Book Review

Judicial Power and Civil Rights Reconsidered

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From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality. By Michael J. Klarman.[*] *New York: Oxford University Press*, 2004. Pp. 655. $35.00.

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INTRODUCTION

No line of cases enhanced the prestige of the Supreme Court as much as *Brown v. Board of Education*[1] and other decisions vindicating the rights of African Americans. Initially, *Brown* was criticized by some prominent liberal legal scholars for overruling the democratic process in a way reminiscent of hated *Lochner*-era jurisprudence.[2] Later, once a liberal consensus favoring *Brown* coalesced, and *Brown* came to be seen by liberals as a courageous, important, and correct decision on behalf of civil rights, the anti-*Brown* banner was raised, if at all, only by some conservatives opposed to what they perceived as the Court's illegitimate judicial activism.[3]

In recent years, however, liberal adulation of *Brown* has come under severe criticism from revisionist scholars associated with the political left. This time, the charge is not that *Brown* was wrongly decided or otherwise improper as a matter of constitutional law. Rather, *Brown* revisionists argue that both scholars and the popular media have vastly exaggerated the importance of *Brown* to the African-American freedom struggle. Moreover, the revisionists suggest that *Brown*, by focusing the energies of liberal advocates of social change on what the revisionists see as largely unproductive litigation, has actually retarded the progressive agenda.[4]

1. 347 U.S. 483 (1954).

2. *See* Gary Peller, Neutral Principles *in the 1950's*, 21 U. MICH. J.L. REFORM 561, 564 (1988) (explaining that, for many 1950s liberal academics, "opposition to *Lochner* demanded opposition to *Brown* as a matter of integrity and principle"). Prominent liberal critiques of *Brown* included LEARNED HAND, THE BILL OF RIGHTS (1958), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The Court was not completely oblivious to such criticism and sometimes explicitly distinguished its decisions in race cases from *Lochner*. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966) ("We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.'" (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting))).

The articles critical of *Brown* generated a pro-*Brown* backlash. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

3. *See, e.g.*, PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE (1995). Perhaps the lone liberal holdout on *Brown* was quirky originalist Raoul Berger. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that *Brown* was wrongly decided because it was contrary to the original intent of the Fourteenth Amendment).

4. *See, e.g.*, DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) (alleging that *Brown* failed to improve education for African Americans and suggesting that the Court might have done better to enforce the pre-*Brown* "separate but equal" regime more rigorously); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004) (asserting that *Brown* failed to effectively promote integration); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-169 (1991)

Michael J. Klarman's *From Jim Crow to Civil Rights*[5] is an impressive addition to the revisionist literature. Klarman pays close attention to the social and political context of civil rights litigation and makes a powerful argument that defenders of the Supreme Court vastly overstate both its inclination and its ability to protect the rights of politically weak racial minorities.[6] *From Jim Crow to Civil Rights* is the definitive study of the Supreme Court's role in the civil rights struggles of the twentieth century. It is also a major contribution to the broader debate over the efficacy of judicial power as a tool for protecting oppressed minority groups.

Reviews of *From Jim Crow to Civil Rights* have focused primarily on Klarman's discussion of *Brown*.[7] Like other revisionist writings,[8] Klarman's initial works on race and the Supreme Court principally focused on the limitations of *Brown* and its immediate progeny as vehicles for desegregating schools.[9] But while Klarman's book provides a detailed and thought-provoking history of *Brown* and its impact, most of it is devoted to events and cases that predated *Brown* and had no direct connection to school desegregation. This Review focuses primarily on this broader history (especially with regard to the Progressive Era), in part to redress the unbalanced treatment of Klarman's book found in most other reviews and in part because of the expertise of the authors, but mostly because *Brown* has peculiar features that make it an unfair exemplar of Supreme Court jurisprudence regarding minority rights. In particular, it seems inappropriate to judge the efficacy of judicial review by the one Supreme Court opinion of the twentieth century to attract massive resistance from an entire region of the United States.

This Review provides a balanced appreciation of Klarman's impressively multifaceted analysis. Without losing sight of the many

(arguing that *Brown* did nothing to advance civil rights and may even have retarded progress by stimulating a Southern white backlash and by diverting black activists away from political action that would have been more effective than litigation).

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

6. Klarman's critique of judicial power in the present work was prefigured in several articles. *See, e.g.*, Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) [hereinafter Klarman, *Racial Change*]; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998).

7. *See, e.g.*, David J. Garrow, *"Happy" Birthday,* Brown v. Board of Education*?* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693 (2004) (focusing primarily on *Brown* in a review of Klarman's book); Randall Kennedy, *Schoolings in Equality: What* Brown *Did and Did Not Accomplish*, NEW REPUBLIC, July 5 & 12, 2004, at 29 (same); Cass R. Sunstein, *Did* Brown *Matter?*, NEW YORKER, May 3, 2004, at 102 (same).

8. *See, e.g.*, BELL, *supra* note 4; ROSENBERG, *supra* note 4.

9. Klarman, *Racial Change*, *supra* note 6; Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

important insights and historical details that Klarman provides, the Review focuses on some of the weaknesses in his argument. While Klarman is right to reject the view that courts could, by themselves, eliminate Jim Crow and other forms of oppression, he underestimates both the willingness and the ability of courts to make a difference. Klarman properly emphasizes the limits of law as a tool for protecting oppressed minorities, and his work, like that of other revisionists, serves as a useful corrective to that of formerly dominant judicial triumphalists who have overstated the power of litigation as a tool for social change. Yet Klarman, while more modest in his conclusions than some of his revisionist predecessors, at times underestimates the importance of Supreme Court decisions and of law more generally. An accurate understanding of the role of the Supreme Court in aiding or preventing the oppression of minorities—which is important both to understand our past and to escape future errors—requires avoiding both undue hagiography and undue skepticism.

Part I of this Review summarizes Klarman's analysis of the development of Supreme Court civil rights jurisprudence in the Jim Crow era. Although Klarman covers a wide range of cases and issues, there is a common theme of skepticism about the importance of the Supreme Court's jurisprudence both in contributing to and reducing the oppression of African Americans.[10]

Judges' ability to affect the condition of African Americans was, Klarman argues, severely limited by two major constraints. First, judges "rarely hold views that deviate far from dominant public opinion."[11] They are therefore "unlikely to have the inclination . . . to defend minority rights from majoritarian invasion."[12] Second, even in the rare cases where judges are inclined to protect oppressed minorities, they generally will be unable to do so because deeply rooted oppression, such as that of African Americans in the Jim Crow era, is based less on law than on social practices and violence. In Klarman's view,

> Most Jim Crow laws merely described white supremacy; they did not produce it. Legal disfranchisement measures and de jure railroad segregation played relatively minor roles in disfranchising and segregating southern blacks. Entrenched social mores, reinforced by economic power and the threat and reality of physical

10. Klarman's refusal to credit or blame the Court for the ups and downs of blacks' status was reflected in the original working title of Klarman's book, *Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century*. *See* MICHAEL J. KLARMAN, NEITHER HERO NOR VILLAIN: THE SUPREME COURT, RACE, AND THE CONSTITUTION IN THE TWENTIETH CENTURY—CHAPTER 1: THE *PLESSY* ERA (Univ. of Va. Sch. of Law, Legal Studies Working Paper No. 99-3a, 1999), *available at* http://ssrn.com/abstract=169262.

11. KLARMAN, *supra* note 5, at 6.

12. *Id.*

> violence, were primarily responsible for bolstering the South's racial hierarchy. Legal instantiation of these norms was often more symbolic than functional. Thus, more favorable Court rulings, even if enforceable, would not have appreciably alleviated the oppression of southern blacks.[13]

This two-pronged attack on the importance of judicial power pervades Klarman's analysis of a wide range of issues, though he is careful to note that some decisions had an impact at the margin.[14] Klarman, like Gerald Rosenberg,[15] attributes the eventual improvement in the legal, social, and political position of African Americans after World War II primarily to broad social forces rather than to changes in the law.[16]

Part II provides a theoretical framework outlining important qualifications to Klarman's view that judicial power had little impact on Jim Crow because the judiciary was usually both unwilling and unable to have a major effect. Economists and political scientists have devoted only limited attention to understanding the mechanisms and effects of public-sector discrimination,[17] but more general economic literature suggests that attempts by Southern whites to establish inflexible and unyielding discriminatory norms necessarily ran into problems. Particularly important was the problem of collective action.[18] Jim Crow laws that sanctioned white defectors were often necessary to prevent collective action problems from unraveling the system of white supremacy.[19] These laws also helped to establish and maintain white supremacy through cost externalization. As we shall see, many Jim Crow laws fulfilled the function of externalizing costs from individual whites and white-owned businesses onto society as a

13. *Id*. at 59-60.

14. *See, e.g.*, *id*. at 7.

15. ROSENBERG, *supra* note 4. For the classic article arguing that courts have little power to resist public opinion and broad social trends, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

16. *See, e.g.*, KLARMAN, *supra* note 5, at 4-5, 443-46. Klarman does not, however, go as far in this direction as Rosenberg. *See* Klarman, *Racial Change*, *supra* note 6, at 10 & n.9 (partially rejecting Rosenberg's thesis with respect to *Brown*); *see also infra* Part IV.

17. *See* Robert A. Margo, *Segregated Schools and the Mobility Hypothesis: A Model of Local Government Discrimination*, 106 Q.J. ECON. 61, 62 (1991) ("Economists have devoted considerable attention to modeling discrimination by private agents, but have been less interested in the formal analysis of discrimination in the public sector.").

18. For well-known general analyses of collective action theory, see JAMES M. BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS (1968); RUSSELL HARDIN, COLLECTIVE ACTION (1982); TERRY M. MOE, THE ORGANIZATION OF INTERESTS (1980); and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

19. *See generally* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 153, 155-56 (1994) (arguing that racist Southern whites in the Jim Crow era could be analogized to a cartel, subject to the same pressures that make standard economic cartels so difficult to enforce without supportive state action).

whole, including both African-American and white taxpayers.[20] These laws also often served the purpose of cost minimization—ensuring that white supremacy was enforced at the lowest possible cost to white society. In these situations, judicial decisions invalidating Jim Crow laws could and often did have a substantial impact.

Part II argues that Klarman's otherwise commendable focus on broader social forces as the main cause of the eventual collapse of Jim Crow ignores ways in which those broader developments were in part dependent on a favorable legal environment. Part II also suggests that Klarman underestimates the degree to which judges are sometimes willing and able to reach decisions that run counter to majoritarian views.

Part III addresses the Court's Progressive Era decisions protecting African-American civil rights. This period poses a challenge to Klarman's theory that Supreme Court decisions usually reflect the political and social climate of the times. Although the Progressive Era marked the worst period of post-Civil War American racism,[21] it nonetheless witnessed a series of important decisions protecting the rights of Southern blacks in four areas of law: defending African-American voting rights against so-called "grandfather clauses," stating that Jim Crow laws must guarantee blacks railroad accommodations equivalent to those provided to whites, invalidating debt peonage laws intended to restrict the mobility of black labor, and invalidating housing segregation laws.

Part IV of this Review considers Klarman's insightful discussion of *Brown v. Board of Education* and its impact. Klarman contends that *Brown* did not, in and of itself, substantially reduce school segregation in the South;[22] he claims, however, that the extreme and violent "massive resistance" of Southern whites to the Supreme Court's decision strengthened Northern white commitment to civil rights and eventually led to the passage of the Civil Rights Act of 1964. Unlike *Brown*, the Act led to the relatively rapid demise of school segregation throughout the South.[23]

Klarman's analysis, like that of other *Brown* skeptics, underestimates the impact of *Brown* on Southern public schools. It largely ignores changes in education policy, including major funding increases for African-American schools, brought on by the mere threat of a school desegregation court decision.[24] Furthermore, Klarman's claim that *Brown* had, and could have had, little effect other than through the Northern response to the

20. The cost externalization point is raised in Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1162-63 (1984).

21. KLARMAN, *supra* note 5, at 63.

22. *Id*. at 344-60.

23. *Id*. at 360-63.

24. *See infra* Section IV.A.

massive resistance of Southern whites raises an important question: Why did segregationists massively resist a court decision that was unlikely to have any real effect on their cherished institutions? A definitive answer to this question requires additional research. However, this Review tentatively suggests that *Brown* might not have been as toothless as Klarman and other revisionist scholars suggest.

I. SUMMARY OF KLARMAN'S THESIS

This Part briefly summarizes the wide-ranging analysis of *From Jim Crow to Civil Rights*. The book is divided chronologically into five parts, covering the *Plessy* era,[25] the Progressive Era,[26] the interwar period,[27] World War II,[28] and finally *Brown* and its impact.[29] For convenience, this Part follows the same format.

A. *The* Plessy *Era*

The main theme of Klarman's account of the *Plessy* era, roughly 1890 to 1910, is that *Plessy v. Ferguson* and other pro-segregation decisions were an inevitable byproduct of social and political developments that undermined Northern white support for African-American civil rights and strengthened Southern white opposition to racial change.[30] Klarman also argues that Jim Crow laws were not necessary to ensure the perpetuation of segregation and white supremacy, because a combination of social mores, private violence, and informal administrative discretion used against African Americans by low-level officials was more than sufficient to achieve the goals of white racists.[31] The claim that *Plessy* did not mark a true watershed is not entirely original to Klarman.[32] But he does give this argument its most thoroughgoing exposition and defense, applying it to a wide range of areas, including segregation in various settings, voting rights, jury service, and education.[33]

25. KLARMAN, *supra* note 5, ch. 1.
26. *Id*. ch. 2.
27. *Id*. ch. 3.
28. *Id*. chs. 4-5.
29. *Id*. chs. 6-7.
30. *See id*. at 58-59.
31. *See id*. at 59-60.
32. *See, e.g.*, CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION (1987) (concluding that *Plessy* was a natural outgrowth of prior precedent and of the political climate of the time).
33. KLARMAN, *supra* note 5, at 48-52 (segregation); *id*. at 52-55 (voting rights); *id*. at 55-57 (jury service); *id*. at 57-58 (education).

