.[138]

The law prohibited blacks from living in a house on the same block where a majority of the residents were white. The same provision applied to whites in black neighborhoods as well,[139] thus applying equally to both races and an obvious attempt at preempting a claim that this ordinance violated government neutrality or the Equal Protection Clause.

To challenge the constitutionality of the ordinance, Louisville blacks formed a chapter of the NAACP and set up a test case. William Warley, an NAACP member, bought a house in a majority-white neighborhood from Charles Buchanan, a white real estate agent who was sympathetic to the cause of racial integration. The NAACP chose the language of the contract carefully; Warley agreed that he would not accept the deed to the property "unless I have the right under the laws of the Commonwealth of Kentucky and the city of Louisville to occupy" it.[140] Warley then refused to obey the contract on the grounds that the segregation ordinance prohibited him from occupying the property.[141] Buchanan, represented by NAACP attorney Clayton Blakely, filed suit against Warley in local court.[142] Given previous experience in *Berea College*, it was little surprise to the NAACP that the Kentucky courts upheld the ordinance.[143]

Although the Supreme Court heard the case in 1916,[144] it was reargued during the next term after two changes in Court personnel.[145] Alexander Bickel and Benno Schmidt speculate that the new makeup of the Court was "perhaps somewhat more sympathetic to claims of racial justice than it had been a few years before."[146] The fact that the Court was willing to grant a reargument is evidence of the perceived significance of the case. To illustrate the importance of the Court's decision, Bickel and Schmidt observe that "[c]ities around the nation stood on the brink of residential apartheid as the nation awaited the response of the Supreme Court."[147]

In his briefs for *Buchanan*,[148] Blakely utilized distinctly *Lochnerian*

---

138. Wright, *supra* note 135, at 41.

139. *Id.*

140. *Id.* at 47-48.

141. *See id.* at 47-48; *see also* BICKEL & SCHMIDT, *supra* note 78, at 795-96.

142. Thus, in a twist of irony, the case involved a black defendant defending a segregation ordinance as the basis for voiding a contract with a white man represented by the NAACP attacking the ordinance.

143. Buchanan v. Warley, 165 Ky. 559 (1915).

144. At the time of the first hearing, Justice Day was ill and Justice Brandeis had yet to be confirmed.

145. By this time, Justice Clark replaced Chief Justice Hughes, who had retired to run for president, and Justice Brandeis had joined the Court.

146. BICKEL & SCHMIDT, *supra* note 78, at 791.

147. *Id.* at 792. Rural areas were also formulating plans to enact residential segregation modeled on the South African plan of "territorial apartheid." *Id.* at 793.

148. When the case was heard for the first time, both Blakely and Moorfield Storey, the

arguments.[149] The brief submitted for reargument stated that Buchanan "is not complaining of discrimination against the colored race.... He is seeking to make the defendant pay for land which the latter has agreed to buy provided he can legally occupy it."[150] The briefs aggressively debunked the public purposes offered in defense of residential segregation. Both attorneys for Buchanan were willing to concede that there is at least some racial tension in Louisville, but Blakely reminded the Court that William Warley had "commit[ted] no nuisance" and "d[id] nothing to cause disorder."[151]

In the brief for rehearing, Blakely and Storey refuted the notion that since the ordinance was racially neutral, it did not constitute class discrimination. They wrote, "A law which forbids a Negro to rise is not made just because it forbids a white man to fall."[152] In other words, even though the ordinance applied equally to whites moving into black neighborhoods, the clear intention of the act was to prevent blacks from moving into wealthier white neighborhoods. Blakely thus posed the question: "Instead of legislating for the welfare of the community at large is [Louisville] not legislating for the benefit of certain of its citizens?"[153] Moreover, in the brief for rehearing, the attorneys noted that Louisville could not even achieve the public purpose that it identified because whites and blacks could still live in close proximity, just not on the same block.[154]

In its briefs, Kentucky[155] emphasized sociological jurisprudence and Court precedent in support of segregation.[156] Encapsulating the racist attitudes that dominated its argument, Kentucky wrote, "It is shown by philosophy, experience, and legal decisions, to say nothing of Divine Writ, that... the races of the earth shall preserve their racial integrity by living socially by themselves."[157] Kentucky included photographs of attractive housing available

---

president of the NAACP submitted briefs for *Buchanan*. On re-argument, Storey and Blakely submitted a joint brief.

149. *See* BICKEL & SCHMIDT, *supra* note 78, at 797 (describing how *Buchanan*'s attorneys compared the plaintiff to the bakery owners in *Lochner*).

150. Brief for Plaintiff in Error on Rehearing at 11-12, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Rehearing Plaintiff Brief].

151. Brief for Plaintiff in Error at 12, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Blakely Plaintiff Brief].

152. Rehearing Plaintiff Brief, *supra* note 150, at 25.

153. Blakely Plaintiff Brief, *supra* note 151, at 12.

154. Rehearing Plaintiff Brief, *supra* note 150, at 12-15.

155. Kentucky submitted one brief for the first hearing before the Court and a second brief at re-argument.

156. Brief for Defendant in Error at 11, Buchanan v. Warley, 245 U.S. 60 (1917).

157. *Id.* at 60. A. Leon Higginbotham put it best, saying,

> From the earliest times slavery advocates have justified its cruelty by way of the Bible and reliance on religious doctrine. So too the City of Louisville, Kentucky—fifty-four years after the Emancipation Proclamation and fifty-two years after the Thirteenth Amendment—justified its residential segregation by calling on Divine Writ and various racist legal precepts.

to blacks in Louisville to bolster its "scientific" evidence.[158] The Commonwealth cited the *Slaughter-House Cases*[159] to demonstrate that even the right to property is subject to regulations by the police power. Further, it utilized the racist pseudo-science described above to demonstrate that this exercise of the police power was reasonable. Kentucky also stressed that the ordinance "operates equally upon both classes."[160]

Despite the popularity of segregation at the time, the Court unanimously struck down the Louisville segregation ordinance, with Justice William Day writing the majority opinion.[161] Day first dismissed the view, endorsed by Justice Holmes,[162] that Buchanan lacked standing to sue because the test case that was designed to challenge the ordinance was not an adversarial suit.[163] The Court recognized that while the states have "very broad" authority to pass regulations, limitations apply to the exercise of the police powers.[164] In typical freedom of contract jurisprudence, the Court explored the rich history and tradition that marks the right to property, and dates back to *Blackstone's Commentaries*.[165] Justice Day, citing the common law definition of property, also rejected the argument that the right to buy and sell property was not abridged because the statute only regulated occupancy.[166] At the same time, the Court recognized that the right to property, just like the state's ability to exercise police powers, was not absolute. After resolving the property rights

---

HIGGINBOTHAM *supra* note 135, at 199.

158. BICKEL & SCHMIDT, *supra* note 78, at 796 n.200.

159. 83 U.S. 36 (1872).

160. Supplemental and Reply Brief for Defendant in Error on Rehearing at 17, Buchanan v. Warley, 245 U.S. 60 (1917).

161. *Buchanan*, 245 U.S. at 60. Justice Day bears no relation to Kentucky State Representative Carl Day discussed in reference to *Berea College*.

162. Justice Holmes had planned to issue a dissent on standing grounds. Professor Fischel contends that Holmes, who was also sympathetic to sociological jurisprudence arguments, might have sustained the ordinance if it gave compensation to Warley for not being able to sell to the highest bidder (*Buchanan*). William Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975, 979 (1998). Professor Bernstein believes that the reason he did not issue the dissent was because he failed to win over a second vote. Bernstein, *supra* note 38, at 855. To read the dissent, *see* BICKEL & SCHMIDT, *supra* note 78, at 592.

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

164. *Id.* at 74.

165. James Ely writes:

> Despite their differences over particular economic issues, the right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution... Indeed the framers saw property ownership as a buffer to protect individuals from governmental coercion. Arbitrary redistributions of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights.

JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 43 (1992). For an extended discussion of the history and significance of property rights in the Constitution, see also Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding, in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43-47 (Ellen Frankel Paul & Howard Dickman eds., 1989).

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

issue, the remaining question before the Court was whether Louisville could issue a police power regulation solely on the basis of race.[167]

The Court explored the history of the Fourteenth Amendment in discerning the extent of the police power doctrine. Justice Day discussed the *Slaughter-House Cases* at length, stating, "The colored race... was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment." Additionally, he cited *Strauder* as an example of the political rights afforded to blacks by the Due Process Clause of the Fourteenth Amendment.[168] Finally, Justice Day referenced the Civil Rights Act of 1866, which proclaimed that all citizens "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."[169] These rights, in the mind of the Court, do not "deal with the social rights of men," but rather ensure fundamental legal equality.[170]

Finally, the Court refuted Kentucky's primary argument in defense of the law—that *Plessy* should be the controlling precedent in *Buchanan*. Justice Day distinguished the two cases, holding that *Plessy* permitted blacks to enjoy the right of railroad service, albeit in separate facilities. The right to sit in the same cars as whites was social equality, which the Fourteenth Amendment did not protect. However, within the residential segregation ordinance, there were no separate but equal provisions. Instead, the ordinance interfered with the right to use and dispose of property, a right that the Fourteenth Amendment did protect.[171] The Court's narrow ruling maintained racial segregation as a social problem, one which the courts were reluctant to resolve.

The scholarly debate over the significance of *Buchanan* is divided. The practical impact of the decision for eradicating housing segregation was limited.[172] States and localities turned to other weapons such as racially restrictive housing covenants and facially neutral zoning laws to ensure de facto residential segregation.[173] Furthermore, *Buchanan* had limited jurisprudential significance because the Court reasserted *Plessy* as good law. However, *Buchanan* is still worthy of examination, as its holding influenced future rulings in favor of racial justice.

Though some scholars view *Buchanan* as primarily a substantive due process and property rights case,[174] substantive due process and property rights

167. *Id.* at 75.

168. *Id.* at 76.

169. An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, ch.31, 14 Stat. 27 (1866) (codified at 42 USC § 1982 (1976)).

170. *Buchanan*, 245 U.S. at 79.

171. The Court cites language from *Carey v. Atlanta*, 143 Ga. 192 (1916), in this effort.

172. Klarman, *supra* note 49, at 940-44; HIGGINBOTHAM, *supra* note 135, at 125.

173. Bernstein, *supra* note 38, at 862-66. However, Professor Fischel disputes the ultimate effectiveness of these alternative segregation methods. Fischel, *supra* note 164, at 978-81.