B. *The Progressive Era*

The Progressive Era cases decided during the 1910s seem to undermine Klarman's thesis. As he notes, the period marked the "nadir" of post-Civil War racism in America.[34] Yet African Americans won four major sets of cases in the Supreme Court between 1911 and 1917: *Bailey v. Alabama*[35] and *United States v. Reynolds*[36] invalidated peonage laws "that coerced primarily black labor";[37] dicta in *McCabe v. Atchison, Topeka & Santa Fe Railway Co*. stated that railroads acting under color of state segregation laws must ensure that black passengers have access to the same classes of accommodations as white passengers, even if black demand for a certain class of accommodation was too low to justify providing it from a railroad's economic perspective;[38] *Guinn v. United States*[39] and *Myers v. Anderson*[40] held that "grandfather clauses" that implicitly discriminated against potential black voters violated the Fifteenth Amendment; and *Buchanan v. Warley*[41] held that a residential segregation ordinance unconstitutionally deprived both whites and African Americans of property rights without due process of law.

Klarman claims that the peonage and grandfather clause cases were easy decisions because the laws flagrantly violated the Constitution in ways that even the racist public opinion of the 1910s found reprehensible.[42] Furthermore, Klarman contends that the conflict with his thesis is largely dissipated if we recognize that the pro-civil-rights Supreme Court decisions of the Progressive Era failed to "produce significant changes in racial practices."[43] In Part III, we dispute this interpretation, arguing that the peonage cases and *Buchanan* had important positive ramifications for black welfare.

C. *The Interwar Period*

The interwar years, Klarman notes, were a period of gradual improvement in the status of African Americans. Racial change was driven by gradual increases in black wealth and education levels, the Great

34. *Id*. at 63.
35. 219 U.S. 219 (1911).
36. 235 U.S. 133 (1914).
37. KLARMAN, *supra* note 5, at 61.
38. 235 U.S. 151, 161-62 (1914).
39. 238 U.S. 347 (1915).
40. 238 U.S. 368 (1915).
41. 245 U.S. 60 (1917).
42. KLARMAN, *supra* note 5, at 69-76.
43. *Id*. at 96.

Migration of African Americans to the more tolerant North and West, and a partial liberalization of white racial attitudes.[44] The Supreme Court decisions on race during this period were a "mixed bag," including both victories and defeats for African Americans.[45] Klarman concludes that, overall, the interwar decisions made only "limited" advances in civil rights law, and he claims that the Court's sympathy for civil rights "advanced at roughly the same pace as the rest of the nation."[46] Moreover, he argues that even those decisions in which African Americans prevailed had little effect because they did not address private-sector discrimination and were often easily circumvented.[47]

D. *The World War II Era*

Klarman views World War II as "a watershed event in the history of American race relations."[48] During this period the social trends that aided blacks in the interwar period—rising black economic status, migration to the North, and liberalization in white attitudes—rapidly accelerated.[49] Moreover, the struggle against Nazi racism abroad helped discredit antiblack racism at home.[50] Blacks who had served in the military or improved their economic status by working in wartime industries were emboldened to combat violations of their rights, contributing to a vast expansion in African-American legal and political activism.[51] After the war, the impact of the antifascist struggle was augmented by that of the Cold War, which led influential white elites to view racial oppression as a hindrance to America's efforts to win international support for the struggle against communism, especially among emerging Third World nations.[52]

This period also saw a series of Supreme Court decisions significantly expanding protections for black civil rights in the South and border states. In *Smith v. Allwright*, the Court overruled a recent precedent and invalidated white primaries.[53] Klarman grants this decision a greater impact than he is willing to concede to virtually any other covered in the book. He points out that black voter registration in the South increased from just three

44. *Id*. at 100-15.
45. *Id*. at 99, 98-99.
46. *Id*. at 99.
47. *Id*. at 152-62.
48. *Id*. at 173.
49. *Id*. at 173-74.
50. *Id*. at 174-77.
51. *Id*. at 175-80.
52. *Id*. at 182-84. For a more detailed analysis, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); and Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).
53. 321 U.S. 649 (1944) (overruling Grovey v. Townsend, 295 U.S. 45 (1935)).

percent of all adults in 1940 to twenty percent in 1952 and concludes that *Smith* "was critical to this dramatic increase in the voting registration of southern blacks."[54] Klarman attributes this impressive effect to the threat of federal criminal prosecution of recalcitrant Southern election officials and a newfound willingness of lower court judges to vigorously enforce and even extend Supreme Court voting rights decisions.[55] The growing political influence of blacks in both the North and the South and slowly declining Southern white opposition to black voting also contributed to *Smith*'s impact.[56]

This era saw other key Supreme Court victories for African-American rights. Klarman grants that some of these cases also had significant effects, though not as great as those of *Smith*. He concludes that the invalidation of the exclusion of blacks from state graduate schools in *Sipuel v. Board of Regents*[57] and *Sweatt v. Painter*[58] was "instrumental to desegregating higher education in the border states and the peripheral South."[59] Similarly, he finds that a series of decisions invalidating segregation in interstate railroads and buses had a meaningful impact on the ground.[60] On the other hand, he argues that the rejection of judicial enforcement of racially restrictive covenants in *Shelley v. Kraemer*[61] and a series of criminal procedure cases expanding the protection of black defendants and potential jurors against discrimination had little or no effect.[62]

Nonetheless, Klarman's treatment of the World War II era is notable for his willingness to concede that several decisions of this era had a substantial impact independent of, or at least in addition to, progress generated by social and political developments. As we shall see, some of the claims that he makes on behalf of *Smith* and other cases of this period may also be applicable to other decisions that he denies had any impact.

E. Brown v. Board of Education *and Its Aftermath*

As already noted, Klarman's main argument in his lengthy discussion of *Brown* is that the case had little direct impact on school desegregation but did have a major indirect effect by promoting a massive and often violent Southern white backlash that repulsed Northerners and eventually

54. KLARMAN, *supra* note 5, at 236-37.
55. *Id*. at 237, 244-46.
56. *Id*. at 180-81, 237-44.
57. 332 U.S. 631 (1948) (per curiam).
58. 339 U.S. 629 (1950).
59. KLARMAN, *supra* note 5, at 253.
60. *Id*. at 217-25, 264-65.
61. 334 U.S. 1 (1948).
62. KLARMAN, *supra* note 5, at 225-32, 262-64, 267-86.

led them to support vigorous federal civil rights legislation. Klarman also concedes that *Brown* helped to mobilize black political activity on behalf of civil rights.[63] Ultimately, however, he concludes that any such effect was fairly small and that the rise in black activism in the late 1950s and early 1960s was primarily caused by "[d]eep background forces" such as rising black expectations, the example of the decolonization of Africa, and the increasing education and political awareness of Southern blacks.[64] Like Gerald Rosenberg before him,[65] Klarman even argues that *Brown* may have actually "*discouraged* direct-action protest," at least "in the short term," because it raised false hopes that civil rights goals could be achieved through litigation alone.[66]

II. WHY JUDICIAL POWER MATTERS: ANALYTICAL FOUNDATIONS

This Part examines several key theoretical reasons to expect that judicial decisions might have an important impact on the rights of oppressed minorities, even in a political environment in which most of the majority group supports, or is at best indifferent to, oppressive policies. Although Klarman is commendably thorough in his analysis of the historical record, he makes little effort to consider relevant theoretical literature from economics and political science. This relative neglect of theory leads Klarman to underestimate the extent to which the enforcement of Jim Crow laws was necessary to sustain white racial domination of blacks, even in a period when white opinion was overwhelmingly racist. The first three Sections present three tasks that laws performed in the maintenance of Jim Crow: solving collective action problems among racist whites, externalizing the costs of segregation and oppression, and minimizing the costs of maintaining a system of white supremacy.

An additional omission from Klarman's analysis is his failure to consider the possibility that some of the broader social forces to which he attributes the ultimate collapse of Jim Crow were in fact partially dependent on a favorable legal environment. Moreover, Klarman does not sufficiently explore why judges might be expected to go against dominant public opinion or at least to reach decisions protecting black rights that would not have been undertaken by politicians. These considerations are addressed in the final two Sections of this Part.

63. *Id.* at 368-81.

64. *Id.* at 377, 376-77.

65. *See* ROSENBERG, *supra* note 4, at 146-50 (arguing that *Brown* strengthened the NAACP's commitment to a litigation strategy and exacerbated rivalries between the NAACP and black organizations more oriented toward protest).

66. KLARMAN, *supra* note 5, at 377.

A. *Jim Crow and the Logic of Collective Action*

1. *Collective Action as an Obstacle to White Cooperation in Suppressing Blacks*

A collective action problem arises if a group of individuals is seeking to produce a "public good"—a benefit for the group that, if produced, will be nonrivalrous and nonexcludable.[67] That is, one group member's consumption of the good does not interfere with that of others, and it is impossible to exclude any group members from enjoying the benefits of the good once it has been produced. In such a situation, group members will have an incentive to free ride on the production of the good so long as the failure of any one member to contribute her share will not by itself prevent the good from being produced.[68] A collective action problem is exacerbated if group members who free ride not only save the direct costs of contribution but actually can reap substantial additional private benefits by defecting. For example, a firm that defects from a price-fixing cartel might reap disproportionately large profits as long as other cartel members continue to adhere to the cartel's rules.

The enforcement of Jim Crow segregation and white supremacy provided public goods for whites who desired these things. If blacks were barred from desirable economic opportunities, prevented from competing with whites, and disfranchised, even those whites who had not made any contribution to the achievement of these goals could potentially reap the perceived benefits of maintaining racial dominance. In most circumstances, an individual white's failure to contribute was unlikely to make a significant difference with respect to the outcome. This created an incentive for individual whites to free ride on the efforts of others to maintain Jim Crow segregation and thus a motive for whites to seek legislation to enforce Jim Crow norms. As Robert Cooter has noted, "[D]iscriminatory social groups suffer the same problems of instability as any other cartel. To sustain discriminatory norms, evaders must be punished by a combination of informal sanctions and formal laws."[69]

Cooter's point is that collective action theory applies not only to traditional economic price-fixing cartels but to any situation where a group attempts to achieve a goal that individual members have an incentive to undercut through actions that benefit them personally at the expense of the

67. For the general theory of public goods, see BUCHANAN, *supra* note 18. *See also* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954) (giving an early presentation of the theory).

68. OLSON, *supra* note 18, at 9-16.

69. Cooter, *supra* note 19, at 156.

common purpose. Moreover, collective action problems do not occur only among "selfish" individuals actuated solely by narrow self-interest.[70] In a situation where her cooperation or lack thereof will not by itself affect the outcome, even a highly altruistic individual might choose not to contribute to the public good but instead direct her efforts to helping others in ways that will in fact make a meaningful difference.[71]

Jim Crow was a comprehensive social system that restricted a wide range of interactions between blacks and whites for the purpose of maintaining white supremacy. As we shall see, the system included traditional economic activities such as employment relations but went far beyond them. It applied also to a wide range of social norms, many of which involved collective action problems that segregationists sought to address through legal enforcement. The cartel model applies to these activities no less than to traditional economic cartels.

For example, even the Jim Crow ban on interracial sexual relations and marriage involved an attempt to solve a collective action problem among whites through a cartel mechanism. While whites as a group, according to the racist view, had a common interest in maintaining the "purity" of their race and ensuring that white supremacy was not undercut through racial integration caused by intermarriage, the maintenance of the system required individual whites to forgo potentially appealing intimate relationships and marriages with black partners.[72] For this reason, segregationists believed that antimiscegenation laws were essential to prevent racial "amalgamation" even in an era when the vast majority of whites held racist views hostile to interracial relationships.[73]

Klarman concludes that "[w]hite supremacy depended less on law than on entrenched social mores, backed by economic power and the threat and reality of violence. Invalidating legislation would have scarcely made a dent in this system."[74] Rather, only federal civil rights laws could

70. The belief that collective action theory relies on the assumption that all human behavior is selfish is a common misunderstanding among scholars critical of the model. For examples of this misconception, see the works cited in Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 436 (1998).

71. *Id.*; *see also* OLSON, *supra* note 18, at 64-65.

72. *See generally* RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 44-144 (2003) (providing numerous examples of whites who sought interracial relationships during the Jim Crow era).

73. For example, the Supreme Court of Appeals of Virginia held in 1878 that "[t]he purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization," Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 869 (1878), required that interracial marriage be prevented "by prohibiting and punishing such unnatural alliances with severe penalties," *id.* at 866, so as to ensure that there would be "no evasion" of the rule by individual whites and blacks, *id.* at 869.

74. KLARMAN, *supra* note 5, at 82.

significantly help blacks.[75] Yet, if one sees Jim Crow as a wide-ranging racist cartel, formal law enforcing the cartel's objectives was hardly superfluous to its success.

Obviously, the best way to break up an existing local cartel—especially one that frequently uses violence with the acquiescence of local authorities—is through the vigorous enforcement of a federal antitrust law, and one can see the federal civil rights laws of the 1960s as serving an analogous function regarding the South's white supremacist Jim Crow cartel.[76] But this hardly shows that the Jim Crow cartel would not have been weaker, perhaps even far weaker, if it had received less support from the state in helping it externalize costs and overcome collective action problems in particular contexts.[77] If the racist cartel had received additional support from the state—for example, if legally sanctioned chattel slavery had continued for another hundred years—it would have been far more difficult for federal authorities to break it up later.[78]

2. *The Cases of Labor Mobility and Housing Segregation*

The history of Southern white efforts to reduce the mobility of black laborers and force them to stay with one employer on a near-permanent basis provides an example of how collective action problems impeded white efforts to control blacks and how repressive laws were adopted to prevent breakdowns in cooperation among whites. In the post-Civil War period, Southern white planters repeatedly attempted to form cartels[79] in order to keep down the wages of the sharecroppers and agricultural laborers who formed the vast majority of the black population[80] and prevent them

75. *Id.*

76. *See* Cooter, *supra* note 19, at 153-57.

77. The Mafia, for example, uses "economic power and the threat and reality of violence," KLARMAN, *supra* note 5, at 82, to enforce its norms. That hardly means, however, that the Mafia would not significantly benefit from official government endorsement and enforcement of those norms.

78. The fact that the Jim Crow cartel not only operated in the economic realm but was also an oppressive and authoritarian social system does not rebut the view that law played an important role in its maintenance. When citizens become sufficiently disgruntled about a policy or regime, sometimes all it takes to catalyze dissent is a few sincere voices or a minor event that casts doubt on the durability of the status quo. *See* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1995). That the postbellum legal system never countenanced an assault on black property rights and self-ownership ultimately provided the civil rights movement with the ability to challenge the system both from within the South and via migration to the North.

79. *See* WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915, at 42 (1991) ("All over the South planters eagerly sought to act collectively to hold down wages and to enforce contracts."); Roback, *supra* note 20, at 1161.

80. *See* ROBERT HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY, 1865-1914, at 41, 63 tbl.4.1 (1977).

from leaving abusive employers.[81] However, these efforts almost always foundered because individual white employers had strong incentives to renege on cartel arrangements and attempt to hire away black laborers from their competitors.[82]

In the late nineteenth century, Southern states enacted peonage laws and other restrictive legislation in an attempt to enforce white control of black laborers.[83] These laws substantially reduced black labor mobility relative to what had existed in the face of previous voluntary efforts to enforce white collusion against blacks, efforts consistently undermined by collective action problems.[84] The evidence that the Supreme Court's invalidation of peonage laws reduced this limitation on black labor mobility is discussed in Section III.B. The collective action problem also applied to white efforts to keep blacks out of white neighborhoods. White support for keeping blacks out of white neighborhoods was very strong in the early twentieth century. Nonetheless, individual whites often had an incentive to defect from the numerous formal and informal voluntary arrangements set up to exclude blacks. Individual white property owners had an interest in getting the highest possible price when selling property. Such incentives were accentuated in situations where white property owners feared that other whites in the neighborhood were also about to sell to blacks or indeed had already done so; if whites were unwilling to sell to blacks earlier, they might end up doing so later after prices in the area had fallen as a result of a black influx.[85]

In the area of housing policy, local governments adopted residential segregation statutes intended to externalize the costs of enforcing neighborhood boundaries and solve the collective action problems white property owners experienced when trying to prevent blacks from moving

81. STEPHEN J. DECANIO, AGRICULTURE IN THE POSTBELLUM SOUTH: THE ECONOMICS OF PRODUCTION AND SUPPLY 38-40 (1974); HIGGS, *supra* note 80, at 47-49.

82. COHEN, *supra* note 79, at 42 ("The evidence is . . . clear, however, that such efforts to 'combine in self defense' generally ended in failure."); HIGGS, *supra* note 80, at 47-49. *See generally* RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 79-80 (Dewey W. Grantham, Jr. ed., Harper & Row 1964) (1908) (discussing "tenant stealers"—planters who offered better wages and working conditions to lure away African-American workers from neighboring planters).

83. COHEN, *supra* note 79 (reviewing the panoply of laws intended to stifle black migration, the effects of these laws, and opposition to these laws among Southerners who sought to encourage black out-migration); Roback, *supra* note 20, at 1165-70 (discussing the types of laws enacted); Jonathan M. Wiener, *Class Structure and Economic Development in the American South, 1865-1955*, 84 AM. HIST. REV. 970, 979-82 (1979) (reviewing laws used to stifle black labor mobility).

84. *See* Roback, *supra* note 20, at 1184-91.

85. *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 859 (1998) (noting that, when blacks started to move into a white neighborhood, the remaining white neighbors would often panic and sell at "fire sale" prices).

into white neighborhoods. Section III.D shows that the Supreme Court's invalidation of these statutes in *Buchanan v. Warley*[86] substantially improved black access to housing by restoring the collective action problems that existed in the absence of formal segregation laws.

3. *Using Collective Action Theory To Help Explain Variation in the Effectiveness of Judicial Intervention on Behalf of Blacks*

Collective action theory helps explain why some judicial interventions to protect black rights were relatively effective while others were largely futile. In situations where the enforcement of white supremacy required only the cooperation of white government officials, the invalidation of specific discriminatory laws could easily be evaded by means of continued discrimination through administrative discretion. By contrast, formal laws were much more important to the maintenance of Jim Crow in policy areas where maintaining the system required the cooperation of white private-sector economic actors who had pecuniary incentives to defect from Jim Crow arrangements.[87]

As Klarman effectively documents in his book, a series of Supreme Court decisions invalidating laws disfranchising blacks proved to be almost completely ineffective in increasing black voter registration in the South.[88] He tells a similar story about the Supreme Court's even more extensive efforts to crack down on antiblack discrimination in the criminal justice system.[89] In both sets of cases, white state officials found a variety of ways to circumvent the Court's decisions and continue to discriminate against blacks.[90] In the case of discrimination in voter registration, a major 1949 study by Harvard political scientist V.O. Key found that the exclusion of blacks was often accomplished not through the application of specific laws

86. 245 U.S. 60 (1917).

87. For a similar argument in the context of analyzing the impact of the Supreme Court's decisions protecting abortion rights, see ROSENBERG, *supra* note 4, at 195-99 (noting that *Roe v. Wade* had a major impact on the availability of abortions by freeing private abortion clinics from restrictions imposed by state laws banning or closely regulating first-trimester abortions). Rosenberg acknowledges that this conclusion is a departure from his generally highly skeptical view of the effectiveness of judicial intervention. *Id.* at 199-201. He concludes that "the availability of a market mechanism for implementation meant that in states where actors were willing to perform abortions change could occur despite the opposition of key institutional actors." *Id.* at 201.

88. KLARMAN, *supra* note 5, at 85-86, 158-59.

89. *Id.* at 152-58, 225-32, 267-86.

90. *Id.* at 457.

but through the exercise of broad administrative discretion delegated to local registrars.[91]

The registrars who disfranchised black voters, and the state prosecutors, police officers, and judges who discriminated against black criminal defendants and potential jurors, had little or no incentive to treat blacks fairly. Indeed, they might well have been sanctioned or dismissed by their political superiors if they chose *not* to discriminate. Key noted that, in most Jim Crow-era Southern states, registrars were appointed by a centralized election board tightly controlled by the state Democratic Party.[92] Presumably, only officials willing and able to use their broad discretionary powers to exclude blacks from the franchise were likely to be selected and subsequently reappointed.

Thus, unlike white employers of black labor or white homeowners seeking to exclude blacks from their neighborhoods, white public officials in the electoral and legal systems were not handicapped by collective action problems in their efforts to perpetuate white supremacy. Indeed, to the extent that these officials belonged to a hierarchical bureaucracy headed by higher-level administrators committed to Jim Crow, they actually had strong private interests in discrimination even in the unlikely event that they were personally indifferent or hostile to the goals of the system. As long as this was the case, discrimination against blacks in areas such as voting and criminal justice was not significantly dependent on the establishment of formal discriminatory laws that might be rendered inoperative by judicial decisions.

Policy areas where enforcement of Jim Crow required the cooperation of private economic actors with incentives to resist rooted in collective action problems allowed much greater opportunities for effective judicial intervention. Although they may well have been just as racist as were public officials, these actors often would only cooperate with the system if required to do so by laws supported by significant sanctions.

Smith v. Allwright,[93] the one voting rights decision to which Klarman ascribes a high degree of effectiveness,[94] further reinforces the explanatory power of collective action theory. As Klarman perceptively emphasizes, by the 1940s, Southern registrars who continued to flout *Smith*'s requirement that blacks be allowed to vote in primaries on the same basis as whites risked criminal prosecution by the Justice Department and suits for money

91. V.O. KEY, JR. WITH ALEXANDER HEARD, SOUTHERN POLITICS IN STATE AND NATION 560-76 (1949). Key's book was based on interviews with politicians, activists, and state officials all over the South. Roscoe C. Martin, *Foreword* to KEY, *supra*, at vi-vii.

92. KEY, *supra* note 91, at 561-63.

93. 321 U.S. 649 (1944).

94. KLARMAN, *supra* note 5, at 236-45.

damages.[95] Even though the Justice Department was far from consistent in carrying out such threats,[96] the mere possibility of personal criminal or civil liability was enough to deter some registrars from continuing their discriminatory practices.[97]

By imposing a potential private cost on registrars, the Court and the Justice Department effectively created a collective action problem for them similar to that facing white planters who sought to form a cartel to control black laborers. Although the Department lacked the will or the resources to force compliance on registrars throughout the South had they all refused to follow *Smith*,[98] individual registrars were hesitant to take the risk of noncompliance because they lacked any assurance that their colleagues in neighboring jurisdictions would do the same. And an isolated flouter of federal authority likely faced an unusually high risk of prosecution.

B. *Cost Externalization*

The problem of cost externalization is related to, but nonetheless distinct from, that of collective action. Even in a situation where efforts to enforce white supremacy did not suffer from collective action problems because the contributions of an individual white could have a substantial impact in their own right, that individual might still choose not to act because of the high cost of doing so. Jim Crow laws could alleviate this reluctance by externalizing some or all of the costs of enforcement from those individual whites to society as a whole.

Once again, white planters' efforts to control black labor provide a helpful example. Although white efforts to form a cartel under which the planters agreed not to hire away each other's workers were subject to collective action problems and defection, any individual planter could potentially avoid collective action problems by using the threat of violence to prevent his own employees from leaving or demanding higher wages. In fact, some employers did just that.[99] However, resort to violence entailed considerable costs: Either the planter would have to take the risk of attacking recalcitrant black employees himself, or he would have to hire brutal thugs to serve as enforcers. Moreover, even in the *Plessy* era, white planters were occasionally punished for egregious acts of violence against

95. *Id.* at 241, 458.
96. *Id.*
97. *Id.* at 241.
98. *See id.* (noting that "the [Justice D]epartment remained reluctant to prosecute").
99. *See, e.g.*, HIGGS, *supra* note 80, at 75-76.

black workers.[100] In some instances, blacks were bold enough to fight back, further increasing the risks faced by white planters.[101]

Peonage laws greatly reduced the costs faced by white planters seeking to coerce black workers by shifting the costs and risks of enforcement to law enforcement authorities paid for by the public fisc. A study by economist Jennifer Roback concludes that "Southern planters may have found it quite profitable to collude to hold down black wages, but only as long as they could pass the enforcement costs on to state and local governments."[102] She notes that nearly all enticement laws adopted by Southern states, which prohibited an employer from "enticing" a worker under contract with another employer, included criminal penalties.[103] This is significant because criminal law is enforced at public expense, whereas civil remedies are only effective if private plaintiffs are willing to assume the cost of litigation.

A similar story could be told about white property owners seeking to exclude blacks from their neighborhoods. While violence could be and sometimes was used to scare off black residents, the costs of such action were much higher than simply leaving the job to state authorities enforcing residential segregation laws. First, not all individual whites were willing to use violence to keep out blacks, and some ethnic groups (Jews in particular[104]) were disinclined sociologically to use violence to exclude blacks from their neighborhoods. Second, violence raised the risks of a violent response. For example, Klarman discusses the case of Dr. Ossian Sweet, who killed one member of a Detroit mob trying to drive him from his home and wounded another.[105] Third, the use of violence carried the risk of arrest and possible prosecution, especially in the North. Law enforcement protection of blacks was hardly perfect and varied dramatically depending on the circumstances, but it was not nonexistent. Even in the South, some influential whites—real estate interests, white business elites concerned with the image of their cities, and whites who generally opposed lawlessness of any form—were opposed to violence and

100. *See* 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21, at 841-56 (1984) (describing Justice Department prosecutions during the Roosevelt and Taft Administrations); *see also* William F. Holmes, *Whitecapping: Agrarian Violence in Mississippi, 1902-1906*, 35 J. S. HIST. 165 (1969) (explaining that some Southern courts convicted whites who used violence to drive blacks from their homes).

101. HIGGS, *supra* note 80, at 76.

102. Roback, *supra* note 20, at 1163.

103. *Id*. at 1166.

104. *See, e.g.*, JONATHAN KAUFMAN, BROKEN ALLIANCE: THE TURBULENT TIMES BETWEEN BLACKS AND JEWS IN AMERICA 171-72 (1988) (contrasting the relatively passive Jewish reactions in the 1960s when blacks started to enter Jewish neighborhoods with the violence met by blacks in other neighborhoods).

105. KLARMAN, *supra* note 5, at 133-34.

were inclined to pressure local officials to prevent it (with varying degrees of success).[106]

Indeed, one reason common carriers such as railroads and streetcar companies were often hostile to segregation laws was that their employees were forced to serve as the primary enforcers of the laws. Not only did such enforcement cost the companies time and money, but it caused many problems when, for example, train conductors needed to decide whether an individual with a medium skin tone was a "light-skinned negro" or a "dark-skinned white." Railroads faced lawsuits both for being insufficiently vigorous in enforcing separate-car laws and for mistakenly assigning whites to "negro" cars.[107] Streetcars, where the costs of enforcement of segregation were very high, were largely integrated before the law intervened.[108]

C. *Cost Minimization: Raising the Price of Oppressive Policies*

White supporters of Jim Crow were committed to maintaining white supremacy, but for most it was not their only concern. Southern whites sought to maintain segregation in ways that minimized the cost to themselves. This consideration is related to that of cost externalization but distinct from it. Cost externalization arises from the desire of some actors to change the *distribution* of the costs imposed by the maintenance of segregation. The concept of cost minimization, on the other hand, stems from Southern whites' desire to minimize the total *amount* of costs.

If the cost of segregation became too high, whites might no longer have been willing to pay it, or at least might have preferred to reduce the scope of the system. This idea of a shift in the "supply curve" for segregation has not been systematically applied to analysis of the impact of judicial review on policies that discriminate against blacks and other minority groups. The potential impact is relatively clear: If judicial review eliminates or curtails the "cheapest" methods of maintaining a system of oppression, it could erode support for the maintenance of that system, even if judicial review does not lead to an immediate increase in respect for minority rights. As

106. *See, e.g.*, W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, at 223-24 (1993) (noting that the business and media elite in Atlanta campaigned against mob violence out of fear for their city's reputation); LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 158 (1998) (discussing incentives whites had to prevent violence); MORTON SOSNA, IN SEARCH OF THE SILENT SOUTH: SOUTHERN LIBERALS AND THE RACE ISSUE (1977).

107. *See, e.g.*, JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 138-43 (2001); BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920, at 356-59 (2001).