174. *See, e.g.*, Klarman, *supra* note 49, at 935.

were merely the vehicles used to achieve a modest yet decisive advancement in civil rights. To bifurcate the civil rights and property rights components of *Buchanan* is to deny the crucial relationship between those rights—a relationship envisioned by the framers of the Fourteenth Amendment.[175] Civil rights leaders of the day understood that securing equal property rights was the foundation for achieving the greater goal of racial justice. As Bickel and Schmidt write, "freedom to acquire and live on desirable property was the reward for hard accomplishment and the avenue to further progress."[176] The goal of social equality between the races necessarily involved the improvement of economic conditions for blacks. Without a decent housing market for the slowly emerging lack middle class, this goal would not have been achieved.[177]

Furthermore, there is some persuasive evidence that the *Buchanan* decision marked a change in the civil rights attitude of the Supreme Court. First, consider the author of the opinion. Justice Day came from a strongly anti-slavery family in Ohio, where he protested the Fugitive Slave Law during his childhood.[178] Justice Day's tenure was marked by a strong,[179] yet imperfect,[180] civil rights record: he dissented in *Berea College*, he initially dissented in *Bailey v. Alabama*[181] when it appeared that the Court would dismiss the case due to standing, and he authored the opinion in *United States v. Reynolds*.[182] More importantly, Day was not the strongest proponent of substantive due process, as evidenced by his dissenting vote in *Lochner*. Possibly to further distance himself from its ruling, Day did not cite *Lochner* in his *Buchanan* majority opinion,[183] despite the obvious parallels.[184] If the Court

175. BICKEL & SCHMIDT, *supra* note 78, at 816; Ely, *supra* note 7, at 956, 964.

176. BICKEL & SCHMIDT, *supra* note 78, at 816.

177. A. Leon Higginbotham states, "To attempt to comprehend the contemporary social and economic position of African Americans without understanding the importance of residential segregation would be futile." HIGGINBOTHAM, *supra* note 135, at 125.

178. BICKEL & SCHMIDT, *supra* note 78, at 814.

179. Bickel and Schmidt go as far as saying, "Day's is indeed a record in race cases that lacks only passionate intensity and the occasion to have dissented from Plessy and the Civil Rights cases, to compare to the great achievement of Harlan." *Id.* at 825.

180. It is important to note that Day also authored the opinion in *Giles v. Teasley*, 193 U.S. 146 (1904), permitting discriminatory administration of voter registration qualifications. The Court ruled the case a political question.

181. 219 U.S. 219 (1911). This was a peonage case involving a law making it a crime to enter, with fraudulent intent, into a labor contract that provided for advance payment of wages.

182. 235 U.S. 133 (1914). This was a peonage case involving a criminal surety system.

183. Professor Bernstein argues that Day was attempting to preserve his recent victory in *Bunting v. Oregon*, 243 U.S. 426 (1917), in which the Court took a step away from *Lochner* by sustaining a maximum work hours law. Bernstein, *supra* note 38, at 854.

184. One interesting parallel between the two cases is the level of skepticism that the Court took concerning the state's justification for passing the law in question. In *Lochner*, the justices dismissed the health and safety reasoning offered by New York and concluded that the statute was a purely labor law. In *Buchanan*, similarly, the Court looked beyond the public safety rationale offered by Louisville to conclude that the law was an unjust restriction of property. *See* David P. Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1137 (1985).

wanted to issue a strictly freedom of contract ruling, one would expect the Court to have assigned an anti-civil rights, pro-*Lochner* author to this case. Instead, the court chose a prominent *Lochner* dissenter to describe the majority's views.

Not only was Justice Day an odd ideological choice for authoring this opinion, Klarman argues that Day did not convincingly distinguish *Buchanan* from *Berea College* or *Plessy*, as one might expect if the Court insisted on preserving the separate but equal doctrine.[185] The Court's willingness to be somewhat awkward in its civil rights jurisprudence suggests that its members may have been rethinking their views on the issue. This case marks the first time that the Court applied the same demanding level of scrutiny, through the doctrine of government neutrality, to a race relations case as it would in a purely economic rights case.[186] Such sensitivity is evidence of civil rights' growing importance in the minds of several justices. Tushnet suggests that *Buchanan* served to combine two factions on the Court. He writes, "Several Justices probably had a residual commitment to anti-class legislation. They and some of their colleagues may have had a similarly residual commitment to anti-caste principles. The Justices could have seen the two commitments converging in *Buchanan* and the other Progressive era cases."[187]

As further evidence that *Buchanan* represented a change in the Court's view, we note that the Court never backed away from *Buchanan* in future *Lochner* era civil rights cases. According to a study, of the twenty-eight cases the Supreme Court heard involving African Americans and the Fourteenth Amendment between 1868 and 1910, African Americans lost twenty-two cases. Yet between 1920 and 1943, African Americans won twenty-five of twenty-seven civil rights cases.[188] The Court continually applied *Buchanan* to strike down future residential segregation ordinances[189]—most notably for its role in prohibiting restrictive housing covenants in *Shelley v. Kraemer*[190]—and further cemented *Buchanan*'s precedential role in history.

Finally, even if *Buchanan* was based on a rigid interpretation of freedom of contract jurisprudence, as opposed to a change in civil rights attitudes, it would still remain significant for advancing civil rights in the United States. Considering the popularity of segregation at the time and the contrasting

185. Klarman, *supra* note 49, at 936.

186. Currie, *supra* note 184, at 1137.

187. Tushnet, *supra* note 53, at 1000. He interprets anti-class legislation as that at issue in *Lochner* era economic rights litigation and anti-caste principles as favoring racial equality. *Id.* at 996.

188. BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920 13-14, 162-63 (1946).

189. See *id.* at 24-27 for a description of *Richmond v. Deans*, 281 U.S. 704 (1930) (per curiam) (Richmond, Virginia, law) and *Harmon v. Tyler*, 273 U.S. 668 (1927) (New Orleans).

190. *See infra* Part IV.

influence of Progressivism,[191] the Court could have easily succumbed to popular pressure and allowed "what would have been run-away racism in America."[192] But the Court was at least willing to stem the tide of segregation, demonstrating that even racial policies, though popular, were subject to the limits imposed by the Constitution.[193] Alternatively, the Court could have sustained the law on the standing grounds advocated by Justice Holmes, but it chose not to issue another cowardly ruling as it had in *Berea College*. Even Klarman concedes, "It is common knowledge that occasionally the Justices finesse procedural hurdles when they feel strongly about the merits, so perhaps we should regard the Court's willingness to decide *Buchanan* as evidence of a burgeoning egalitarian commitment."[194] In this sense, *Buchanan* represents a courageous exercise of the rule of law.

Overall, *Buchanan* reflects the original intention of government neutrality—a weapon to defend a defenseless minority class against the tyranny of the majority. Bernard Nelson argues that the case "made it difficult to construct segregation ordinances which would stand the test of 'due process of law.'"[195] James Ely agrees: "The *Buchanan* case is a reminder that a principled defense of individual property rights, under a substantive reading of the Due Process Clause, often safeguarded the interests of vulnerable and powerless segments of society."[196] Richard Epstein writes, "Indeed, *Buchanan* represents both the resolute defense of property owners' rights against regulation and the most significant judicial victory for civil rights during the early decades of the twentieth century."[197] Mark Tushnet reasons that *Buchanan* represents a transformation of government neutrality jurisprudence from its Jacksonian roots. He writes, "Having expanded from an attack on the power of concentrated wealth to an attack on concentrated power generally, that jurisprudence might have been in the process of contracting into an attack on caste legislation, a particular form of class legislation."[198]

In the next section, we deal with a further transformation of government neutrality in an age when the Court had supposedly abandoned that jurisprudence altogether. Our discussion supports Benno Schmidt's claim that:

> The unrestrained commitment to the principle of racial separation reflected in residential segregation laws helped bring into play a

191. Benno Schmidt writes, "Residential segregation was both racism's ultimate expression and its desperate response to the great twin movements of the black race in the Progressive era." BICKEL & SCHMIDT, *supra* note 78, at 791.

192. HIGGINBOTHAM, *supra* note 135, at 126.

193. Professor Ely writes, "In a sense, the fundamental value of property rights trumped popular racist views implicit in residential segregation ordinances." Ely, *supra* note 7, at 954.

194. Klarman, *supra* note 49, at 937 (emphasis added).

195. NELSON, *supra* note 190, at 24.

196. Ely, *supra* note 7, at 972.

197. *Id.* at 953.

198. Tushnet, *supra* note 53, at 996.

countervailing commitment to racial equality that not only would bring down residential segregation, at least in its *de jure* aspect, but would, in the fullness of time, put the axe to the principle of racial separation root and branch.[199]

IV.

SHELLEY & CORRIGAN: THE STRUGGLE FOR FREEDOM OF CONTRACT SURVIVES

As a result of the Court's decision in *Buchanan* whites in both the North and South began to develop other ways to maintain racially segregated communities.[200] The use of private agreements among landowners prohibiting the sale of their property to blacks became a popular method for reinforcing the racial segregation of neighborhoods and perpetuating these divisions through the transfer of property. These racially restrictive housing covenants were often inserted in property deeds,[201] or they took the form of written contracts among property owners within a community.[202] Deed restrictions were structured in various ways with some covenants lasting indefinitely and others expiring after a specific length of time; some covenants restricted sale, lease or conveyance, while others restricted use or occupancy.[203] Although most restrictive covenants targeted blacks, records indicate that restrictive covenants were used to exclude "Mexicans, Armenians, Chinese, Japanese, Jews, Persians, Syrians, Filipinos, [and] American Indians."[204] Scholars are divided over the practical impact and effectiveness of these covenants,[205] but it is clear

199. BICKEL & SCHMIDT, *supra* note 78, at 795.

200. The two Great Migrations also played a role in this process. TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS, 11 (1948).

201. Even though the decision in *Shelley* disallowed judicial enforcement of such restrictions, many property deeds remained unaltered, continuing to retain racial restrictive clauses. Some high profile examples exist. During the confirmation hearings of Chief Justice William Rehnquist, Senator Joseph Biden criticized Rehnquist for owning two properties whose deeds contained racially restrictive covenants. Diane Alters, *Questions on 2d Rehnquist Deed*, BOSTON GLOBE, August 1, 1986, at 1. It was later revealed that Senator Biden himself lived in a home whose deed contained such a racial restriction. *Biden Lived in Home Barring Ownership by Blacks, Rehnquist Supporter Says*, BOSTON GLOBE, Aug. 8, 1986, at 5.

202. CLARK & PERLMAN, *supra* note 200, at 12.

203. *Id.* at 11.

204. *Id.* at 18.

205. On the one hand, Clement Vose carefully details the enforcement of restrictive covenant agreements in various metropolitan areas of the United States. CLEMENT VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT CASES 2 (1959). On the other hand, William Fischel argues that restrictive covenant agreements sometimes failed for lack of enforcement vis-à-vis those property owners with little dogmatic attachment to racial separation. This fact "would, in situations in which no coercive enforcement of collective action is possible, often defeat attempts to exclude blacks." Fischel, *supra* note 164, at 978. David Bernstein also points out that covenants are only effective if they cover the entire neighborhood, which is an economically difficult requirement. As a result, Bernstein writes, "Restrictive covenants certainly played some role in keeping African Americans out of white neighborhoods, but perhaps not as large a role as is commonly assumed." Bernstein, *supra* note

that the effect was to limit the capacity of African Americans to own, use and dispose of property, i.e., to make use of the general right of persons to own, use and dispose of property as recognized in the common law tradition.