108. *See* Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893 (1986).

this Review shall argue, this concept helps to elucidate *Brown*'s significance.[109]

D. *Judicial Power and the Rise of External Social Forces Favoring Blacks*

Klarman rightly emphasizes the role of broad social forces in accounting for the increased respect and protection for black civil rights. His argument and Gerald Rosenberg's similar claim are important correctives to traditional accounts, which focus almost exclusively on the role of the judiciary.[110] However, Klarman neglects the possibility that some of the social forces to which he attributes racial progress were in part dependent upon favorable legal decisions.

In particular, Supreme Court decisions striking down peonage laws and racial segregation laws played a key role in protecting black mobility.[111] This is of vital importance because Klarman correctly emphasizes the crucial role of mobility in black advancement.[112] The Great Migrations of blacks to the North in the 1910s and during and after World War II enabled first hundreds of thousands and later millions of blacks to better their economic prospects and gain access to improved education.[113] The ability of blacks to vote in the North ensured that the growth of the black population there would eventually translate into greater black political influence in the nation as a whole, ultimately forcing national politicians to confront the Jim Crow system in the South.[114]

Klarman deserves credit for being one of the few legal scholars to recognize that migration to the North also had a significant immediate impact on the treatment of blacks who remained in the South. Fear of losing their black labor force led white planters and businessmen to treat blacks better and to lobby for laws ameliorating the most egregious practices of Jim Crow. "Thus, the black exodus induced southern cities and states to promise, and occasionally deliver, ameliorative policies, such as antilynching laws, increased educational spending, higher agricultural wages, and fairer legal treatment."[115] As a 1917 NAACP publication put it,

109. *See infra* Section IV.C.

110. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. & expanded ed. 2004). Kluger's book, originally published in 1975, played a key role in establishing the conventional wisdom on *Brown*.

111. *See infra* Sections III.B, D.

112. KLARMAN, *supra* note 5, at 100-02, 163-64, 173-74, 178.

113. *Id.* at 100-03.

114. *Id.* at 100-02, 173-78.

115. *Id.* at 102.

migration was "the most effective protest against Southern lynching, lawlessness, and general deviltry."[116]

Migration within the South was also significant.[117] Increasing black migration from the countryside to the cities enabled more blacks to gain better economic and educational opportunities and also to move to areas where a much higher proportion of blacks were allowed to vote. Even internal migration within the Southern countryside increasingly enabled blacks to better their prospects by forcing white employers both to bid against each other for their services and to ask their political representatives to provide better public services for blacks.[118]

Substantial black migration both inside and outside the South would surely have occurred even in the complete absence of favorable judicial intervention. But to the extent that peonage laws significantly hindered rural blacks' ability to leave their homes and employers,[119] and to the extent that residential segregation laws made it harder for them to move to cities, Supreme Court intervention eliminating these obstacles played a critical and underemphasized role in hastening the end of Jim Crow oppression.

E. *Causes of Judicial Independence*

So far, this Part has focused on ways in which judicial power helped alleviate the plight of blacks under Jim Crow. However, even if the judiciary had the ability, we must still ask why it would have had the will. While we lack the space to consider the full range of possible reasons why the judiciary's agenda might diverge from that of political leaders and the public, we do note several possibilities that are especially relevant to the history of civil rights jurisprudence.[120]

Klarman himself ascribes significance to the fact that most jurists come from relatively wealthy and highly educated "elite" backgrounds. On some

116. Editorial, *Migration and Help*, 13 CRISIS 115 (1917), *quoted in* KLARMAN, *supra* note 5, at 164.

117. By the 1890s, African Americans were migrating within the South at historic levels. Indeed, "in the 1890s and 1900s every Southern state except Mississippi, Alabama, and Florida registered rates of black outmigration almost as great as in the famed 'Great Migration' of the World War I years." EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 151 (1992); *see id*. at 493 n.56.

118. *See* HIGGS, *supra* note 80, at 47-50, 75-77; *see also* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 783-84 (1998).

119. For evidence that this was indeed the case, see Roback, *supra* note 20, at 1165-70; *supra* Section II.A; and *infra* Section III.B.

120. In analyzing possible causes of judicial independence, this Review, like Klarman, focuses primarily on the United States Supreme Court. However, most points made in this Review also apply to other Article III courts.

issues, elite opinion systematically differs from that of non-elites.[121] However, Klarman neglects several other relevant factors, which are discussed below.

1. *Life Tenure and Relative Insulation from Political Pressure*

The insulation provided by life tenure is the oldest of arguments for judicial independence. In *Federalist No. 78,* Alexander Hamilton argued that it would ensure that the judiciary would function as an "excellent barrier to the encroachments and oppressions of the representative body."[122] While life tenure certainly does not give judges anything approaching complete immunity from political pressure,[123] it does give them greater discretionary leeway than is usually enjoyed by elected officials and temporary political appointees. Relative to the latter, judges are comparatively immune to punishment by interest groups and others offended by their decisions.

Moreover, regardless of personal prejudices, federal judges typically have institutional loyalty to the federal government and are protective of federal prerogatives. For example, federal judges in the late nineteenth century, almost none of whom had any personal sympathy for Chinese immigrants, generally (and in contrast to state courts) protected them from hostile local legislation by invoking the Fourteenth Amendment and the United States's treaty obligations to China.[124] Similarly, Ninth Circuit judges hearing immigration cases in the 1890s shared the prevalent negative attitude toward the Chinese, but were constrained by their "perception of their institutional obligations," and when "weighing the evidence in individual cases" often disregarded "the fact that the litigants were Chinese or of Chinese descent."[125] Indeed, anti-Chinese forces were sufficiently disturbed by judicial rulings that they lobbied to curtail federal courts' jurisdiction to hear immigration cases.[126]

121. *See* KLARMAN, *supra* note 5, at 450, 452.

122. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

123. There is an extensive scholarship outlining ways in which the political branches can influence judicial decisionmaking. For a helpful critical analysis of some of the literature, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138-81 (1998).

124. *See* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994); David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); David E. Bernstein, *Two Asian Laundry Cases*, 23 J. SUP. CT. HIST. 95 (1999).

125. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW, at xvi (1995).

126. *Id.* at xvii.

2. *Generational Cohort Effects*

An important additional implication of life tenure is the fact that Justices will often be members of an earlier generation than the majority of politicians and voters. Political scientists and sociologists have for a long time realized that people's views on controversial political and ideological issues are often critically dependent on generation-specific formative experiences. Social scientists refer to these intergenerational differences in outlook as "cohort effects."[127]

Cohort effects lead to large intergenerational differences in attitudes on a wide range of political issues.[128] While social scientists have long recognized the importance of cohort effects, those effects have not featured prominently in the debate among legal scholars over the role of the judiciary in protecting minority rights. Particularly important for our purposes is the well-documented finding that cohort effects have a huge impact on the public's attitudes regarding racial issues.[129] Modern public opinion research finds that later cohorts tend to be more racially tolerant than earlier ones.[130] In the Progressive Era, however, white racism toward blacks was increasing rather than abating, and the fact that most Supreme Court Justices belonged to an older cohort probably made them *more* tolerant than the median voter and political officeholder.[131]

3. *Selection of Justices from Unrepresentative Subgroups Within the Population*

A variety of political pressures might lead presidents to select all or most of their Supreme Court appointments from a subset of the population with unrepresentative views on a given set of issues. For present purposes, it is significant that Justices will usually be selected from within the President's own political party. Presidents often will choose Justices who not only are members of their party but who also come from a faction within the party that is likely to best serve the President's political and ideological purposes.

In some cases, of course, Justices are deliberately chosen for their views on specific issues. But it is important to recognize that a Justice chosen for liberal views on issue *A* may also be disproportionately likely to

127. *See* Norval D. Glenn, *Distinguishing Age, Period, and Cohort Effects*, *in* HANDBOOK OF THE LIFE COURSE 465 (Jeylan T. Mortimer & Michael J. Shanahan eds., 2003).

128. *See* WILLIAM G. MAYER, THE CHANGING AMERICAN MIND 141-89 (1992).

129. *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 196-229 (rev. ed. 1997).

130. *Id*. at 197-98.

131. *See infra* Section III.E.

have liberal views on issue *B*, even if *B* was not a significant consideration in the President's decision to appoint the Justice.

Both types of unrepresentative selection bear on Klarman's thesis. In the Progressive Era, most of the Justices on the Court had been picked by Republican presidents and were therefore members of the Republican Party. Because the Republican Party in that era had little support among white Southerners, these Republican Justices were all Northerners, and therefore none of them came from subgroups of the population that had the most hostile attitudes toward blacks. While not inevitable, it also is not surprising that these Justices did not look kindly on the expansion of Jim Crow legislation in the South in the cases that came before them.

Under President Franklin Roosevelt, who made a record nine appointments to the Court, judicial selection was heavily influenced by factional and issue-based considerations, as well as by party considerations. Roosevelt sought to ensure that his appointees would be liberals who would vote to support broad presidential power, virtually unlimited federal power over economic regulation, and (to a much lesser degree) freedom of speech and religion.[132] As a result, six of FDR's nine appointees were Northern liberal Democrats, the group most likely to share these views.[133] "[W]hile there is no clear evidence that FDR nominated jurists with a specific desire to advance African American rights, his nominees' adherence to rights-centered liberalism combined with their devotion to defer to the executive branch ensured that the NAACP would find fertile ground to lay its antisegregation precedential seeds . . . ."[134] Although helping blacks was not FDR's goal, the Justices drawn from the faction of the Democratic Party likely to support the President's actual objectives were also—at that time—more likely to oppose Jim Crow than the average white.

In his book, Klarman recognizes that *Brown*, decided by a Court still dominated by the five remaining FDR appointees, was ahead of both public and political opinion in its willingness to strike down Southern school segregation.[135] Klarman attributes the Justices' stance to their "elite" status.[136] Yet an important additional element was the manner in which they

132. *See* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 97-143 (2004).

133. *Id*. Of the three Southerners, Hugo Black, Stanley Reed, and James F. Byrnes, one (Byrnes) served only briefly, *id*. at 138, and another (Black) was actually a racial liberal, despite having once been a member of the Ku Klux Klan, *id*. at 111-12.

134. *Id*. at 142.

135. KLARMAN, *supra* note 5, at 343, 450-52. Although, as Klarman notes, about half the public agreed with the *Brown* decision from the outset, he also recognizes that *Brown* came long before there was any strong political pressure on Congress to attack Jim Crow segregation directly, and acknowledges that the Court "played a vanguard role in school desegregation." *Id*. at 343.

136. *Id*. at 450-52.

were chosen. Certainly, a random sample of nine members of the American elite of 1954 would have been unlikely to unanimously support the elimination of school desegregation.[137]

III. RACE AND THE SUPREME COURT IN THE PROGRESSIVE ERA

The major civil rights decisions of the Progressive Era illustrate the importance of considerations that Klarman fails to incorporate into his analytical framework. The Supreme Court turned out to be both more effective and more willing to take steps to protect some of the rights of African Americans than his argument would suggest.

A. *The Puzzle of the Progressive Era Race Decisions*

As noted previously, in the 1910s, at the height of the Progressive Era, the cause of black civil rights emerged victorious in four sets of cases.[138] The Progressive Era cases marked a turning point with regard to Supreme Court jurisprudence on race. According to one tally, the Supreme Court heard 28 cases involving African Americans and the Fourteenth Amendment between 1868 and 1910; of these, African Americans lost 22.[139] However, between 1920 and 1943, African Americans won 25 of 27 Fourteenth Amendment cases before the Supreme Court.[140]

The Progressive Era decisions came in a decade when "racial attitudes and practices seemed to have reached a post-Civil War nadir."[141] Most whites, including most white intellectuals, believed that African Americans were culturally and biologically inferior.[142] Progressive political and intellectual leaders generally shared the racism of the day,[143] and Progressive social scientists promoted pseudoscientific theories of race

137. Although the Justices differed among themselves on the legal propriety of *Brown*, Klarman shows that all but Justice Reed agreed that school segregation was morally reprehensible. *Id.* at 294-301.

138. *See supra* notes 35-41 and accompanying text.

139. *See* BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, at 13-14 (1946).

140. *Id.* at 162.

141. KLARMAN, *supra* note 5, at 63.

142. "The literature of sociology was dominated by the view that Negroes were inferior to the white race in every way. This position of scholars both reflected and reinforced popular beliefs." CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 65 (1959) (footnote omitted).

143. *See* DAVID W. SOUTHERN, THE MALIGNANT HERITAGE: YANKEE PROGRESSIVES AND THE NEGRO QUESTION, 1901-1914, at 48-49 (1968) (describing the racist connotations of scholarly works of the late nineteenth century); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 369-95 (1951) (asserting that both Northern and Southern Progressives shared a racist outlook).

differences.[144] Moreover, the political branches were overtly hostile to blacks. Politicians almost unanimously endorsed segregation; those who disagreed generally kept quiet.[145] In 1912, Republican presidential candidate William Howard Taft and Progressive (and former Republican) candidate Theodore Roosevelt were so overtly hostile to the interests of blacks that many leading civil rights activists supported Southern Democrat Woodrow Wilson.[146] The Wilson Administration, however, turned out to be consistently hostile to African Americans,[147] and Congress was only marginally better.[148]

As Klarman acknowledges,[149] the historical context of the 1910s civil rights decisions is a problem for those, like him, who argue that "changes in the social and political context of race relations preceded and accounted for changes in judicial decision making."[150] The decisions of the Court during this period may tempt one to conclude that "this apparent disjunction between cases and context reveals that the justices possess a significant capacity to defend minority rights from majority oppression."[151] Yet Klarman resists this conclusion and instead suggests that the Progressive Era race cases simply "may show that where the law is relatively clear, the Court tends to follow it, even in an unsupportive context."[152] Klarman adds that except insofar as they inspired civil rights activists, the Court's Progressive Era race decisions "proved inconsequential":[153] Southern peonage continued for decades; railroads continued to offer blacks unequal

144. *See* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 154-75 (1963) (discussing racist theories of this era).

145. DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT 21 (1995).

146. KLARMAN, *supra* note 5, at 67-68.

147. *See* Henry Blumenthal, *Woodrow Wilson and the Race Question*, 48 J. NEGRO HIST. 1, 6 (1963) (asserting that the Wilson Administration's "discrimination against Negroes had all the earmarks of racial prejudice"); Cleveland M. Green, *Prejudices and Empty Promises: Woodrow Wilson's Betrayal of the Negro, 1910-1919*, 87 CRISIS 380, 387 (1980) ("[F]or blacks, the Wilson years were a step backward in their struggle for advancement."); Nancy J. Weiss, *The Negro and the New Freedom: Fighting Wilsonian Segregation*, 84 POL. SCI. Q. 61, 61 (1969) ("Woodrow Wilson's first administration inaugurated officially-sanctioned segregation in the federal departments . . . .").

148. *See generally* Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WIS. MAG. HIST. 30 (1970) (discussing Congress's stance toward blacks during the Wilson years).

149. KLARMAN, *supra* note 5, at 62.

150. *Id.* at 443.

151. *Id.* at 62.

152. *Id.*

153. *Id.*

accommodations; *Guinn* and *Myers* enfranchised no blacks; and American cities became increasingly segregated.[154]

With respect to the voting rights cases, Klarman makes a strong argument. While the Court could have constructed a plausible opinion upholding grandfather clauses,[155] the laws in question were a rather blatant attempt to nullify the Fifteenth Amendment, and legal commentators had widely predicted that the Court would invalidate them.[156] Even President Taft—like others who believed that the Fifteenth Amendment was misconceived but must be obeyed—thought that grandfather clauses were unconstitutional.[157] And the practical implications of invalidating grandfather clauses were minimal, as Southern states had many other means of restricting the franchise. Indeed, in dicta the *Guinn* Court explicitly endorsed literacy tests. According to Klarman, this dictum "ensured that the ruling had no impact on black disfranchisement."[158]

Even if the Court had evinced less tolerance of disfranchisement mechanisms like literacy tests, in practice disfranchisement was primarily the responsibility of local officials who could use their bureaucratic discretion to the detriment of blacks and had every political incentive to do so.[159] Ensuring blacks' ability to vote in the South would have taken tremendous litigation resources (which civil rights activists did not have)[160] *and* the sustained support of the executive branch in supporting litigation efforts and protecting black registrants and voters from violence (which was not forthcoming).[161]

Klarman's argument becomes more dubious when one considers the peonage and railroad segregation cases, which are discussed in more detail in Sections B and C, respectively. The strongest challenge to Klarman's position comes from *Buchanan v. Warley*, discussed in Section D. Section E discusses why the Supreme Court suddenly became more sympathetic to civil rights during the Progressive Era.

154. For a similar analysis of the Progressive Era race cases, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

155. A detailed explanation of how the Court could have justified a ruling that came out the other way is found in 9 BICKEL & SCHMIDT, *supra* note 100, at 958-59.

156. KLARMAN, *supra* note 5, at 70.

157. *Id.* at 71.

158. *Id.* at 85.

159. *See supra* notes 91-92 and accompanying text (discussing Key's work on disfranchisement).

160. KLARMAN, *supra* note 5, at 86.

161. Between *Plessy* and the Truman Administration, the administration most friendly to black political aspirations was likely the short-lived Harding Administration. Harding sought to rejuvenate the Republican Party in the South but, unlike other prominent Republicans of his era, hoped to do so via a biracial coalition, not by turning the Republican Party lily white. Nevertheless, the Harding years saw only nominal efforts on voting rights. JOHN W. DEAN, WARREN G. HARDING 124-26 (2004).

B. *The Peonage Cases*

After emancipation, employers responded to rising African-American wages by attempting to create voluntary cartels to assure a noncompetitive labor market.[162] When these efforts failed, planters frequently turned to violence to limit black mobility.[163] However, private violence had its limits: Its use required a certain level of brutality and lawlessness that only some plantation owners were prepared to exercise; it ran the risk of counterviolence or defensive violence; and it was costly, because it usually required payment to the overseers and underlings who carried out the violence. Not surprisingly, planters preferred to turn to government to externalize their costs in suppressing black mobility.[164] Moreover, government was needed to solve the collective action problems created by the fact that individual planters had an incentive to lure black labor away from other planters by bidding up wages and working conditions.[165]

The Fourteenth Amendment outlawed overt legislative discrimination, so the planters lobbied for facially neutral legislation.[166] Among the laws used to suppress black labor mobility were enticement laws; emigrant agent laws, which restricted the rights of out-of-state labor recruiters; the criminal surety and convict-lease system, which allowed the government to lease black workers convicted of petty crimes—real or trumped up—to planters; and false pretenses laws, which made it a criminal offense to fail to repay an advance a worker had fraudulently accepted from his employer.[167]

False pretenses laws and the criminal surety system frequently left blacks in a state of peonage. In *Clyatt v. United States*, the Court upheld the 1867 Peonage Act, which banned involuntary servitude when physical coercion was used to force a worker to pay off a debt.[168] Six years later, the case of *Bailey v. Alabama* came to the Supreme Court.[169] The issue in *Bailey* was the legality of an Alabama false pretenses law under the Peonage Act and the Thirteenth Amendment. After similar laws had been invalidated or construed narrowly several times by federal and state courts, Alabama enacted a law that created a presumption of fraudulent intent

162. *See supra* notes 79-82 and accompanying text.

163. *See, e.g.*, Frederick Douglass, The Nation's Problem, Speech Made upon the Twenty-Seventh Anniversary of Abolition in the District of Columbia (Apr. 16, 1889), *in* NEGRO SOCIAL AND POLITICAL THOUGHT, 1850-1920, at 323 (Howard Brotz ed., 1966) (reporting that violence was used against African Americans caught trying to migrate).

164. *See* Roback, *supra* note 20.

165. *See supra* Section II.A.

166. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 9 (2001).

167. KLARMAN, *supra* note 5, at 71-72.

168. 197 U.S. 207 (1905).

169. 219 U.S. 219 (1911).

whenever a worker breached a labor contract after receiving an advance from his employer.[170] Moreover, the laborer was not even permitted to testify "'as to his uncommunicated motives, purpose, or intention.'"[171] The Supreme Court invalidated the law, holding that it effectively criminalized ordinary breach of contract.

Bailey marked "the first decision since *Strauder v. West Virginia* in 1880 in which the Supreme Court took the side of black people in an important issue of race relations."[172] Nevertheless, and although the Court's opinion drew dissents from Justices Holmes and Lurton, Klarman is correct that one can construe the case as legally and politically "easy."[173] Debt peonage was commonly understood as a form of involuntary servitude, and public support for debt peonage was minimal outside of the planter class. Even Wilson Administration Attorney General James McReynolds, who later became a Supreme Court Justice notorious for his racism, opposed peonage.[174]

Indeed, McReynolds expedited the next black labor case to reach the Supreme Court,[175] *United States v. Reynolds*.[176] *Reynolds* tested the legality of Alabama's criminal surety laws. Criminal surety laws were not inherently objectionable, as formally they merely gave a convicted man a choice between paying a fine, serving jail time (likely on a chain gang as a leased convict), or working for a planter willing to pay off the fine. However, the Court chose not to ignore "the patent fraud in a system that routinely manufactured black criminals" and then entrapped them in a system in which they were destined to be long-term peons.[177]

Given general societal revulsion toward peonage, *Bailey* and *Reynolds* do not, by themselves, seem to reflect any great progressiveness on racial issues by the Supreme Court. Klarman further argues that these cases "seem to have had little effect on peonage"[178] and adds that "experts agree that southern peonage remained widespread after *Bailey* and *Reynolds*."[179] Both

170. 1903 Ala. Acts 345-46.

171. *Bailey*, 219 U.S. at 228 (citing Bailey v. State, 49 So. 886, 886 (Ala. 1909), *rev'd*, 219 U.S. 219 (1911)) (explaining that this was an evidentiary rule in Alabama, "which must be regarded as having the same effect as if read into the statute itself").

172. 9 BICKEL & SCHMIDT, *supra* note 100, at 888. *Clyatt* upheld the Peonage Act but reversed the conviction under the Act on a technicality.

173. KLARMAN, *supra* note 5, at 75.

174. 9 BICKEL & SCHMIDT, *supra* note 100, at 880-81.

175. 9 *id*.

176. 235 U.S. 133 (1914).

177. KLARMAN, *supra* note 5, at 75.

178. *Id*. at 86.

179. *Id*. at 88. Klarman points to letters in NAACP files reporting coercive labor practices in various Southern states, as well as to a 1921 report by the United States Attorney General on the persistence of peonage in Georgia. *Id*. Indeed, the Georgia Supreme Court ignored *Bailey* and upheld Georgia's false pretenses law on the ground that the Georgia statute, unlike the Alabama statute invalidated in *Bailey*, allowed the defendant to "make a statement," though not to testify

of these statements are open to question. The fact that some peonage continued after *Bailey* does not mean that, as Klarman contends, *Bailey* "apparently had no effect on the amount of peonage that existed."[180]

Bailey clearly changed the legal regime in various Southern states. After *Bailey*, Alabama passed a new false pretenses law that "omitted the objectionable prima facie clause."[181] Historian Pete Daniel reports that the incidence of peonage complaints in Alabama "fell off abruptly after the *Bailey* case."[182] Meanwhile, pending prosecutions under the invalidated statute seem to have been dropped.[183] Arkansas removed its unconstitutional false pretenses law from the state code in 1921.[184] "Mississippi's Code of 1917 included such a statute, but the Revised Code of 1930 did not."[185] The North Carolina Supreme Court invalidated the state's prima facie clause soon after *Bailey*, though the legislature did not delete the law from the state code until 1943.[186]

Klarman believes that such formal legal changes had no effect "on the ground," but events in Florida suggest otherwise. Florida initially dropped its prima facie evidence clause to comply with *Bailey*, but then reenacted a statute with this clause in 1919.[187] While this means that *Bailey* was ineffective in Florida, it also may contradict Klarman's view that peonage laws were superfluous to the coercion of black labor. Laws are sometimes passed for symbolic or expressive reasons, but the addition of a prima facie clause to a false pretenses statute probably does not fall within that category of laws. The prima facie clause could also have been enacted proactively by the legislature to please planters by showing an interest in their affairs, even if the planters saw little need for such a law. But the more plausible explanation for the reemergence of the clause is that planters' ability to successfully prosecute workers for failing to pay their debts made a significant difference with respect to the planters' ability to coerce blacks. In any event, Klarman does not address the issue.

under oath, before the jury. Wilson v. State, 75 S.E. 619, 620 (Ga. 1912). The Supreme Court invalidated Georgia's law in 1942. Taylor v. Georgia, 315 U.S. 25 (1942).

180. KLARMAN, *supra* note 5, at 96. Benno Schmidt points out that Alabama employers must have thought that pre-*Bailey* peonage laws were significant, "since it would otherwise be hard to account for the legislature's tenacity in amending the statute repeatedly to get around the state courts' aversion to criminal liability for breach." 9 BICKEL & SCHMIDT, *supra* note 100, at 900.

181. COHEN, supra note 79, at 292-93.

182. PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969, at 145 (1972).

183. 9 BICKEL & SCHMIDT, *supra* note 100, at 872.

184. COHEN, supra note 79, at 293.

185. *Id.* (italics omitted).

186. *Id.*

187. *See* Pollock v. Williams, 322 U.S. 4, 13 (1944) (reviewing the history of the clause and invalidating the statute).

In general, a small risk of incarceration for engaging in illegal peonage likely deterred some plantation owners from engaging in that practice—very preliminary investigations, after all, were enough to frighten some planters into murdering witnesses.[188] The somewhat greater risk of criminal prosecution and eventual exoneration by a jury had its own deterrent effect, given the uncertainty, legal costs, and shame of a trial.

As Klarman notes, while *Bailey* upheld federal law banning peonage for debt, there was no federal law banning involuntary servitude as such. Nevertheless, one cannot assume that every planter who was willing to force a black employee convicted of fraud to work off a debt would have been willing and able to simply enslave his workers. The former scenario had a far greater air of legitimacy, and, as with all other forms of human behavior, the level of brutality planters were willing to engage in no doubt varied from one individual to another.[189] While there is no way to precisely measure such things, the fact that *Bailey* made it more difficult to externalize the costs of enforcing coercive labor practices seems to have accelerated a decline in peonage throughout most of the Deep South.[190]

In addition to their connection to the collective action problems faced by planters who sought to cartelize the labor market, the peonage cases provide support for both the cost externalization and cost minimization theories of judicial impact.[191] Obviously, white planters had a strong

188. *See* DANIEL, *supra* note 182, at 133-38 (recounting a case of murder provoked by a desire to avoid prosecution for peonage); GREGORY A. FREEMAN, LAY THIS BODY DOWN: THE 1921 MURDERS OF ELEVEN PLANTATION SLAVES (1999); KLARMAN, *supra* note 5, at 88.

189. *See, e.g.*, John Roland, *Cotton Hands That Stay: Methods That Prove Satisfactory on Mississippi Plantations*, COUNTRY GENTLEMAN, Dec. 29, 1917, at 21, 24 (describing the labor practices of various Mississippi planters and concluding that while precise management techniques vary, successful planters are "firm, just men, who take a friendly interest in the personal welfare of the negroes").

190. William Cohen concludes that "it would be misleading to imply that little had changed in the South since 1865, or even since 1911. From the time of *Bailey v. Alabama*, and probably earlier, involuntary servitude in the South was in decline." COHEN, *supra* note 79, at 292. Cohen points out that "[i]n the decade 1910-1920, Mississippi lost over 15 percent of its black population. In the next decade, South Carolina lost almost 30 percent of its." *Id.* at 297. And these numbers reflect net out-migration, not total out-migration. As Cohen notes, "Numbers of that magnitude are simply inconsistent with a picture of the South as a vast jail." *Id.* Pete Daniel suggests throughout his book on peonage that labor conditions for Southern blacks were as bad in the 1920s as they were twenty years earlier. He notes anecdotal evidence that those who investigated peonage in rural areas in the 1920s found it to be widespread. *See* DANIEL, *supra* note 182, at 148. "Widespread" is a subjective and relative term, one that does not lend itself to easy empirical comparison to earlier periods. Yet Daniel concedes that one *objective* measure of peonage—the number of complaints about the practice—was lower in the 1920s than it had been twenty years earlier. *Id.*

Klarman makes the somewhat mysterious concession that "[b]lack mobility and the competitive market for agricultural labor limited coercive possibilities." KLARMAN, *supra* note 5, at 88. But the whole point of the coercive practices was to limit labor mobility. If there was a great deal of labor mobility, it shows that coercive practices, including unlawful peonage post-*Bailey*, were not effective.