There is a strong case to be made that restrictive housing covenants violate the history and tradition of common law property rights. From the earliest statements of Anglo-Saxon law, owners of realty held in fee simple had a virtually unregulated right to dispose of their property.[206] Such "unencumbered alienation" (or, the power of the freeholder to "sell at his own pleasure his lands and tenements, or part of them")[207] was the basis for the protected status afforded contract and property rights by the Constitution and laws of United States. As the *Restatement of Property* puts it: "The underlying principle which operates throughout the field of property law is that freedom to alienate property interests... is essential to the welfare of a free society."[208]

D.O. McGovney writes, "Unquestionably at common law... a restraint on alienation [such as a restrictive covenant] was void as against public policy."[209] While this status is not absolute, property interests exist prior to government,[210] and thus government regulation of property interest must not overstep the restrictions of equal protection and due process guarantees.[211] Furthermore, some restraints on alienation were considered acceptable, but never a restriction so broad as to exclude an entire class of people.[212] According to the

---

38, at 865-66. Attorney General Clark contended in its *amicus* brief in *Shelley*, "If this trend [of the use of restrictive covenants] continues, almost all new residential sections of our cities will be barred, within ten or twenty years, from occupancy by Negroes." CLARK & PERLMAN, *supra* 200, at 18. Finally, D.O. McGovney writes, "The result [of restrictive covenants] is a socially costly retardation in the cultural and social development of great masses of Americans." D.O. McGovney, *Racial Residential Segregation*, 33 CAL. L. REV. 5, 37 (1945).

206. CLARK & PERLMAN, *supra* note 200, at 76.

207. VOSE, *supra* note 205, at 2.

208. RESTATEMENT (FOURTH) OF PROPERTY § 406 (1936), *quoted in* CLARK & PERLMAN, *supra* note 200, at 76.

209. McGovney wrote, "Contract law principles commonly employ public policy concerns to find certain bargains unenforceable. Public policy derives from a state's statutes, constitution, and judicial decisions." McGovney, *supra* note 205, at 7. State courts have given many reasons for not enforcing private contracts that violate public policy," including "agreements that impair family relationships, involve gambling, encourage litigation, improperly influence legislators and other government officials, restrain alienation of property, encourage commission of a tort, or induce a breach of a fiduciary duty." Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "Time for Keeping; a Time for Throwing Away"?*, 47 KAN. L. REV. 61, 103-04 (1998).

210. *See* Dartmouth College v. Woodward, 17 U.S. 518 (1819).

211. While property interests were generally thought to be free from governmental interference, they were subject to considerations of public interest where the state could show an overwhelming interest in regulation. This is a common law definition that the Court reinforces in modern decisions. For example in *Shelley*, the Court held that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

212. McGovney, *supra* note 205, at 7-8. Attorney General Clark agreed: "If the courts which to enforce such covenants were merely applying a general rule that all restraints on

Restatement of Property, in order to uphold restrictions on alienation, "justification must be found in the objective that is thereby sought to be accomplished."[213] The obvious goal of these covenants was to exclude whole classes of persons from living in close proximity, a goal that the Court refused to endorse in *Buchanan*.

Common law allowed the state to have more discretion in regulating the use of property, and many state courts were willing to sustain covenants restricting use and occupancy but not ownership.[214] It seems obvious however that a racially restrictive covenant prohibiting a race from using property is a de facto restraint on alienation.[215] In fact, alienation is defined as "destruction of the rights of the grantor and [the] creat[ion of] similar rights in the grantee. If one of those rights cannot be re-created in the grantee, the grantor's power of alienation is curtailed." Usage restrictions, on the other hand, do not impact the vendibility of the property.[216]

A. Corrigan v. Buckley*: Selective Protection of Private Property Rights*

The Supreme Court heard an initial challenge to the use of racially restrictive housing covenants in *Corrigan v. Buckley*.[217] In Washington, D.C., a group of white landowners signed an agreement that they would refuse sale of any parcel of land to those not of the Caucasian race. This agreement took the form of a racially restrictive covenant attached to their property deeds. Corrigan, one of these owners, then attempted to sell a parcel to a black couple. Buckley, a cosigner of the restrictive agreement, filed suit against him to prevent the sale and enforce the racially restrictive provisions of the property deed, raising claims under the Fifth, Thirteenth, and Fourteenth Amendments, and prevailing on the merits. Corrigan petitioned the Supreme Court for review.

---

alienation, that might be one thing. It is quite another when the courts do not enforce all restraints on alienation, but do approve those which are based on race and color." CLARK & PERLMAN, *supra* note 200, at 56.

213. RESTATEMENT (FOURTH) OF PROPERTY § 406 (1936), *quoted in* CLARK & PERLMAN, *supra* note 200, at 76.

214. *See, e.g.*, Los Angeles Investment Co. v. Gary, 181 Cal. 680 (1919); White v. White, 108 W. Va. 128 (1929) (striking down covenants restricting ownership, while stating in dicta that covenants restricting usage would pass constitutional muster).

215. *See* CLARK & PERLMAN, *supra* note 200, at 79.

216. McGovney, *supra* note 205, at 8-9 n.17. Understanding the difference between restrictions on the usage of property and the disposal of property is key to understanding the proper reach of the Court's ruling in *Shelley*. For example, there was (and perhaps still is) lingering controversy over the impact of *Shelley* on the operation of homeowners associations. *See, e.g.*, Saxer, *supra* note 212, at 65 (citing Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV., 273 (1997)). While we do not address this question, there does seem to be a prima facie difference at law between restricting sale of property by caste and restricting one's right to place pink flamingos on one's front lawn. Surely, the former is entitled to just slightly more constitutional protection than the latter.

217. 271 U.S. 323 (1926).

In its opinion, the Supreme Court dismissed the case for want of jurisdiction, stating that the claim "is lacking in substance."[218] However, the Court went on to construe the Fourteenth Amendment in dicta. Justice Sandford's majority opinion relied on the *Civil Rights Cases*[219] where the Court distinguished between private and public discrimination, limiting the scope of the Fourteenth Amendment to only those discriminatory acts undertaken by government. In *Corrigan*, the Court found that the contract placed a valid restriction on the property right of Corrigan because it constituted an agreement among private individuals for which the Fifth and Fourteenth Amendments provided no remedy.

Though the Court issued its opinion to explain its decision to deny appeal under a provision of District of Columbia law,[220] there are several problems with the broader precedential application of this ruling. First, the Court never considered the claim that judicial enforcement of restrictive covenants constitutes state action prohibited under the Fourteenth Amendment.[221] Second, the Court stated that the Fifth Amendment due process claim was not properly raised; it therefore was not before the Court.[222] Third, the Court never considered the issue of the prohibition on restrictive alienation, a common law principle determining rights to dispose of property at fee simple.[223] Combined, these oversights suggest that the Court's opinion in *Corrigan* did not settle the constitutional issue of restrictive covenants, but only explained its decision to deny this particular appeal under a provision of District of Columbia law. Thus, it seems odd that the Court's decision in *Corrigan* should play such a central role in later decisions of state courts on the issue of restrictive covenants. In light of these limited findings in *Corrigan*, the Court's decision in *Shelley v. Kraemer*, the next restrictive housing covenant case, does not appear to be as contrary as a cursory glance might suggest.

B. Shelley v. Kraemer*: Breaking Down the "Caucasian Bulwark"*

Just twenty-one years after its decision in *Corrigan v. Buckley*, the Court

218. *Id.* at 331.

219. 109 U.S. 3 (1883).

220. *See* CLARK & PERLMAN, *supra* note 200, at 64; McGovney, *supra* note 205, at 6.

221. The *Civil Rights Cases* provide compelling evidence that judicial enforcement of restrictive covenants constitutes state action. The Court in that case said that the Fourteenth Amendment applies to "the action of state officers, executive or *judicial*." 109 U.S. at 11 (emphasis added). The Court also stated, "It is proper to state that civil rights, such as guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, *customs, or judicial or executive proceedings*." *Id.* at 17 (emphasis added). This terminology demonstrates that judge-made common law is considered state action.

222. *See* McGovney, *supra* note 205, at 34. In fact, McGovney goes on to say that since the Court "was focused [*sic*] on the plea that the covenant was of itself unconstitutional, strictly read there is not even a dictum here." *Id.* at 35.

223. *See* CLARK & PERLMAN, *supra* note 200, at 21.

took up the issue of restrictive housing covenants yet again when it scheduled *Shelley v. Kraemer*[224] and two companion cases[225] for oral argument during its October 1947 term. The *Shelley* case began with the purchase of property in St. Louis, Missouri by the Shelleys, an African-American family. Shortly thereafter, Fern and Louis Kraemer, owners of property situated in the same district, filed suit against the Shelleys to divest them of title to their new residence for violating the district's restrictive covenant agreement barring purchase of property by African Americans. At trial, the state court determined that the covenant was not in effect because not all property owners in the district had signed it at the time the suit was filed. The Missouri Supreme Court reversed stating that the Shelleys had not been denied any constitutionally guaranteed right.[226] The Shelleys, supported by the St. Louis chapter of the NAACP, appealed to the Supreme Court.

The Department of Justice, headed by then–Attorney General Tom Clark, prepared an amicus brief in the *Shelley* case that outlined the property rights issues at stake. Clark wrote, "When a State, through its judiciary, enforces a restrictive covenant against a colored citizen of the United States, it thereby denies him the right to purchase or lease property solely on racial grounds."[227] The brief focused on *Buchanan v. Warley* because the effect of restrictive housing covenants was substantially the same as legislation requiring residential segregation.[228] The Justice Department invoked a neutrality argument in pointing out that restrictive covenants constitute "a disability against Negro citizens which does not exist for white citizens."[229]

While *Shelley* is most often viewed as either an alteration of the state action doctrine,[230] or a major civil rights victory,[231] the Court firmly grounded its decision on the common law understanding of property rights asserted in

224. 334 U.S. 1 (1948).

225. These are *McGhee v. Sipes*, 331 U.S. 804 (1947) (granting certiorari) and *Hurd v. Hodge*, 334 U.S. 24. (1948). *McGhee* was heard on a grant of certiorari to from the Michigan Supreme Court, and *Hurd* came to the Court from the Court of Appeal of the District of Columbia. *Shelley v. Kraemer* came up to the Court from the Supreme Court of Missouri.

226. *See* Kraemer v. Shelley, 355 Mo. 814 (1946); Kraemer v. Shelley 358 Mo. 364 (1948).

227. CLARK & PERLMAN, *supra* note 200, at 52.

228. *See id.* at 47, 57 (citing *Buchanan*, 245 U.S. 60 (1917)).

229. *See id.* at 52.