191. *See supra* Sections II.B-C.

interest in externalizing the cost of peonage enforcement to the criminal justice system, paid for by all taxpayers rather than by the planters alone. In addition, public enforcement may have served to minimize the total costs of maintaining the peonage system by freeing planters from the necessity of using relatively costlier and riskier enforcement methods, such as private violence.

C. McCabe v. Atchison

Klarman portrays *McCabe*'s dicta requiring roughly equal railroad allocations for blacks and whites, regardless of levels of demand from each group,[192] as a case in which the Court simply followed clear law.[193] Yet compared to the peonage laws at issue in *Bailey* and *Reynolds*, the law at issue in *McCabe* was less clearly legally problematic. *Plessy v. Ferguson* had held that "reasonable" railroad segregation laws were permitted. In the context of the times, many people would not have thought it unreasonable for a train company operating under a segregation law to refuse to provide separate first-class cars when market demand for such accommodations did not justify the supply. Moreover, in *Cumming v. Richmond County Board of Education*, the Supreme Court had unanimously upheld the provision of a public high school for whites but not for blacks, largely on the grounds that the inequality at issue was reasonable under the circumstances.[194] As further evidence that *McCabe*'s dicta was not obviously compelled, four *McCabe* Justices concurred without opinion, likely because they agreed with the substantive holding (that the plaintiffs lacked standing) but did not want to associate themselves with the decision's equalitarian dicta.[195]

Klarman notes that despite *Plessy* and *Cumming* the common understanding in the legal world was that, under the Fourteenth Amendment, segregation laws had to require equal accommodations for both races.[196] But despite Klarman's protestations to the contrary,[197] it is hard not to see the *McCabe* dicta as an important shift in the Court's views on the constitutional limits of segregation, especially because the opinion emphasized that equal protection with regard to racial classification was a personal right. Unlike in nonracial contexts, this right apparently could not be easily overridden by a showing that the classification at issue was a

192. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161-62 (1914).

193. KLARMAN, *supra* note 5, at 62, 77-78.

194. 175 U.S. 528 (1899).

195. KLARMAN, *supra* note 5, at 78. Andrew Kull argues, based on a memo from Justice Hughes to Justice Holmes, that Holmes would have upheld the law on the merits had the Court reached the issue. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 136-37 (1992).

196. KLARMAN, *supra* note 5, at 77.

197. *Id.* at 78.

reasonable one with regard to one's group.[198] While the Court was not yet prepared to challenge the general structure of Jim Crow, *McCabe* "implied that laws requiring segregation were constitutionally disfavored,"[199] a rather significant shift given the climate of the times.

On the other hand, *McCabe* is consistent with Klarman's theory that while the Supreme Court will rein in jurisdictions that fail to adhere to national norms, it is rarely in the forefront of social change. Before *McCabe*, most Southern states explicitly required that separate accommodations be equal; only four states allowed unequal luxury accommodations.[200] The *McCabe* Court had no intention of challenging the basic edifices of Jim Crow, and the Court continued to uphold segregation laws in the 1920s and 1930s.[201]

Nevertheless, the decision marked a large step forward in the Court's equal protection jurisprudence.[202] Once the NAACP had the resources and strategic vision to challenge the unequal provision of public schooling for blacks, NAACP attorneys relied on *McCabe* in support of litigation requiring Southern states to provide equal graduate school education for blacks.[203] Indeed, the Court's ruling in *Missouri ex rel. Gaines v. Canada*,[204] requiring that a black student be provided with state-funded legal education, either through admission to the University of Missouri or creation of a separate but equal law school for blacks, explicitly relied on *McCabe*.[205]

Klarman asserts that *McCabe* seems to have "had no effect on railroad accommodations for southern blacks."[206] The Court said that state law should not authorize inequality; if railroads nevertheless provided unequal

198. *See* KULL, *supra* note 195, at 137-38; *see also* Andrew Kull, *Post*-Plessy, *Pre*-Brown*: "Logical Exactness" in Enforcing Equal Rights*, 24 J. SUP. CT. HIST. 155, 164-67 (1999).

199. KULL, *supra* note 195, at 138.

200. KLARMAN, *supra* note 5, at 78.

201. *Id.*

202. *See* WELKE, *supra* note 107, at 355 ("[T]he Court's recognition that the right to equality did not depend on it being economical to provide equal accommodations that were separate laid a critical foundation for future constitutional challenges by African-Americans.").

203. KLARMAN, *supra* note 5, at 149-50.

204. 305 U.S. 337 (1938). Justice McReynolds, who was in the minority in *McCabe*, not surprisingly dissented in *Gaines*.

205. *Id.* at 350-51. Perhaps, given social, political, demographic, and economic changes in the ensuing years, the school cases would have come out the same way even if the *McCabe* majority had not included strong equalitarian dicta, or even if it had ruled that the denial of equal accommodations was reasonable under the circumstances. But *Gaines* was decided in 1938, well before the quantum shift in race relations following World War II that Klarman identifies. This suggests that the Court's willingness to uphold the individual rights of blacks was at least partially a product of legal doctrine. And surely, given its extremely limited resources, the NAACP would have been less likely to have pursued public education cases to begin with if it had not been aware of *McCabe*'s statement that facilities provided to whites under a Jim Crow regime must also be provided to blacks.

206. KLARMAN, *supra* note 5, at 89.

accommodations, black passengers only had recourse to the common law or state statutes requiring separate but equal facilities. By the 1910s, blacks, recognizing that state courts were inhospitable to these suits, had generally stopped filing them. However, contrary to what Klarman implies,[207] there do seem to have been occasional successful lawsuits.[208]

McCabe, then, had an only marginal effect on black railroad passengers. However, it does seem to have had long-term effects on the legal status of unequal public education.

D. Buchanan v. Warley

1. Buchanan *and the Rise and Fall of Housing Segregation Laws*

Starting in 1910, many cities in the South, border states, and the lower Midwest, responding to a wave of unwanted African-American in-migration from rural areas,[209] passed laws mandating residential segregation in housing.[210] As Klarman notes, more cities were ready to follow suit if the laws were found to be constitutional.[211] But for the intervention of the Supreme Court, residential segregation by law would likely have become nearly universal in the South and perhaps would have spread to the North as well.

207. *Id*.

208. *See, e.g.*, Ill. Cent. R.R. Co. v. Redmond, 81 So. 115 (Miss. 1919). *Redmond* was a victorious lawsuit brought by a black railroad passenger who was denied equal accommodations. Among other things, the Mississippi Supreme Court held that if a railroad provides white passengers with separate toilet facilities for men and women, it must do so for black passengers as well. For what appears to be another example of a successful lawsuit over unequal conditions, see David S. Bogen, *Precursors of Rosa Parks: Maryland Transportation Cases Between the Civil War and World War I*, 63 MD. L. REV. (forthcoming Dec. 2004) (manuscript at 30 n.102, on file with authors).

209. KLARMAN, *supra* note 5, at 79.

210. *See* Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179, 180-83 (1968). Klarman reports that Baltimore; several Virginia cities; Winston-Salem, North Carolina; Greenville, South Carolina; Louisville; and Atlanta all enacted segregation ordinances in the 1910s. KLARMAN, *supra* note 5, at 79. Other scholars have identified residential segregation laws passed at this time in Asheville, North Carolina; Ashland, Clifton Forge, Richmond, Norfolk, Portsmouth, and Roanoke, Virginia; Oklahoma City; St. Louis; Madisonville, Kentucky; Mooresville, North Carolina; Tulsa; and Port Arthur, Texas. 9 BICKEL & SCHMIDT, *supra* note 100, at 791; ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 84-85 (2002) (discussing the Tulsa segregation law); MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933, at 265-66 (1994); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 41 (1993); Christopher Silver, *The Racial Origins of Zoning: Southern Cities from 1910-40*, 6 PLAN. PERSP. 189, 192-93 (1991); Charles E. Wynes, *The Evolution of Jim Crow Laws in Twentieth Century Virginia*, 28 PHYLON 416, 418 (1967); Posting of Steve Reich to http://www.h-net.msu.edu/~south/archives/threads/segregation.html (Feb. 22, 1996) (discussing Port Arthur's segregation ordinance). Undoubtedly, other as-yet-unidentified Southern and border state cities also enacted residential segregation laws.

211. KLARMAN, *supra* note 5, at 90.

Louisville's residential segregation ordinance prohibited "any colored person [from] mov[ing] into and occupy[ing] as a residence . . . any house upon any block upon which a greater number of houses are occupied . . . by white people than are occupied . . . by colored people."[212] The opposite restriction applied to whites.[213] In *Buchanan v. Warley* in 1917, the Supreme Court unanimously ruled that Louisville's law was unconstitutional. The Court reasoned that the law violated the Due Process Clause of the Fourteenth Amendment by infringing on the right to own and alienate property without a valid police power rationale.

After the Supreme Court upheld a general (nonracial) zoning ordinance in 1926,[214] another wave of residential segregation laws swept the South. The NAACP, relying on *Buchanan*, persuaded the Supreme Court to invalidate segregation ordinances in New Orleans[215] and Richmond.[216] Local branches of the NAACP successfully challenged laws passed in Winston-Salem, Baltimore, Indianapolis, Norfolk, and Dallas.[217] By the 1930s, residential segregation laws were rare[218] and clearly unconstitutional.

2. Buchanan *as a Civil Rights Decision*

Klarman acknowledges that *Buchanan* "was not constitutional minimalism."[219] The Supreme Court was certainly not bound by precedent to invalidate residential segregation laws. *Plessy v. Ferguson*, the segregation precedent most obviously relevant to *Buchanan*, held that segregation was a valid police power function, and the *Plessy* opinion was infused with pseudoscientific racist assumptions. Moreover, elite legal opinion strongly supported the constitutionality of residential segregation.

212. Buchanan v. Warley, 245 U.S. 60, 70-71 (1917).

213. *Id.* at 71.

214. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

215. Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam).

216. City of Richmond v. Deans, 281 U.S. 704 (1930) (per curiam).

217. *See* VOSE, *supra* note 142, at 51-52 (discussing various successful challenges to segregation ordinances brought by the NAACP).

218. *See id.* at 52. Despite the general demise of residential segregation ordinances, Brooksville, Florida passed a law as late as 1948 requiring all black residents to live in the southern part of town. Dan DeWitt, *Racism's Remnant*, ST. PETERSBURG (Fla.) TIMES, Feb. 22, 1998, Hernando Times, at 1. The law was not invalidated until 1972. *Id.* A 1944 Birmingham residential segregation law was invalidated in 1949. Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950). A state court invalidated a Winston-Salem ordinance in 1940. *See* Major Gardner, Note, *Race Segregation in Cities*, 29 KY. L.J. 213, 213 (1941). Oklahoma City passed a residential segregation law in 1934, which survived a court challenge because the complaint was flawed. Jones v. Okla. City, 78 F.2d 860, 861 (10th Cir. 1935).

219. KLARMAN, *supra* note 5, at 80.

Both before and after *Buchanan*, law review authors consistently argued that residential segregation ordinances passed constitutional muster.[220]

The Court's opinion in *Buchanan*, therefore, seems anomalous and presents something of a mystery. Like many other commentators,[221] Klarman argues that the mystery unravels once it is understood that *Buchanan* was mostly about property rights, not civil rights. Undoubtedly, property rights played an important role in the decision, as it allowed the Court to distinguish *Buchanan* from *Plessy*.[222] African Americans did not have a common law right to sit with whites on trains, so the *Plessy* Court held that the interest in doing so was a social right unprotected by the Fourteenth Amendment.[223] By contrast, blacks clearly had a Fourteenth Amendment right to purchase and occupy property.

To this extent, Klarman is correct that *Buchanan* was a property rights decision. However, Klarman ignores the most significant aspect of the *Buchanan* opinion: the Court's refusal to concede that laws enforcing segregation were within the scope of the police power.[224] In addition to relegating railroad seating to the realm of social rights, *Plessy* had suggested that any "reasonable" segregation regulations would be proper exercises of the police power and had applied a rather lax and racism-infused standard of reasonableness. In contrast, after noting that property rights are subject to the police power, the *Buchanan* opinion

> moves immediately into the antidiscrimination litany that no Supreme Court majority had [in]voked since *Strauder*: the Reconstruction Amendments; the *Slaughter-House Cases* as the great expositor of the amendments' central purpose; *Strauder* itself, with its famous antidiscrimination passages quoted at length; *Ex parte Virginia*; and the 1866 and 1870 Civil Rights Acts for good measure.[225]

220. *Id.*

221. *See* 9 BICKEL & SCHMIDT, *supra* note 100, at 811-12 (recounting the views of those who consider *Buchanan* purely a property rights decision); KULL, *supra* note 195, at 139 ("The usual explanation for how it came about that the Supreme Court should vote unanimously to strike down a segregation ordinance in 1917 . . . is that *Buchanan* is essentially a decision in defense of property rights.").

222. Carol Rose, *Property Stories:* Shelley v. Kraemer, *in* PROPERTY STORIES 169, 174 (Gerald Korngold & Andrew P. Morriss eds., 2004).

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

224. *Cf.* Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245, 258 (1997) ("[T]he desire to create a segregated society was patent, and the Court simply refused to entertain it as a permissible legislative goal.").

225. KULL, *supra* note 195, at 139-40; *see also* 9 BICKEL & SCHMIDT, *supra* note 100, at 799 (stating that the opinion "introduced an abrupt shift of tone and perspective . . . from the entire corpus of Jim Crow law that had grown out of *Plessy v. Ferguson*").