230. *See* Erwin Chemerinsky, *Rethinking State Action,* 80 NW. U. L. REV. 503 (1985); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1697-98 (1978). In fact a valid argument can be made that the Court does not expand the state action doctrine, but clarifies its decision in *Corrigan*. As noted above, according to the *Shelley* majority opinion, the Court was asked in *Corrigan* to rule on the validity of private contracts. As the Court states, "[T]he question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment [was not] properly before the Court, as the opinion of this Court recognizes." Shelley v. Kramer, 334 U.S. 1, 9 (1948).

231. In particular, *Shelley* is viewed as an endorsement by the Court of the private right of association among the races. *See* VOSE, *supra* note 205, at 2. Additionally, Kenneth Karst, writes, "The principle of equal citizenship easily encompasses that state's duty to refuse to enforce racial covenants in deeds." KENNETH KARST, BELONGING TO AMERICA 76 (1989).

Buchanan—the right of owners to use and dispose of property. Thus, the state action doctrine and the implications of this decision on associational rights are actually important vehicles for the Court to clarify the broader goal of protecting property rights (and by extension civil rights) through the imposition of neutral requirements on government.

Writing for the Court, Chief Justice Vinson began with an examination of the covenant restriction. The Court noted the violation of common law property rights immediately by distinguishing between regulation of property use and ownership. The covenant did not regulate use of property for residential or other purposes; rather, it excluded a class of persons from ownership and occupancy. As the Court observed, the covenants "determine who may and who may not own or make use of the properties for residential purposes."[232] In viewing this restriction, Vinson stated, "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."[233]

Clearly, *Shelley* represents the endpoint of a shift in the Court's position on state action that places burdens on citizens based solely on race. As Clement Vose notes, state courts prior to *Shelley* claimed neutrality as to race in the enforcement of these restrictive provisions.[234] African Americans had, courts asserted time and again, the same right to restrict ownership of property to only African Americans as Caucasians had to restrict ownership to other Caucasians.[235] The language of the Court resolved a tension in law that had plagued jurists since ratification of the Fourteenth Amendment. As Gillman states:

> [W]hen legislatures were so bold as to impose special and unique burdens on blacks explicitly in statutes, courts were willing to strike down those laws, as the Supreme Court did... in *Strauder v. West Virginia*, 100 U.S. 3030 (1880).... [However] political elites and judges were deeply divided over the question of whether segregation amounted to the imposition of unique burdens on blacks or whether they represented the imposition of equal burdens on blacks and whites for the good of both races.[236]

---

232. *Shelley*, 334 U.S. at 10.

233. *Id.*

234. VOSE, *supra* note 205, at 1. He argues that state court precedent that created a "Caucasian bulwark," included Parmlee v. Morris, 218 Mich. 625 (1922), Porter v. Johnson, 232 Mo. App. 1150 (1938), and Ridgway v. Cockburn, 296 N.Y.S. 939 (1937). *Id.*

235. For example, the Missouri Court of Appeals asserted that white homeowners "have a right to protect [property] against . . . elements distasteful to them." In response to the underlying equal protection claim, it then asserted, "Negroes have the same right in this respect as do other races." Porter v. Johnson, 232 Mo. App. 1150, 1160 (1938).

236. GILLMAN, *supra* note 4, at 235. Indeed, Vinson noted the line of cases involving the exclusion of Negroes from jury service in criminal prosecutions, using *Strauder* as an example of "the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a

In response to this doctrinal conflict, the Court had indeed upheld "less explicit attempts to deny African Americans equal rights through the use of standards or practices that on their face were race neutral."[237]

While the Court in *Buchanan* was able to justify striking down legislation limiting property ownership because of the explicit restrictions it placed on blacks solely on the basis of their race and color, the circumstances in *Shelley* were quite different. Between the *Buchanan* and *Shelley* decisions, state courts had endorsed a pattern of discrimination based on private agreements, not legislative fiat. The state action in *Shelley* was qualitatively different than the challenged statute in *Buchanan*. The covenant at issue in *Shelley* represented one of those "less explicit" innovations by the state to deny blacks equal rights. Because of this distinction, the Court needed to justify why judicial enforcement of restrictive covenants ranked with the legislation at issue in *Buchanan* as a violation of equal protection under the Fourteenth Amendment.

Vinson took special care to lay out the history of the Court's interpretation of state action as related to the state judiciaries, quoting extensively from *Virginia v. Rives*,[238] *Ex parte Virginia*,[239] the *Civil Rights Cases*,[240] *Twining v. New Jersey*,[241] and *Brinkerhoff-Faris Trust v. Hill*,[242] among others with respect to state court denial of procedural due process.[243] He further extended this to the supervision of state court actions that deny "substantive rights" on the basis of the common law.[244] In particular, Vinson offered a rebuttal to the respondents' contention in oral argument that "since the state courts stand ready to enforce restrictive covenants excluding white persons from the

judicial official in the absence of statute." *Shelley*, 334 U.S. at 16.

237. Gillman cites the example of *Williams v. Mississippi*, 170 U.S. 213 (1898) (approving the use of literacy tests, noting that they were equitably applied to whites and blacks as a condition for voting). GILLMAN, *supra* note 4, at 235.

238. 100 U.S. 313, 318 (1880) ("It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or another."), *cited in Shelley*, 334 U.S. at 14.

239. 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."), *cited in Shelley*, 334 U.S. at 14.

240. 109 U.S. 3, 11, 17 (1883) ("[T]his Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion."), *cited in Shelley*, 334 U.S. at 14-15.

241. 211 U.S. 78, 90-91 (1908) ("The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."), *cited in Shelley*, 334 U.S. at 15.

242. 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branches of government."), *cited in Shelley*, 334 U.S. at 15.

243. *Shelley*, 334 U.S. at 14-17.

244. *Id.* at 17. In other words, procedural due process is not all that is guaranteed by the Fourteenth Amendment, which implies that substantive due process with regard to property rights is still functioning, in spite of the "Revolution of 1937."

ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws...."[245] Vinson answered this claim with a long consideration of state action doctrine as it relates to the state judicial power.[246] He continued with a vindication of the Fourteenth Amendment's protection of rights accruing to the individual.[247] Finally, his rebuttal concluded with the now famous statement that, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."[248]

Thus, even where a state court fulfills a basic function at common law—such as the filing of deeds, enforcement of deed provisions, and other contractual obligations—the Supreme Court may review those judicial acts as state actions subject to the boundaries of the Fourteenth Amendment. Vinson noted that the goal of the restrictive covenants was not one that could be legitimately accomplished through legislation.[249] If judicial enforcement of contracts constitutes state action, and if the goal of the action is to impose a denial of constitutional rights,[250] restrictive housing covenants cannot be judicially enforced. In fact the Court partially based its decision in *Hurd v. Hodge*[251] on the notion that racially restrictive covenants contravened the public policy of the United States. The Court wrote, "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States."[252] The public policy requirement is a part of the common law conception of property rights.[253]

Despite the Court's expanded view of state action to include judicial enforcement of private contracts, *Shelley* represents a departure from the time honored justification for state interference in the private right of association. Missing from the Court's opinion is any argument that construed state judicial enforcement of restrictive housing covenants as necessary for maintaining racial harmony, or for any other purpose related to maintenance of a social

245. Shelley, 334 U.S. at 21.

246. *Id.* at 14-18.

247. Vinson writes, "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color." *Id.* at 22.

248. *Id.*

249. *Id.* at 11.

250. Vinson wrote, "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." *Id.* at 19.

251. 334 U.S. 24 (1948). The main logic for the decision was that the Civil Rights Act of 1866 forbids federal courts from enforcing a denial of property rights.

252. *Id.* at 34-35.

253. *See supra* notes 205-12 and accompanying text.

order. Unlike the outcome in *Buchanan*, the Court does not attempt to balance property rights against the goals of segregation; the logic of *Plessy* and the separate but equal regime is nowhere to be found.[254]

Instead, the *Shelley* opinion reads like a *Lochner* era property rights decision. The Court extensively considered the state action doctrine and concluded that the three cases before it did not involve governmental action neutral as to class or party. Rather, the Court stated that, "these are cases in which the States have made available to [the white respondents] the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights...."[255] Vinson provided even more intriguing evidence by citing *Oyama v. California*,[256] a case in which the Court ruled that states could not prohibit Japanese immigrants ineligible for citizenship from transferring land as a gift to their citizen children. Vinson wrote, "Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws."[257] We contend that if a scholar of the Court were to read the previous two quotations without knowing from where they came, she would hypothesize that they originated in *Lochner* era Court opinions.

One early commentary on *Shelley* uses government neutrality to explain why the case does not completely eradicate the state action doctrine. Louis Henkin argues that *Shelley* involved a dilemma for the state to balance the property interests of Shelley against the associational preferences of Kraemer.[258] In some circumstances in the private sphere, the right of liberty to discriminate trumps the countervailing equal protection claim,[259] to which the state can sometimes give effect.[260] Henkin proposes that the Court use neutral principles to balance the competing claims.[261] Those neutral principles flow from the Court's understanding of due process concerns present in the case. Thus, "while the notion that due process implies a particular economic

254. Unlike in transportation (when it is possible to provide separate but equal accommodations), no such ability exists in the field of property rights, as no two pieces of property are ever completely identical. McGovney, *supra* note 205, at 27-28.

255. *Shelley*, 334 U.S. at 19.

256. 332 U.S. 633 (1948).

257. *Shelley*, 334 U.S. at 21.

258. Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 496-87 (1962). This argument is similar in nature to the criticism that Herbert Wechsler levies against *Brown* in that the Court cannot find a neutral way to balance the preferences of blacks who desire integrated education against the preferences of whites who desire segregated education. *See* Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

259. Henkin, *supra* note 258, at 490.

260. *Id.* at 491.

261. *Id.* at 502.

philosophy has been happily abandoned, the requirement of due process continues to protect even 'property' to an extent."[262] Shelley claims a legitimate right, recognized at common law, to acquire and occupy property on equal terms. Thus, restrictive housing covenants cannot be enforced, Henkin argues, under a variety of standards. For example, the standard could be that if the discrimination could not be undertaken through legislation, the state cannot give power to private actors to enforce that same discriminatory action.[263]

As we have illustrated, the Court was clearly in the process of expanding the scope of the Equal Protection Clause with regard to civil rights; ironically it moved forward by taking a step back into the jurisprudence of *Lochner* era. Eleven year after it was supposedly dismantled in *West Coast Hotel v. Parrish*,[264] the neutrality principle was prominent in *Shelley*, although it was a doctrine in transition from its traditional home in economic rights to its new role in adjudicating civil rights conflicts. This transition sped up rapidly between 1948 and the Court's historic *Brown v. Board of Education* decision in 1954.

V.
GOVERNMENT NEUTRALITY AND DESEGREGATION: "THE OLD DOCTRINE REASSERTED" IN *BROWN V. BOARD OF EDUCATION*

> Whether the result [of *Brown v. Board of Education*] would have been the same if the interests involved had been economic, of course I cannot say, but there can be no doubt that at least as to "Personal Rights" the old doctrine seems to have been reasserted.[265]

In the preceding sections, we traced the importance of government neutrality in resolving jurisprudential tensions between economic and civil rights of association. In *Buchanan* the Court applied a modified version of the *Lochner* decision, holding that all citizens regardless of race have contract and property rights that must, necessarily, be free from arbitrary government interference. The modification in *Buchanan* was to extend that property right partially into the sphere of race relations. This modification countered the logic embedded in *Plessy*, which recognized that the state may interfere in race relations where it can justify its decision on a reading of the sociology of race relations. The Court's ruling in *Shelley* extended the new logic of *Buchanan* into the sphere of state enforcement of private decisions, despite the fact that *Shelley* took place after the so-called "Revolution of 1937."

In this section, we contend that the Court then applies the neutrality principle as developed through these cases to early civil rights cases, including

262. *Id.*
263. *Id.* at 495.
264. 300 U.S. 379 (1937).
265. LEARNED HAND, THE BILL OF RIGHTS 55 (1972).

Brown v. Board of Education[266] and *Bolling v. Sharpe*.[267] As you will see, the Court used the logic developed in *Buchanan* and *Shelley* to invalidate state sponsored segregation as a violation of government neutrality under the Fourteenth Amendment's Equal Protection Clause.

A. Brown v. Board of Education

Our argument in favor of a government neutrality interpretation of the *Brown* decision begins with the recognition that the Court in *Brown* confers upon education the status of a right. The Court declares that education "is a right which must be made available to all on equal terms." The opinion also describes education as "perhaps the most important function of state and local governments" and "the very foundation of good citizenship." [268] Klarman agrees that this pronouncement was intended to group "public education among the important rights that the Fourteenth Amendment's framers had thought worthy of protection against racial discrimination."[269]

Having conferred the status of substantive (although not fundamental)[270] right upon education,[271] the Court, under the neutrality principle, must examine whether the state has made education "available to all on equal terms."[272] The Court concluded that discrimination is impermissible because it confers second-class status on minority children by depriving them of that substantive right to equal educational opportunity. In other words, the state had interfered impermissibly in the realm of education, advancing the interest of one class over another. In this sense, interpreting the opinion is somewhat confusing because the Court invoked the Equal Protection Clause here, whereas in previous cases, the Court examined violations of a substantive right with regard to the Due Process Clause. Thus, it seems that the Court is modifying the doctrine of government neutrality, organically developing its realm of application although the essence of the principle—that government cannot advance the interests of one class over another—remains intact.

We agree with Klarman's assessment that the Court's approach in *Brown* seems somewhat odd. Klarman observes that most of the pre-*Brown* civil rights cases involved challenges to racial discriminations that deprived African

266. 347 U.S. 483 (1954).

267. 347 U.S. 497 (1954).

268. *Brown*, 347 U.S. at 493.

269. Klarman, *supra* note 50, at 787 n.167.

270. See our discussion of Chief Justice Warren's draft opinion in *Bolling v. Sharpe*, at note 307 and accompanying text *infra*.

271. The Court continued to refer to education as a substantive right through *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972). The very next year, however, the Court declared in *San Antonio School District v. Rodriguez*, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. 1, 35 (1973).

272. *Brown*, 347 U.S. at 493.

Americans of fundamental rights—property, fair criminal procedure, voting rights, etc.[273] While there remains much controversy over the original meaning of the Fourteenth Amendment, Klarman argues that it was difficult to infer that education was one of the fundamental rights the framers of the amendment intended to protect.[274] Consequently, one would expect the Court to rely on another jurisprudential approach—a broad prohibition on racial classifications.[275] This approach would free the Court from having to justify the importance of education as deserving of special protection along with the right to property, the right to vote, etc.[276]

In contrast, Tushnet argues that this narrow approach to originalism is flawed. Education, he notes, had become in 1954 the "functional equivalent not of public education in 1868 but of freedom of contract in 1868." Tushnet states that the end goal of the framers of the Fourteenth Amendment was not simply to protect property rights, but to provide the legal and constitutional tools that foster and protect the "foundation of personal achievement" in civil society.[277] Regardless of the specifics of this debate, *Brown* represents a *Lochner* era substantive due process case in the guise of an equal protection/education/civil rights case.

Given the relative consistency in doctrine, what other changes caused the Court to reverse its view on race? We posit that the key change between *Plessy* and *Brown* was an increasingly skeptical view of the social order justification behind segregation laws. The Court in *Plessy* and other early civil rights cases relied on sociological jurisprudence to justify segregation; separating the races was essential to the "preservation of the public peace and good order"[278] because of the "physical differences" [279] that caused hostility. In the years preceding *Brown*, the Court was willing to look beyond the purported public purpose of segregation and consider its effect on minority rights. In an ironic twist, it was sociological evidence that allowed the Court in *Brown* to demonstrate that "separate educational facilities are inherently unequal."[280]

The sociological evidence offered in the controversial footnote eleven supports at a minimum the principle of state noninterference. It raises the possibility (even where interpreted as remote) that racial segregation creates a

273. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 236 (1991).

274. *Id.* at 252.

275. Klarman writes, "[T]he rationale of *Brown v. Board of Education* confirms the Court's commitment to the limited fundamental rights approach to equal protection rather than to the racial classification rule ostensibly embraced in *Hirabayashi* and *Korematsu*." *Id.* at 238-39.

276. *Id.* at 239.

277. MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 42 (1998).

278. Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

279. *Id.* at 551.

280. *Brown*, 347 U.S. at 495.

disadvantage government neutrality was designed to prevent. Thus, the contention that *Brown* was based on sociology rather than legal precedents is invalid.[281] The scientific evidence in *Brown* is merely the tool by which the Court could determine whether a violation of government neutrality had actually taken place, just as the Court considered scientific evidence to examine the possibility of partisanship in *Lochner*. In fact, *Plessy* can be dismantled using the very arguments leveled against the *Brown* decision by conservative Southerners who argue that the Court simply used social science to ratify their personal preferences. The only difference between the two cases is that social science had undergone a dramatic revolution.[282]

The Court was very careful to limit the holding in *Brown*. Nowhere did the Court overturn *Plessy* outright; instead, the Court stated that education should be an exception to *Plessy*. Chief Justice Warren wrote in the opinion: "We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place."[283] When Warren presented the opinion in *Brown* to Justice Jackson, who was in the hospital at the time, Jackson offered two alterations. Warren rejected one of the suggestions because it could be construed as an attack on segregation in general, rather than in the context of public education. One of Jackson's law clerks, who was present at the occasion, remarked, "[Chief Justice Warren] wanted the decision to be narrowly circumscribed."[284] In his famous criticism of *Brown*, Herbert Weschsler writes, "The problem inheres strictly in the reasoning of the opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned. The Court did not declare, as many wish it had, that the Fourteenth Amendment forbids all racial lines in legislation...."[285]

Despite (or perhaps, because of) its limited holding, the Warren Court issued a series of *per curiam* rulings, without opinion, striking down segregation in public higher education (*Louisiana State University v. Tureaud*,[286] *Florida ex rel. Hawkins v. Board of Control*[287]) public parks (*New Orleans City Park Improvement Ass'n v. Detiege*[288]), public transportation (*Gayle v. Browder*[289]), public golf courses (*Muir v. Louisville Park Theatrical Ass'n*[290] and *Holmes v. Atlanta*[291]), and public houses and beaches (*Baltimore v.*

281. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 711 (1976) (citing James Reston, *A Sociological Decision*, THE NEW YORK TIMES, May 18, 1954 at X).

282. Hovenkamp, *supra* note 116, at 627.

283. *Brown*, 347 U.S. at 495 (emphasis added).

284. KLUGER, *supra* note 281, at 697.

285. Wechsler, *supra* note 258, at 32.

286. 347 U.S. 971 (1954).

287. *Id.*

288. 358 U.S. 913 (1958).

289. 352 U.S. 903 (1956).

290. 347 U.S. 971 (1954).

291. 350 U.S. 879 (1955).

Dawson[292]). Why did none of these rulings include an opinion? Perhaps the Court felt awkward about applying *Brown* because the case never explicitly struck down the constitutional validity of the separate but equal doctrine. Therefore, the only way the Court could extend *Brown* to other types of segregation would be to articulate additional substantive rights that the Fourteenth Amendment protected, just as it had done with education. We suggest that the Court avoided writing opinions in these cases because it would be absurd to claim that the Fourteenth Amendment protected such fundamental rights as a right to go to the beach, or to play golf. Klarman writes, "*Brown*'s narrow rationale left unresolved the constitutionality of segregation in contexts less fundamental than education—that is, most areas of life.... Some additional explanation, such as a candid avowal of a racial classification rule, was required to justify convincingly the results in the post-*Brown* per curiams. Yet the Court provided none."[293] The Court's silence on this matter caused Herbert Weschsler to inquire what legal principles were at stake. He observes, "I do not know, and I submit that you cannot know, whether the per curiam affirmance in the *Dawson* case... embraced the broad opinion of the circuit court that all state-enforced racial segregation is invalid or approved only its immediate result and, if the latter, on what ground."[294]

B. Bolling v. Sharpe

Bolling v. Sharpe,[295] decided on the same day as *Brown*, was a companion case that challenged the constitutionality of public school segregation in the District of Columbia. Because the Equal Protection Clause of the Fourteenth Amendment only applies to states, while the District of Columbia falls within the purview of the federal government, an affirmative *Bolling* decision would ensure that desegregation would apply equally to both state and federal institutions. The Court struck down the segregation law, reasoning that the Equal Protection Clause applied to the federal government through the Due Process Clause of the Fifth Amendment. This case has sometimes been described as "reverse incorporation"[296] because, unlike most incorporation doctrine cases, it involved applying a state-level right at the federal level. We suggest that the *Bolling* opinion provides even clearer evidence of the influence of government neutrality on the Court's emerging civil rights jurisprudence.

The opinion in *Bolling* appears to clarify some of the murkiness as to whether government neutrality is applied solely through the Due Process Clause or whether it can extend to equal protection claims. Chief Justice

292. 350 U.S. 877 (1955).
293. Klarman, *supra* note 273, at 248.
294. Wechsler, *supra* note 258, at 22.
295. 347 U.S. 497 (1954).
296. *See, e.g.*, Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 221-27 (1997).

Warren wrote, "The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."[297] Furthermore, Warren stated, "Discrimination may be so unjustifiable as to be violative of due process."[298] The Court, at the same time, extended the educational rights logic of *Brown*. The opinion cited *Gibson v. Mississippi*,[299] a whites-only juries case from 1895: "The Constitution of the United States, in its present form, forbids, so far as *civil and political rights* are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."[300] Thus, by 1954 the Court was willing to include education as one of those "civil and political rights" protected by the Constitution.