The Court emphasized that "[c]olored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color."[226]

The Court then proceeded to explicitly reject all of the police power rationales that Kentucky argued supported state-enforced segregation, including limiting interracial friction, preventing miscegenation, and preventing the depreciation in the value of property owned by whites when African Americans became their neighbors. The *Buchanan* Court ruled that blacks could not be deprived of their property rights on such bases.[227]

The Court's refusal to defer to Kentucky's assertion of its police power is remarkable for several reasons. First, as noted previously, the 1910s represented the worst period of post-Civil War racism in American history. Second, the Court had to go out of its way to distinguish *Plessy* and was not entirely persuasive in doing so. As Klarman notes, "After *Plessy*, one could argue that segregation plainly qualified as . . . a reasonable police-power objective . . . ."[228] *Buchanan* was "a flat repudiation of the vague and flaccid *Plessy* standard of reasonableness as the governing constitutional sanction for legalized racism."[229] Third, by the 1910s, Progressive advocates of sociological jurisprudence so dominated mainstream legal thought that Charles Warren remarked that "any court which recognizes wide and liberal bounds to this State police power is to be deemed in touch with the temper of the times."[230] Fourth, the Supreme Court had recently expressed sympathy for nonracial zoning, based on Progressive precepts that could also be applied to racial zoning,[231] and Jim Crow racial segregation itself was part of a broader pattern of state regulation that was broadly Progressive in nature.[232] And, fifth, although *Buchanan* was

226. Buchanan v. Warley, 245 U.S. 60, 78-79 (1917). Klarman fails to summarize the legal reasoning in *Buchanan*, much less directly quote from it. It seems nearly impossible to read the opinion closely and maintain that the underlying basis of the decision was solely protection of property rights without consideration of the rights of blacks. The best one can say for the contrary argument is that some of the Justices who joined the opinion likely did not approve of Justice Day's emphasis on blacks' rights—Holmes and McReynolds are likely suspects, the former because he drafted an undelivered dissent and the latter because of his racism.

227. As Schmidt argues, "The decision should be read as a recognition, in 1917, that black people could claim basic rights of personhood and autonomy as those concepts were then understood." 9 BICKEL & SCHMIDT, *supra* note 100, at 989.

228. KLARMAN, *supra* note 5, at 24. Indeed, just before the Court decided *Buchanan*, the Georgia Supreme Court held that residential segregation laws were constitutional as reasonable exercises of the police power. Harden v. City of Atlanta, 93 S.E. 401, 402-03 (Ga. 1917).

229. 9 BICKEL & SCHMIDT, *supra* note 100, at 814.

230. Charles Warren, *A Bulwark to the State Police Power—the United States Supreme Court*, 13 COLUM. L. REV. 667, 668 (1913). Warren prefaced this remark by noting that "[u]nder the present prevailing anti-individualism, there can be no doubt that the test of the progressiveness of a court is the degree of remoteness of the line fixed, within which the legislature shall have scope to legislate without being held to infringe on the Constitution." *Id*.

231. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

232. WELKE, *supra* note 107, at 351-52.

decided during the *Lochner* era, and the Court no longer simply deferred to claimed state exercises of the police power, during the 1910s the Court almost always upheld state regulatory legislation as a valid exercise of the police power.[233] In 1917, the year *Buchanan* was decided, the Court upheld several controversial regulatory laws.[234]

Klarman also argues that *Buchanan* was mostly a victory for property rights, not civil rights, because "three of the five southern courts that considered the issue had invalidated residential segregation ordinances. Though the precise holding varied, these decisions consistently emphasized owners' rights to sell property unimpeded by government regulation."[235] The high courts of Georgia,[236] Maryland,[237] and North Carolina[238] did indeed invalidate racial segregation ordinances. However, by 1917 the Georgia Supreme Court had reversed itself and upheld a revised residential segregation law. It distinguished its previous holding by narrowly interpreting the holding as invalidating the law in question only because it applied retroactively.[239] The Maryland opinion was expressly limited to protecting vested rights. Finally, the North Carolina case, though broader in its dicta than the other two, held that the law in question violated the

233. *See* MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) [hereinafter Bernstein, Lochner *Era Revisionism*]; David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX L. REV. 1 (2003).

234. Klarman acknowledges that the specific holding of *Lochner* itself was silently overruled in 1917 in *Bunting v. Oregon*, 243 U.S. 426 (1917), but adds that the Court issued a Lochnerian decision that same year invalidating a law banning employment agencies in *Adams v. Tanner*, 244 U.S. 590 (1917). KLARMAN, *supra* note 5, at 81. Klarman, however, neglects other deferential decisions the same year. *See* Stettler v. O'Hara, 243 U.S. 629 (1917) (per curiam) (upholding in a 4-4 vote, with Progressive Justice Brandeis recused, a minimum wage law for women); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (upholding a statute that required that employees be compensated from a pool into which all employers in an industry had to contribute); N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917) (unanimously upholding the constitutionality of workers' compensation laws); Bowersock v. Smith, 243 U.S. 29 (1917) (upholding a statute eliminating the fellow servant rule and the defenses of contributory negligence and assumption of risk). Many of these decisions split the Court, but one can hardly say that in 1917 the Court was aggressively limiting the states' exercise of their police powers.

In *Wilson v. New*, 243 U.S. 332 (1917), the Court upheld a federal law limiting the hours of railroad workers to eight and prohibiting the railroads from reducing pay to make up for the shorter hours. Justice Day, the author of *Buchanan*, dissented in *Wilson*, arguing that the law violated the Due Process Clause of the Fifth Amendment. KLARMAN, *supra* note 5, at 81. This shows that Day was not a strict opponent of Lochnerian jurisprudence. Klarman raises this dissent to buttress his claim that *Buchanan* was primarily a property rights decision. However, as explained above, that *Buchanan* involved the invocation of property rights and that all the Justices believed the Fourteenth Amendment's Due Process Clause protected property rights to some degree did not dictate the outcome of the police power issue.

235. KLARMAN, *supra* note 5, at 81.

236. Carey v. City of Atlanta, 84 S.E. 456 (Ga. 1915).

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

238. State v. Darnell, 81 S.E. 338 (N.C. 1914).

239. Harden v. City of Atlanta, 93 S.E. 401 (Ga. 1917).

general welfare clause of a city charter, not that it violated the Federal Constitution. Meanwhile, the Kentucky[240] and Virginia[241] high courts had upheld residential segregation laws. By the time *Buchanan* was decided, then, no state had ruled that a residential segregation law that did not apply to vested rights exceeded the states' police power, and three state courts explicitly had held that it did not.[242]

3. Buchanan*'s Underrated Impact*

As Klarman notes, civil rights activists at the time hailed *Buchanan* as a momentous decision, and some modern commentators have followed suit.[243] *Buchanan* was the NAACP's first major victory before the United States Supreme Court, and Klarman acknowledges that *Buchanan* likely was important in energizing the NAACP and inspiring civil rights activism by encouraging blacks to "believe the racial status quo was malleable."[244]

However, Klarman concludes that *Buchanan* was otherwise inconsequential. First, he disagrees with those commentators who believe that the decision inhibited state and local governments from passing more pervasive and brutal segregation laws, akin to those enacted in South Africa.[245] Second, Klarman asserts that *Buchanan* "had little or no effect on segregated housing patterns, and neither did the two summary affirmances

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

241. Hopkins v. City of Richmond, 86 S.E. 139 (Va. 1915).

242. Klarman further contends that the Louisville segregation law was such an obvious infringement on property rights that "[e]ven the committed majoritarian, Holmes, could not countenance such a substantial interference with property rights." KLARMAN, *supra* note 5, at 82. Yet Holmes drafted a dissenting opinion, arguing that the white plaintiff (who was barred from selling his property to a black man) could not assert the rights of blacks disadvantaged by the statute and that the law did not infringe on the plaintiff's property rights in a way that violated the Fourteenth Amendment. *See* 9 BICKEL & SCHMIDT, *supra* note 100, at 592 illus. (providing a copy of Holmes's undelivered dissent in *Buchanan*). Only eleven days before *Buchanan* was released, Holmes was still considering whether to issue his dissent. *Id*. at 805 n.255. He ultimately did not, probably not because he changed his mind on the merits but because he could not get a second vote. *Id.*

243. KLARMAN, *supra* note 5, at 90, 93-94.

244. *Id*. at 94.

245. *Id*. at 93; *see, e.g.*, JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO *BROWN* 192 (1999) (suggesting that the wave of residential segregation laws passed in the South in the 1910s "can be seen as a formal step toward a system of apartheid"); A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 770 (concluding that if *Buchanan* had come out the other way, in "many southern states and perhaps many other parts of America" the living conditions of black Americans could have been "almost akin to that of black South Africans" under apartheid).

in the interwar years,"[246] and that the invalidation of segregation laws had little effect on residential patterns.[247]

With regard to Klarman's first point, the evidence is inconclusive. On the one hand, as Klarman points out, *Buchanan* clearly did not lead to a rollback of de jure segregation, or even stop its extension "to new areas of life, such as restaurants, parks, and barbershops, and to new technologies, such as office elevators, taxicabs, and buses."[248] An underfunded NAACP could barely keep up with challenges to clearly unconstitutional residential segregation ordinances that cities continued to enact, much less attempt to expand *Buchanan*'s holding.[249]

On the other hand, Jim Crow in the South never came close to matching the apartheid system in South Africa, with its stringent restrictions on black residence and migration. Perhaps, as Klarman implies, political, social, and economic forces would have prevented such developments regardless of the Supreme Court's ruling in *Buchanan*. But perhaps a contrary ruling in *Buchanan* would have emboldened racist political interests to launch a broader legal attack on blacks before such forces coalesced. NAACP founder Oswald Garrison Villard warned in 1913 that, if upheld, residential segregation laws would be a first step in a series of broader antiblack measures.[250] Indeed, to get an idea of where things might have gone, one need only consider that agitation for the complete segregation of blacks and whites in the rural South was fairly prominent in the 1910s,[251] and Winston-Salem considered segregating white- and black-owned businesses in 1912, shortly after it segregated housing.[252]

While *Buchanan* did not change the Court's acquiescence to the segregation of public spaces, it made clear that Jim Crow had its legal limits. W.E.B. Du Bois, in fact, credited *Buchanan* with "the breaking of

246. KLARMAN, *supra* note 5, at 159.

247. *Id*. at 143.

248. *Id*. at 93.

249. Also, Mark Tushnet suggests that the NAACP, allied with Progressives on many issues, was not comfortable with pursuing its civil rights agenda through a property rights paradigm. Mark Tushnet, Laying the Groundwork: From *Plessy* to *Brown* 11-12 (n.d.) (unpublished manuscript, on file with authors).

250. *See* OSWALD GARRISON VILLARD, SEGREGATION IN BALTIMORE AND WASHINGTON: AN ADDRESS DELIVERED BEFORE THE BALTIMORE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, OCTOBER 20, 1913, at 2, 7 (1913).

251. *See* 9 BICKEL & SCHMIDT, *supra* note 100, at 791-94; Jeffrey J. Crow, *An Apartheid for the South: Clarence Poe's Crusade for Rural Segregation*, *in* RACE, CLASS, AND POLITICS IN SOUTHERN HISTORY 216, 217-18 (Jeffrey J. Crow et al. eds., 1989).

252. *See* Michael E. Daly & John Wertheimer, State v. William Darnell*: The Battle over De Jure Housing Segregation in Progressive Era Winston-Salem*, *in* WARM ASHES: ISSUES IN SOUTHERN HISTORY AT THE DAWN OF THE TWENTY-FIRST CENTURY 255, 271 n.29 (Winfred B. Moore Jr. et al. eds., 2003).

the backbone of segregation."[253] More recently, Judge Leon Higginbotham argued that "*Buchanan* was of profound importance in applying a brake to decelerate what would have been run-away racism in the United States."[254] Given the counterfactual nature of the inquiry, one cannot say with any certainty who has the better of the argument, but one can say that Klarman's confidence in his position that *Buchanan* did not inhibit broader antiblack measures seems unwarranted.

Another important aspect of *Buchanan*, one not previously emphasized by scholars (though related to the apartheid conjecture), is that the Court clearly enforced blacks' right to own and alienate property.[255] The right to property not only improved blacks' economic status, but also gave property- and business-owning Southern blacks some economic autonomy from local whites, which allowed them to play leading roles in the civil rights movement.[256] But for *Buchanan*, it is possible that the property rights of blacks would ultimately have come under legal threat, at least in the more reactionary parts of the South.

As for Klarman's second point that *Buchanan* had little if any effect on segregated housing patterns, he is generally correct.[257] Indeed, "residential segregation dramatically increased in the 1910s and 1920s" despite *Buchanan*, as blacks poured into cities in both the North and South.[258] The

253. 1 W.E.B. DU BOIS, W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1890-1919, at 52 (Philip S. Foner ed., 1970).

254. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 126 (1996); *see also* HOWARD, *supra* note 245, at 193 ("Given the underlying logic of segregation there was no inherent limit to the racial structuring of social life. The legal premises justifying segregation yielded arguments for the total racial structuring of society.").

255. While many blacks remained poor and essentially assetless during the Jim Crow era, others managed to accumulate sufficient property to give them middle-class status or, far more rarely, wealth. *See, e.g.*, JOHN SIBLEY BUTLER, ENTREPRENEURSHIP AND SELF-HELP AMONG BLACK AMERICANS: A RECONSIDERATION OF RACE AND ECONOMICS (1991). Especially in isolated rural areas, this property was at risk from white violence ("whitecapping"). *See* AUGUST MEIER, NEGRO THOUGHT IN AMERICA, 1880-1915: RACIAL IDEOLOGIES IN THE AGE OF BOOKER T. WASHINGTON 106 (1963) (explaining that whitecappers would attack business establishments owned by African Americans and drive their proprietors out of town); Holmes, *supra* note 100. Moreover, the livelihoods of many middle-class blacks were constantly under threat from Progressive labor laws that benefited racist labor unions. *See* BERNSTEIN, *supra* note 166, at 44-46, 51-53, 61-65, 69-71, 80. But blacks' right to own property was never seriously threatened by law.

256. *See, e.g.*, David Beito & Linda Royster Beito, 'The Most Hated, and the Best Loved, Man in Mississippi': The Life of T.R.M. Howard (n.d.) (unpublished manuscript, on file with authors) (discussing the civil rights activism of Dr. Howard, a wealthy African-American physician in Mississippi).

257. *Cf.* DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948, at 147 (1998) (noting that *Buchanan* "by no means entailed the dismantling of racial residential segregation").