Later in the opinion, the Court rearticulates a pre-1937, traditional understanding of substantive due process. Warren stated, "[Liberty] is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[301] Compare that language to the *Lochner* Court, which wrote: "The end itself [of a police powers regulation] must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."[302] Notably, the *Bolling* Court also cited *Buchanan v. Warley* and *Hurd v. Hodge* as precedent, cases that relied on *Lochner* era conceptions of property rights. As in *Brown*, the key difference between the Court in 1954 compared to the Court in 1896 is its view of the public purpose justification of segregation. In *Bolling* the Court wrote, "Segregation in public education is not reasonably related to any proper governmental objective. Thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[303]

We have considered the scope of the Court's decision in *Brown* and Warren's efforts to justify its stewardship of due process and equal protection guarantees in *Bolling*. It is important to consider the influences that led the Court to limit the reach of these decisions. Though the justices were developing the logic that would ultimately lead them to conclude the separate but equal doctrine had no place in American society, that logic created internal tensions within the Court. We now turn to a consideration of those internal dynamics that led the Court to temper its public stance in *Brown* and *Bolling*.

297. *Bolling*, 347 U.S. at 499.
298. *Id.*
299. 162 U.S. 565 (1895).
300. *Bolling*, 347 U.S. at 499 (emphasis added).
301. *Id.* at 499-500.
302. *Lochner*, 198 U.S. at 57-58.
303. *Bolling*, 347 U.S. at 500.

C. Education and Government Neutrality: Extra-Textual Evidence

In this section we consider how the Court arrived at its decision in *Brown*. In particular, we note the insight provided by conference notes from the justices' deliberations and Warren's draft opinion in *Brown*'s companion case, *Bolling v. Sharpe*. One can see the Court grappling with the problem of substantive guarantees in the area of civil rights both in its internal documents and in the opinion issued to the public.

Justice Tom Clark's notes of the first conference the Court held on *Brown* in 1952 provides insight regarding the justices' various hesitations. It appeared that then-Chief Justice Vinson was apprehensive about how to handle the case. Vinson prefaced his doubts, as Clark recorded, stating, "In *Sipuel* and *McLaurin* we said *right* was personal."[304] Dennis Hutchinson observes, "The point was critical to Vinson. In *Shelley*, *Sweatt*, and *McLaurin*, all bearing Vinson's signature for a unanimous Court, and in *Sipuel*, authored by Vinson as a per curiam decision, the Court had emphasized that the rights of black plaintiffs were 'personal.'"[305] The notion of a personal right is crucial because government neutrality is applied in controversies surrounding the abrogation of substantive personal rights.[306]

The Court had the option to articulate its civil rights doctrine in terms of a broad prohibition against racial classifications, which would emphasize the rights of blacks as a class. However, the Court in *Brown* followed the tradition urged by Chief Justice Vinson to treat educational segregation as a violation of a personal right to education.

Chief Justice Warren's initial draft opinion in *Bolling* went much further in articulating a right to education,[307] illustrating Warren's predisposition among those on the bench to push the issue of education as a substantive right. Warren cited *Meyer v. Nebraska*,[308] *Bartels v. Iowa*,[309] *Pierce v. Society of Sisters*,[310] and *Farrington v. Tokushige*[311] as precedent supporting educational liberties. As one would expect under the neutrality test, Warren considered but

304. Clark, J. Conference Notes [Dec. 13, 1952] Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin, *reprinted in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 91 (1979).

305. Hutchinson, *supra* note 304, at 37.

306. For example, consider *Lochner* when Justice Peckham asks, "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?" *Lochner*, 198 U.S. at 56.

307. Harold H. Burton Papers, Library of Congress, Manuscript Division, Box 263, *reprinted in* Hutchinson, *supra* note 304, at 93.

308. 262 U.S. 390 (1923) (using the Due Process Clause to invalidate a requirement that public and private educational instruction take place in English only).

309. 262 U.S. 404 (1923) (invalidating a law similar to that in *Meyer*).

310. 268 U.S. 510 (1925) (interpreting the Due Process Clause of the Fourteenth Amendment as granting the liberty for parents to enroll their children in private schools).

311. 273 U.S. 284 (1927) (involving a law similar to that in *Meyer*).

ultimately rejected the public purpose justification of a segregated educational system, writing, "[S]egregation in public education is not reasonably related to any proper government objective, and it imposes on these children a burden which constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause."[312] Articulating a broad conception of due process that ought to include educational rights, Warren again cited *Meyer*: "Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights."[313] Finally, Warren classified education as "a fundamental liberty."[314]

Warren eventually abandoned that language, most likely as a result of pressure from Justices Jackson and Frankfurter on the danger of articulating fundamental rights not enumerated in the Constitution, raising the possibility of a return to the *Lochner* era.[315] Dennis Hutchinson writes of this change, "With a flick of the wrist [Warren] changed *Bolling v. Sharpe* from an education case into a race case, and the equal protection component of the fifth amendment was born."[316] We disagree with Hutchinson that the change from the draft opinion to the final opinion was that severe. The Court did not classify education as a "fundamental liberty," but it did declare that education falls within the realm of a substantive right without explaining the distinction. More importantly, the decisions in *Brown* and *Bolling* employ the logic of inequitable access to a personal right of education using a government neutrality framework.

These differences in perspective and general concern among Court members and personnel over the issues of substantive rights doctrine and the Court's place within majoritarian politics demonstrates why neutrality is at the heart of the *Brown* decision. Internally, the Court is conflicted over its approach to race-based governmental policies. Next, we consider how external pressures on the Court contributed to its decision to reject the social order justification of the separate but equal doctrine.

D. The Court, Institutional Constraints, and Social Conflict

Why did the Court take such a measured approach to *Brown*? We suggest that legal, political, social, and historical factors influenced the Court's decision

312. Burton Papers [Warren draft opinion], *supra* note 311. Obviously, *Brown* and *Bolling* deal with two different constitutional clauses, as the latter case originated in the District of Columbia. However, the treatment of rights in these cases are equivalent—educational rights are interpreted within the rubric of government neutrality, regardless of the constitutional amendment at issue in these cases.

313. 262 U.S. 390, 399, *quoted in id.*

314. 262 U.S. 390, 399, *quoted in* Burton Papers [Warren draft opinion], *supra* note 311.

315. Klarman, *supra* note 273, at 239; Hutchinson, *supra* note 311, at 48-50.

316. Hutchinson, *supra* note 304, at 46.

to make gradual progress in desegregating primary and secondary educational systems in the United States. First, government neutrality had been the Court's *modus operandi* for 150 years, with strong connections running back to the founding era. Since the *Brown* Court was committed to the notion of equality of rights, it did not need to establish this basic principle to address segregation. Instead, it relied upon an age-old jurisprudence that was in need of a new home in the public square, allowing the Court to base its decisions in *Brown* and *Bolling* on known, yet evolving legal principle. Furthermore, because state neutrality with regard to substantive rights (be they economic or civil by nature) is regarded as part of the original intent of the Fourteenth Amendment's framers,[317] the Court was unwilling to abandon this principle without careful consideration.

Second, we argue that the Court took such a calculated approach in *Brown* because it was very conscious of the potential public outcry, especially in the South.[318] It would be easier for the public to excuse the decision in *Brown* if it concentrated on one aspect of segregation, rather than condemning the entire system of Jim Crow.[319] Government neutrality served as a convenient vehicle that the Court could use to blunt political pressure that would undermine its future institutional legitimacy. Additionally, liberal-minded scholars Herbert Weschsler[320] and Alexander Bickel[321] are critical of the Court's decision, claiming that it effectively invented a substantive right that is not specifically enumerated in the Constitution. Once again, however, this criticism is easier for the Court to rebut than if it had conducted a full assault on Jim Crow.[322] These legal weaknesses, along with footnote eleven, were likely the two largest sources of resentment for Southern conservatives, who called the opinion ignorant of "all law and precedent."[323] Additionally, circumscribing the reach of the opinion may have been necessary to reach a unified consensus within the Court, [324] and a broad prohibition against all racial classifications would usher in other touchy social/constitutional issues—such as miscegenation.[325]

Privately, the Justices were very conscious of and sensitive to the imminent resistance to their decision. In the conference on *Sweatt v. Painter*,[326] *McLaurin v. Board of Regents*,[327] and *Henderson v. United States* in

317. Klarman, *supra* note 273, at 235, 244; GILLMAN, *supra* note 4, at 35.

318. Klarman, *supra* note 273, at 241.

319. This is an argument made forcefully in the social science literature. KLUGER, *supra* note 281, at 752. See also our discussion of ROSENBERG, *infra* at note 335.

320. *See generally* Wechsler, *supra* note 258.

321. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

322. Klarman, *supra* note 273, at 241-43.

323. KLUGER, *supra* note 281, at 710 (quoting Governor Herman Talmadge of Georgia).

324. Klarman, *supra* note 273, at 242.

325. *Id.* at 242-43. In fact the Court refused to grant certiorari to a miscegenation case the very same year as *Brown*. *See* Jackson v. Alabama, 72 So. 2d 114, *cert. denied,* 348 U.S. 888 (1954).

326. 339 U.S. 629 (1950).

1950,[328] Justice Tom Clark cautioned, "A flat overruling of the *Plessy* case would cause subversion or even defiance of our mandates in many communities."[329] Justice Jackson feared that having *Brown* "decided wisely" would be extremely difficult because "everyone seems under conscious or unconscious emotional commitments of one sort or another."[330] In the 1952 conference on *Brown*, Chief Justice Fred Vinson remarked that the "abolition of [the] separate school system in [the] South raises serious practical problems."[331] In urging the Court to request a reargument of *Brown*, Justice Felix Frankfurter hoped that the other branches of government would independently choose to desegregate during the interim. Frankfurter said, "The social gains of having them accomplished with executive action would be enormous."[332] Even Justice Hugo Black, an outspoken opponent of segregation, recognized that the decision would result in "some violence"[333] and create a "storm over this Court."[334] The Court's fear of losing its legitimacy in the face of public outcry tempered its response in *Brown*.

Indeed, the Court's fears were well-founded, as *Brown* created a fervor that threatened the Court's institutional legitimacy. Following the decision, over fifty bills were introduced in Congress to curb the power of the Court.[335] At the state level, Southern states engaged in massive resistance to attempt to defeat the Court. By 1957, Southern legislatures had enacted 136 new laws and state constitutional amendments to preserve segregation. Virginia closed its schools and instituted a tuition grant scheme to allow white families to enroll their children in private, segregated schools. Almost every Southern state passed laws attempting to ban the NAACP from holding meetings.[336] Southern states also passed facially neutral legislation that produced discriminatory results—an attempt to satisfy the test of the neutrality principle. Gerald Rosenberg writes, "If outright segregation didn't work, the states could rely on... newly established 'neutral' health, safety, moral, and age requirements to

327. 339 U.S. 637 (1950).

328. 339 U.S. 816 (1950).

329. Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COL. L. REV. 1867, 1891 (1991) (quoting Memorandum (Apr. 1950) (Tom C. Clark Papers, Tarlton Law Library, Univ. of Texas Law School, Box A2, folder 3)).

330. *Id.* at 1896 (quoting Letter from Justice Robert Jackson to Charles Fairman (March 13, 1950) (Robert Jackson Papers, Library of Congress, Box 12, file: Fairman, Charles)).

331. *Id.* at 1903 (quoting Conference Notes of Justice Robert Jackson (Dec. 13, 1952) (Robert Jackson Papers, Library of Congress, Box 184, file: OT 1953, *Segregation Cases*)).

332. *Id.* at 1906 (quoting Conference Notes of Justice William Douglas 1 (Dec. 13, 1952) (William O. Douglas Papers, Library of Congress, Box 1149, file: Original Conference Notes re Segregation Cases)).

333. *Id.* at 1904.

334. *Id.* at 1924.

335. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 74 (1991).

336. *Id.* at 79.

maintain segregation."[337]

From a sociological perspective, we suggest that the Court relied on government neutrality in a new context to adapt to the changing nature of social conflict at the time. An historical understanding of the adaptability of neutrality to changing social conditions points to its past usefulness in weathering various storms in American political and social life. The Founding Fathers viewed government neutrality as a means of alleviating social tension by limiting the influence of political factions.[338] Preventing government from advancing the interests of some economic classes over others made sense in the eighteenth century American economy. The emerging capitalist markets in America worked well for most producers, and, if an individual could not succeed, he could always move west to take advantage of open land and new opportunities. Government neutrality was the best policy when actors in the economy had roughly equal bargaining power, resulting from a free and self-correcting market.[339] Thus, there was no need for government to play favorites.

However, the economy would undergo fundamental changes around the turn of the twentieth century that affected the social and economic climate in which *Brown* and other civil rights cases were decided. First, as the frontier closed, individuals could no longer escape to the promise of the West. Second, as industrialism swept the country, large corporations emerged and technological improvements led to a decrease in the need for skilled workers in the marketplace. Many workers therefore became expendable, and the fundamental balance of bargaining power tipped towards employers. Because a worker who demanded too much in compensation or working conditions could be easily replaced, employees often could not bargain for a fair deal.[340] By the time of the New Deal, the Court realized that industrialization had undermined the core assumption behind government neutrality in the economic sphere—bargaining equality in a resource—and opportunity-filled market. As a result, the Court could no longer serve as the guardian of economic justice, and

337. *Id.* at 80.

338. Many of those bearing the title Founder (Madison, Franklin, Washington among them) and those closely associated (Jefferson) viewed factionalism as a threat to the republican nature of government. The obvious example is Madison's *Federalist Papers 10*. All but Hamilton appeared concerned that urban commercial elites and bankers posed the greatest threat, fanning flames of economic discord that might lead popularly elected legislatures to institute factional policies. *See* JOSEPH J. ELLIS, FOUNDING BROTHERS (2000). Gillman notes that various founders worried about social tensions caused by developments in manufacturing, access to land, and attendant social policies of "price controls, debtor relief and paper currency" to counter economic abuses. *See* GILLMAN, *supra* note 4, 22-33.

339. GILLMAN, *supra* note 4, at 39.

340. *See, e.g.*, HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1965). Croly wrote, "The experience of the last generation plainly shows that the American economic and social system cannot be allowed to take care of itself, and that the automatic harmony of the individual and public interest, which is the essence of the Jeffersonian democratic creed, has proven to be an illusion." *Id.* at 152.

yielded to the progressive economic agenda created by the other two branches of government.[341]

The so-called jurisprudential Revolution of 1937, in which the Court abandoned government neutrality as the basis for its stewardship of the economic order, left the Court searching for a new *raison d'etre*. During that period of American history, there were two major sources of social tension: conflict between workers and employers that had lingered since industrialization and an emerging conflict between racial classes over segregation. Having ceded a large amount of power to adjudicate economic conflicts to the other branches of government, the Court was left with few options. It elected to take on the mantle of protector of minority rights in an era dominated by the kind of politics the founders had sought to avoid—one in which narrow interests exerted powerful and direct influence on policy making.

In embarking down a new path, the Court took with it a trusty guide, the neutrality principle. The doctrine of government neutrality was a jurisprudence that had survived massive social change in the past—from the founding of the country, through the Civil War and Reconstruction, all the way to the modern era. The Court had employed the doctrine of government neutrality in fulfilling its old mission of adjudicating economic rights conflicts, and the new era of the Court would be no different in advancing civil rights. Thus, the social context prior to the early Civil Rights movement created an atmosphere amenable to the use of the neutrality principle to adjudicate issues of social justice.

VI.
AN INTEGRATED APPROACH TO UNDERSTANDING CIVIL RIGHTS JURISPRUDENCE

A. Traditionalist View: Brown *as a By-product of the New Deal*

Most traditionalist interpretations of *Brown v. Board of Education* rely heavily on the changing nature of the federal government that occurred between *Buchanan* and *Brown*. Bruce Ackerman suggests that *Brown* was largely the result of a vision of constitutional politics that emerged with the New Deal, just as the founding of the country and Reconstruction shaped earlier eras in the Court's history. With the evolution of the welfare state, the size and reach of government increased dramatically in many policy areas in order to pursue a more modern conception of the public good. Compulsory public education was one manifestation of this new activism.

Ackerman argues that the Supreme Court sanctioned this constitutional vision in *West Coast Hotel v. Parrish*, which embraced New Deal activism, and

341. For a more detailed discussion of *West Coast Hotel*, see GILLMAN, *supra* note 4, at 190-93 and Cass R. Sunstein, Lochner's *Legacy*, 87 COL. L. REV. 873, 876 (1987).

United States v. Carolene Products, which turned the Court's focus towards civil rights. These two cases, Ackerman contends, were essential pre-conditions for the Court's decision in *Brown*.[342] Thus, in order to reach *Brown*, the Court had to abandon *Lochner*.[343]

We agree with Ackerman and the justices themselves that compulsory public education was certainly a strong example of the New Deal conception of the public good. As Chief Justice Warren wrote, "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[344] However, the larger significance of Warren's focus on the importance of education is that it allowed the Court to declare education a substantive right. Because the evidence indicated that segregated schools "deprive [African American children] of some of the benefits they would receive in a racial[ly] integrated school system,"[345] government neutrality dictated striking down educational segregation.

However, where we differ from Ackerman's view is in his association of government neutrality with minimalist government. It is true that these two concepts were often correlated during the *Lochner* era.[346] However, we believe that government neutrality is a criterion for adjudicating conflict (a means) rather than a preordained outcome of a conflict (an end). Applying government neutrality as a test in the realm of segregation revealed that the arbitrary separation of citizens results in class favoritism, even if separate but equal facilities are provided.

Government neutrality does not always produce a minimalist government result;[347] in fact, one might argue that both enforcing and eradicating Jim Crow required substantial government activism. States, in order to enforce segregation, took large-scale action in many areas of public policy: transportation, education, housing, marriage, and public accommodations. For example, the burden of separate but equal was so immense that Missouri attempted to pay black graduate students to attend school in another state rather

342. ACKERMAN, *supra* note 28, at 127.

343. *Id.* Our discussion of Tushnet in the text accompanying note 280 applies here also. We argue that the Court's treatment of education in 1954 as comparable to a substantive right to contract in 1868 indicates that not only would a *Lochner* style argument find a home in early civil rights decisions, but that the Court in fact employed one.

344. Brown v. Board of Education, 347 U.S. 483, 492-93 (1954).

345. *Id.* at 494.

346. For example, if the Court viewed a minimum wage law as illicit class legislation, the result of applying government neutrality is a severe limitation on the regulatory power of the state.

347. This was true even during the *Lochner* era. *See* Munn v. Illinois, 94 U.S. 113 (1877); Muller v. Oregon, 208 U.S. 412 (1908); Nebbia v. New York, 291 U.S. 502 (1934); Minneapolis & Saint Louis Ry. v. Beckwith, 129 U.S. 26 (1888). The outcomes of each of these cases increased government supervision of the economy, despite its limited reach compared to the New Deal.

than building an all black graduate school.[348] Nonetheless, the shift in Supreme Court jurisprudence resulting from the New Deal provided one key part of the equation for a full understanding of *Brown*.

B. Revisionist view: Brown *as Civil Rights Judicial Activism*

The other part of the equation is a revisionist view of *Brown* that comes mainly from David Bernstein, who challenges one of the main assumptions of the *Lochner* era—that government neutrality in the realm of freedom of contract disproportionately benefited the wealthy. Bernstein advances a competing case that government neutrality furthered the economic interests of poor black workers. State laws restricting labor recruitment, licensing requirements advanced by racist labor unions, and federal New Deal wage legislation all damaged the economic interests of black workers (either intentionally or accidentally). However, the courts struck down most of these regulations because they violated the neutrality principle.[349]

At the end of his work, Bernstein briefly extends his theory from freedom of contract cases to civil rights cases. He writes, "Moreover, *Lochnerian* jurisprudence, had it survived the New Deal, *could have been* a potent weapon against segregation laws. Many of these laws, after all, restricted freedom of contract by preventing voluntary transactions between whites and African Americans."[350] Since the Court had fundamentally changed its outlook on race since *Plessy*, it would no longer blindly accept public purposes justifications of segregation. Thus, if the Court applied the government neutrality test in *Brown*, the Court likely would have rendered all segregation unconstitutional.

Jack Balkin takes a somewhat similar approach to the relationship between government neutrality and *Brown*. He hints at segregation being a form of class discrimination forbidden under the neutrality principle, but he never connects the dots directly to *Brown*. Balkin writes, "The framers and ratifiers of the Fourteenth Amendment, influenced by Jacksonianism, sought to prohibit 'class legislation,'" which "referred to legislation or state action that was designed to grant special privileges...."[351] Yet Balkin, like Ackerman, believed that the Court had to abandon *Lochner* to arrive at *Brown*. He argues, "*Brown* stood as the key precedent for a responsible form of judicial activism; not the activism of *Lochner*, which protected the rich and powerful and gave constitutional sanction to an unjust status quo.[352]

We agree, in part, with both Bernstein and Balkin. We take Bernstein's

348. *See* Missouri ex rel. Gaines v. Canada, 249 U.S. 367 (1938).

349. *See generally* BERNSTEIN, *supra* note 26.

350. *Id.* at 108 (emphasis added).

351. JACK M. BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 82 (Jack M. Balkin ed., 2001).

352. *Id.* at 15-16.

argument one step further and contend that the Supreme Court actually *did* use government neutrality as a key part of the legal logic of *Brown*. The Court declared education to be a fundamental right and then followed the neutrality principle to determine whether that right was distributed equally. Because educational segregation inherently harms black students, the neutrality principle mandated integration.

Similarly, even if Balkin is correct in his assessment of the *Lochner* era, that outcome does not mean that government neutrality had to be abandoned for the Court to arrive at *Brown*. Instead, the Court simply needed to retool its application of neutrality to protect minority interests better. As stated before, protecting minority interests was the true historical intent of government neutrality by preventing dueling political factions from granting favors to a particular class. In *Brown*, a valid interpretation of government neutrality would prohibit whites from advancing their interests at the expense of blacks.

C. An Integrated Approach: The Good Society and Government Neutrality Converge in Brown

Perhaps our theory fits best with the work of Charles Black and Cass Sunstein. In responding to Herbert Wechsler's criticism of *Brown v. Board of Education*, Black argues that the Fourteenth Amendment's civil rights protections should be applied according to the neutrality principle. He writes, "The equal protection clause... should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states."[353] According to this logic, Black proposes that if segregation imposed burdens on African Americans, the system must be destroyed. Equality between the races must be upheld unless a valid public purpose exists—as he puts it, "a fairly tenable reason [must] exist for inequality."[354]

Black develops his argument by citing *Strauder* and the *Slaughter-House Cases*, both of which articulated the Fourteenth Amendment's protection of legal equality. He maintains that the Court in *Plessy* did not abandon the principles of these earlier decisions; instead the Court attempted to prove that segregation did not disadvantage African Americans.[355] Just as the Court used social science evidence to justify segregation in the past, the Court in *Brown* is justified in considering social science evidence for desegregation. He writes that the question of whether segregation amounts to discrimination "can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid."[356]

353. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 70 YALE L.J. 421 (1960).
354. *Id.* at 422.
355. *Id.*
356. *Id.* at 427.

Cass Sunstein writes that "it would be difficult to imagine a constitutional system that did not have some premises in common with *Lochner*"[357] and that versions of government neutrality "can be found at every stage of American constitutionalism."[358] Sunstein argues that the version of neutrality that survived the New Deal era relied upon the notion that preexisting levels of resources or bargaining power were no longer considered natural. As a result of *West Coast Hotel*, the status quo was considered a product of law and social choices; thus, the failure of government to act to correct inequities was equivalent to direct government action creating them.

Even the common law itself is understood in a different light after *West Coast Hotel*, according to Sunstein. He writes, "*Shelley* is the bridge between *West Coast Hotel* and *Brown*"[359] because the *Shelley* Court held that common law rules were not pre-political. Instead, *Shelley* endorsed the notion that common law rules could be considered state action, in which the neutrality principle should be applied. This distinction places an important limitation on the state's ability to correct private acts of discrimination. State action exists in spheres of private discrimination only when common law principles were being used.[360]

Sunstein also tackles Wechsler's critique of *Brown*, namely that no neutral principles[361] could be utilized in this case because it would be impossible for the state to balance the interests of whites who wish to avoid interracial association and blacks who desire it. Sunstein responds that desegregation cannot be viewed as merely advancing the interests of one of two groups with equal status, in this case African Americans. He writes, "The existing distribution [of educational resources] is not natural and does not provide a neutral baseline; it resulted in part from government decisions, notable among them slavery and segregation itself."[362] Since government had imposed burdens on African Americans in the past, desegregation "may even be constitutionally compelled"[363] to bring society closer to a neutral baseline.

This fusion of the New Deal conception of the good society and earlier notions of neutrality created a strong doctrine of associative rights that guided the Court into 1954 and beyond. We posit that this integrated approach to jurisprudence is the best way to understand the foundation of the Court's modern stance on civil rights. Next, we will consider how the principle of government neutrality can be applied in current constitutional controversies.

---

357. Sunstein, *supra* note 341, at 903.

358. *Id.*

359. CASS SUNSTEIN, THE PARTIAL CONSTITUTION 56 (1993).

360. *Id.* at 56-57.

361. By which Wechsler means decisions that are generalizable beyond the political issue of an individual case. *See* Wechsler, *supra* note 258.

362. SUNSTEIN, *supra* note 359, at 76.

363. *Id.*

D. Future Uses of an Integrated Approach to Government Neutrality

As stated above, the story of government neutrality does not end in 1954; this principle has been at the forefront in more recent constitutional controversies over affirmative action. Government neutrality, both in its *Lochner* era and post–New Deal formulations provide interpretive frameworks for both supporters and opponents of affirmative action.

Critics of affirmative action have embraced a principle known as color blind constitutionalism.[364] Under this theory government must make decisions in an impartial (or meritocratic) manner, and irrelevant characteristics, such as race, cannot be a factor. Proponents of this jurisprudence argue that it is the true intent of the Fourteenth Amendment's Equal Protection Clause—the prohibition that "no person" be denied "equal protection of the laws" refers to all people, not just members of minority racial groups.[365]

There is a strong relationship between color blind constitutionalism and the *Lochner* era conception of government neutrality. During the *Lochner* era, redistribution of economic resources was considered partisan because it altered a status quo that was assumed to be just. Likewise, color blind constitutionalism prohibits racial classifications, regardless of the intent or the target of the classification, because it assumes equality of opportunity already exists. This doctrine rests on the premise that the destruction of legal barriers was the necessary (and only permissible) condition for promoting equal opportunity. Just as the adherents to government neutrality in the *Lochner* era had faith that the market would produce just outcomes without state interference, the believers of color blind constitutionalism have a similar faith in desegregation.

In his dissent in *Grutter v. Bollinger*,[366] Justice Thomas elucidates the parallels between these two doctrines. He began by quoting Frederick Douglass, who said: "What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us.... I have had but one answer from the beginning. Do nothing with us!"[367] This attitude of picking oneself up by one's bootstraps corresponds strongly to Justice Peckham's observation in *Lochner* that bakers are intelligent enough to bargain for employment terms.[368] Thomas also declared that supposedly benign classifications are offensive

364. This principle is sometimes called the anti-classification or antidiscrimination principle.

365. John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-discrimination Principle*, 71 FORDHAM L. REV. 423, 431 (2002). Hasnas provides excellent description of the literature on both color blind constitutionalism and the equal citizenship principle.

366. 539 U.S. 306, 349 (2003).

367. *Id.* (quoting THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds. 1991)).

368. *See supra* text accompanying notes 32-34.

"because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[369] In other words, the advancement of African Americans, much like the advancement of workers in the *Lochner* era, must be accomplished without governmental assistance.

On the opposite side of the affirmative action debate, supporters of affirmative action frequently utilize the equal citizenship principle,[370] which mirrors the post–New Deal conception of government neutrality. Kenneth Karst describes the equal citizenship principle as one that "forbids the organized society to treat an individual as a member of an inferior or dependent caste."[371] Karst argues that formal equality alone, by which he means the absence of racial classifications in law, is not satisfactory to ensure social justice and inclusion.[372] Instead, government must proactively ensure that all citizens have the tools needed to pursue their conception of the good life.[373]

In the 1937 case *West Coast Hotel v. Parrish*,[374] the Court shifted its government neutrality jurisprudence in response to New Deal pressures. The Court upheld the constitutionality of a minimum wage law for women, a complete reversal of a previous *Lochner* era decision.[375] Chief Justice Hughes, unlike his *Lochner* era predecessors, questioned whether inequality of bargaining power existed, which would necessitate government intervention. He wrote, "The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances."[376] Thus, government intervention in the market did not weaken freedom of contract; it provided a baseline standard of economic fairness.

Similarly, the equal citizenship principle holds that government intervention to increase educational opportunities for minorities provides a baseline standard of equal opportunity. In his dissent in *Regents v. Bakke*, Justice Marshall proclaimed, "[W]hen a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."[377] Justice Brennan wrote in his dissent in *Bakke* that affirmative action is the price that must be paid to compensate African Americans for

369. *Grutter*, 539 U.S. at 354.
370. This principle is also known as the anti-caste or anti-subordination principle.
371. KARST, *supra* note 231, at 5.
372. *Id.*
373. *Id.*
374. 300 U.S. 379 (1937).
375. Adkins v. Children's Hospital, 261 U. S. 525 (1923).
376. *West Coast Hotel*, 300 U.S. at 398.
377. Regents of the University of California v. Bakke, 438 U.S. 265, 387 (Marshall, J., dissenting).

"educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination."[378]

VII.
CONCLUSION

This article makes two related points concerning the foundations of civil rights jurisprudence in the United States. First, we can comprehend connections among evolving conceptions of due process and equal protection in American law under the rubric of the neutrality principle. This suggests that the commonly accepted understanding of individual rights vis-à-vis state power arbitrarily and inappropriately bifurcates constitutional rights doctrine into the general areas of economic and civil rights, leaving much of the historical connections between them unexplored. Rather than compartmentalizing law and treating developments as unrelated points in time, we suggest a more nuanced understanding of rights doctrine. The principle of government neutrality provides a general paradigm which organizes and accounts for historically relevant economic, social and cultural influences on law. It creates a coherent basis for understanding developments in law across historical eras.

It is our contention that the Supreme Court's stewardship of the Fourteenth Amendment's due process and equal protection clauses can be understood in these terms. The Court adapted old doctrines to new circumstances, and we have demonstrated that the justices' own understand of the issues they faced in early civil rights cases supports this contention. Perhaps the clearest statement that the Court's decision in *Brown* was a product of both an understanding of due process grounded in jurisprudential tradition and socio-cultural developments comes from an uncirculated draft concurrence written by Justice Robert Jackson:

> Nor can we ignore the fact that the concept of the place of public education has markedly changed. Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.[379]

Justice Jackson was considered the most ambivalent about the court's decision in Brown, and yet even he embraced the neutrality framework of the Court—if education is a right and it is distributed unequally, it is unconstitutional. Justice Jackson recognized the malleable nature of constitutional principle, and its reciprocal relationship to social circumstance. Education may have been a resource that could be distributed capriciously in

378. *Id.* at 375-76 (Brennan, J., dissenting).

379. Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 262 (1988).

1864, but in 1954 it had become a right.

Second, we argue that government neutrality is also a valuable framework to understand the theoretical basis on which affirmative action is debated. In fact, neutrality is a tool that aids both supporters and opponents of affirmative action. Both sides in the affirmative action debate gain legitimacy for their positions by couching their arguments in terms of a time-honored jurisprudence. Supporters of affirmative action employ the post–New Deal conception of neutrality in which real equality of opportunity requires government intervention, while opponents of affirmative action lay claim to the *Lochner* era philosophy that government intervention is unjustifiable favoritism.

Finally, we hope this article has illuminated the prominence of government neutrality in constitutional debates spanning multiple centuries and many different substantive contexts. It is more than jurisprudence; it is an enduring civic value. It serves as an intellectual frame that defines the terms on which questions of equality and fairness are considered. Like the Constitution itself, government neutrality has survived and adapted throughout the history of our Republic, all the while balancing deeply held cultural values against modern realities.

ESSAYS