258. KLARMAN, *supra* note 5, at 91. In a few Southern cities, such as Charleston, Savannah, New Orleans, and Little Rock, traditional black and white residential intermingling continued. Even in those cities, segregation increased, KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930, at 173 (1976), though not to the extent it would have if *Buchanan* had upheld residential segregation laws. On the other hand, Michael Daly and John

significance of *Buchanan* should not be exaggerated; a decision invalidating de jure segregation could not, and indeed did not purport to, overcome private preferences that inevitably led to pervasive housing segregation throughout urban America.[259]

However, scholars who argue for *Buchanan*'s practical significance do not claim that the decision affected segregation levels.[260] Rather, they argue that *Buchanan* impeded the efforts of urban whites to prevent blacks from "colonizing" white neighborhoods, both in the South and the North. The black urban population in the United States almost doubled between 1910 and 1929[261] and continued to grow in later years. In certain cities, the growth was far more dramatic; roughly 6000 blacks lived in Detroit in 1910, compared to approximately 120,000 in 1930.[262] In the absence of residential segregation laws, "[a]s the black population continued to grow in a given city . . . some expansion of the black-occupied area was inevitable; and attempts to prevent it sooner or later collapsed."[263] But if *Buchanan* had permitted racial zoning, many potential black migrants to cities would literally have had nowhere to go. They either would have been forced to stay in rural areas or been shunted off to the undeveloped suburban periphery of cities. Either result would have been disastrous for black welfare.[264] Not only did cities provide more economic opportunity for blacks, but, as Klarman himself points out, the migration of blacks to cities, North and South, was a crucial element in the ultimate victory of the civil rights movement. Among other advantages, it enabled blacks to increase their political power by moving to areas where they could vote.[265]

Klarman never directly addresses the potential effect of residential segregation ordinances on black migration patterns. However, he asserts

Wertheimer point out that Winston-Salem's segregation law, had it survived, would have frozen housing patterns at a relatively integrated level, ultimately creating all-white and all-black *blocks*, but also requiring the continued integration of *neighborhoods*. Daly & Wertheimer, *supra* note 252, at 265-66. Instead, "blacks flowed into East Winston, and whites flowed out," eventually leading to Winston-Salem becoming "the second-most segregated city in the United States." *Id*. at 266.

259. Thomas Schelling explains that even if most whites and most blacks prefer to live in integrated neighborhoods, if both blacks and whites prefer to live in neighborhoods where their group is a majority, there will be no integrated neighborhoods. THOMAS C. SCHELLING, *Sorting and Mixing: Race and Sex*, *in* MICROMOTIVES AND MACROBEHAVIOR 135 (1978). During the Jim Crow era, of course, most whites did *not* want to live in integrated neighborhoods.

260. *E.g*., James W. Ely Jr., Book Review, 44 AM. J. LEGAL HIST. 293, 294 (2000) (praising *Buchanan* but stating that "no decision by the Supreme Court could undo the host of legal devices and informal arrangements that su[s]tained racially separate housing").

261. Arthur T. Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721, 723 (1934).

262. *Id*. at 724.

263. HIGGS, *supra* note 80, at 116.

264. *See* James W. Ely, Jr., *Reflections On* Buchanan v. Warley*, Property Rights, and Race*, 51 VAND. L. REV. 953, 955 (1998).

265. KLARMAN, *supra* note 5, at 100-02.

that segregation ordinances were unnecessary to maintain segregated housing,[266] so he likely would also argue that segregation ordinances were unnecessary to prevent blacks from moving to white neighborhoods. Indeed, Klarman, citing an article by Booker T. Washington,[267] attributes the proliferation of segregation ordinances not to the demands of white homeowners seeking to exclude blacks but to "politicians seeking votes."[268] "A single black family's entrance into a white neighborhood could rivet public attention and create an irresistible opportunity for ambitious politicians. Once someone proposed extending segregation to a new sphere of life, the incentives of politicians were skewed toward jumping on the bandwagon."[269]

One of the authors of this Review has favorably cited Washington's claim as at least a partial explanation for residential segregation laws,[270] and political entrepreneurship of the sort that Klarman describes has been discussed in both theoretical and historical academic literature.[271] Yet further investigation reveals that Washington was wrong; residential segregation laws were not simply political fluff. Examinations of the origins of segregation laws in Baltimore,[272] Louisville,[273] St. Louis,[274] and Winston-Salem[275] show that they were enacted in response to the demands of white homeowners and real estate investors who sought to keep blacks out of white neighborhoods. St. Louis's residential segregation ordinance not only originated from the grass roots, but twenty-three of the twenty-

266. *Id*. at 92.

267. Booker T. Washington, *My View of the Segregation Laws*, NEW REPUBLIC, Dec. 23, 1915, at 113.

268. KLARMAN, *supra* note 5, at 92.

269. *Id*.

270. Bernstein, *supra* note 85, at 834 n.184.

271. For example, Jennifer Roback shows that politicians successfully promoted mandatory segregation of streetcars to attract votes from relatively indifferent but politically dominant whites, despite strong opposition from streetcar companies and African Americans. Jennifer Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58, 63 (1991). Roback provides a more general and theoretical explanation of the relationship between political entrepreneurship and de jure racism in Jennifer Roback, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661 (1989) (describing the politicization of race by political entrepreneurs).

272. *See* VILLARD, *supra* note 250, at 3 (stating that "the chief motive" underlying the segregation law in Baltimore was the "desire to prevent the depreciation of real estate by sales to colored people"); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 299 (1983) (tracing the origins of Baltimore's segregation law and attributing it to a desire to confine blacks to their existing neighborhoods); Editorial, *Baltimore*, CRISIS, Nov. 1910, at 11, 11 (discussing the demand for a segregation law in Baltimore after successful blacks began "'invading'" white neighborhoods).

273. *See* George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917*, 78 REG. KY. HIST. SOC'Y 39 (1980).

274. *See* Daniel T. Kelleher, *St. Louis' 1916 Residential Segregation Ordinance*, 26 MO. HIST. SOC'Y BULL. 239 (1970).

275. Daly & Wertheimer, *supra* note 252, at 257.

eight city aldermen publicly opposed it.[276] The ordinance passed by an overwhelming margin in a referendum, and "[t]he white wards closest to Negro residential areas voted most heavily for the ordinance."[277]

Of course, showing that white homeowners *wanted* segregation laws does not necessarily mean that such laws were *needed*. Indeed, many commentators have argued that restrictive covenants were an almost perfect "private" substitute for residential segregation laws.[278] But Klarman himself, while discussing the effects of *Shelley v. Kraemer*, aptly sums up the academic literature on restrictive covenants as concluding that the covenants generally proved "too clumsy and expensive to frustrate powerful demographic and economic trends."[279] For example, restrictive covenants were not self-enforcing, but required someone to pay the expense of litigation to enforce the covenant, creating a massive collective action problem.[280] As economist William Fischel explains,

> Among prejudiced whites, an all-white neighborhood is a "public good." Such a "good" is non-rival and non-excludable in consumption. Thus if a black family moves into a neighborhood, the well-being of all prejudiced whites is reduced, even though they may have no direct interaction with the newcomer. Indeed, the only person who has an immediate economic interaction with the newcomer is the seller who has most likely departed herself from the neighborhood or, as a landlady, may not live there herself. While a neighboring white homeowner might be willing to pay

276. Kelleher, *supra* note 274, at 242, 245-46.

277. *Id.* at 246. The ordinance passed by a three-to-one margin. Blacks cast roughly half of the no votes, which means that, assuming no blacks voted for the ordinance, the margin favoring residential segregation among white voters was six to one. Roger N. Baldwin, *Negro Segregation by Initiative Election in St. Louis*, 14 AM. CITY 356 (1916).

278. *E.g.*, KLUGER, *supra* note 110, at 120 (claiming that restrictive covenants made *Buchanan*'s ban on residential segregation laws "almost worthless").

279. KLARMAN, *supra* note 5, at 262. Indeed, contrary to the general impression that restrictive covenants spread only after the *Buchanan* decision, Winston-Salem whites, for example, lobbied for a segregation law precisely because restrictive covenants had proved ineffective in restricting black settlement. Daly & Wertheimer, *supra* note 252, at 257. Restrictive covenants were also well known in St. Louis before white residents started campaigning for racial zoning. *See* Rose, *supra* note 222, at 181 (noting that the restrictive covenant at issue in *Shelley v. Kraemer* had been signed in 1911).

280. *See* Ely, *supra* note 260, at 294 ("Not only did the enforcement of covenants rest upon private initiative, but parties had to satisfy highly technical requirements in order to create binding limits on land use."); Rose, *supra* note 222, at 175 ("Unlike zoning, [racially restrictive covenants] required developers and homeowners themselves to bear the costs of creating and enforcing legal exclusion; this greater expense undoubtedly discouraged some level of racial exclusion and opened up a greater *total* amount of housing to minority members, even if minority residential areas remained segregated as they expanded."). To overcome the collective action problem of enforcing restrictive covenants and to externalize the costs to the state, Dallas passed an ordinance making the violation of a restrictive covenant agreement a crime. A state court of appeals held that the ordinance was unconstitutional. City of Dallas v. Liberty Annex Corp., 19 S.W.2d 845 (Tex. Civ. App. 1929).

> something to blacks to move out of his neighborhood, his ability to combine his monetary offering with his neighbors' is complicated by the free rider problem of such goods. His white neighbor will think, "If he is willing to pay let him. We will both benefit, and I won't have to pay." Such reasoning would, in situations in which no coercive enforcement of collective action is possible, often defeat attempts to exclude blacks.[281]

If many blacks had already moved in by the time homeowners or landlords[282] in a "threatened" neighborhood managed to raise funds to "protect" their property, the "changed circumstances" doctrine rendered the covenant unenforceable.[283] Carol Rose concludes that "[g]iven the patterns of neighborhood change in major cities, there doubtless were many [racially restrictive covenants] that simply fell apart for lack of enforcement."[284]

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281. William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975, 978 (1998). Homeowners lobbying in favor of residential segregation laws also faced a collective action problem, but a less severe one. First, the problem only needed to be overcome once, whereas covenants would need to be continuously enforced over time. Second, politicians respond to the active lobbying of only a fraction of the relevant population if they believe that the activists' views reflect the views of more passive neighbors, while making and effectively enforcing covenants required far more cooperation among neighbors. Third, while few white homeowners had any reason to actively undermine the push for prospective residential segregation laws, Fischel notes,

> It is often in the interest of at least a few whites to sell to blacks. Some blacks may have a preference for integrated neighborhoods and be willing to offer more than whites. Or some white homeowners might anticipate that the neighborhood may be about to be integrated, and they may want to sell quickly. Excluding all blacks from the market would often mean that homeowners who are selling get lower offers for what is usually the largest single asset they own.

Id. at 978-79; *see also* MASSEY & DENTON, *supra* note 210, at 37 ("The racially segmented market generated real estate values in black areas that far exceeded anything in white neighborhoods, and this simple economic fact created a great potential for profits along the color line, guaranteeing that some real estate agent would specialize in opening up new areas to black settlement.").

282. Like white homeowners, landlords tried to use restrictive covenants and other private agreements to exclude blacks. Gilbert Osofsky explains, for example, that white landlords in Harlem had restrictive covenants on their properties prohibiting them from renting to blacks. However, no group was able to get all white property owners to enforce the covenants. Instead, landlords formed block associations, in which all landlords on a given street agreed not to rent to blacks. Yet individual landlords consistently shirked on their agreements; white and black speculators purchased tenements and rented them to blacks "to try to force neighbors to repurchase them at higher prices." GILBERT OSOFSKY, HARLEM: THE MAKING OF A GHETTO 109 (1966). "The minority of Harlem landlords who adhered to their original restrictive covenants suffered serious economic consequences. Many were unable to find white people willing to rent their apartments." *Id*. at 110. White tenants stayed only when rents were lowered significantly. As Osofsky concludes, "The opponents of Negro settlement faced the dilemma of maintaining a 'White Only' policy and probably losing everything, or renting to Negroes at higher prices and surviving. Most chose what seemed to them the lesser of two evils." *Id*.

283. *See* Rose, *supra* note 222, at 188-89 (discussing the "changed circumstances" doctrine in the context of restrictive covenants).

284. *Id*. at 182.

In the absence of segregation laws or effective restrictive covenants, whites often turned to violence to drive out new black residents from white neighborhoods. Violence had a significant advantage over restrictive covenants in that only a minority of local whites needed to participate for it to be a potentially effective tool against black "interlopers." Yet such violence was neither omnipresent nor fully effective when used. Unlike residential segregation laws, which externalized to taxpayers the costs of excluding blacks, the costs of engaging in violence were internalized by those who engaged in the violence. These costs could be substantial—violence not only raised the risk of arrest for the perpetrators but also led to the possibility that they would be wounded or killed by blacks acting in self-defense.[285]

Restrictive covenants and violence did sometimes succeed in excluding blacks from white neighborhoods, but they were nowhere near as effective as residential segregation laws would have been. Despite white opposition, blacks flooded into formerly white neighborhoods in St. Louis,[286] East St. Louis,[287] Chicago,[288] and New York.[289] Even in the South, where white

285. KLARMAN, *supra* note 5, at 133-34 (discussing the case of Dr. Ossian Sweet). *See generally* HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY (1988); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward An Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 353-55 (1991) (recounting incidents in which African Americans engaged in armed self-defense during the Jim Crow era). Many works of history mention incidents of armed self-defense by African Americans during the Jim Crow era, but no comprehensive treatment of the subject seems to exist.

286. EMMETT J. SCOTT, NEGRO MIGRATION DURING THE WAR 97 (Arno Press 1969) (1920) ("Houses here are as a rule old, having been occupied by whites before they were turned over to negroes.").

287. *Id*. at 100.

288. JAMES R. GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION 137 (1989) (discussing the expansion of the "black ghetto" starting in 1917); *cf.* THOMAS LEE PHILPOTT, THE SLUM AND THE GHETTO: NEIGHBORHOOD DETERIORATION AND MIDDLE-CLASS REFORM, CHICAGO, 1880-1930, at 117 (1978) (describing the growth of the black community in Chicago); SCOTT, *supra* note 286, at 104 ("The presence of negroes in an exclusively white locality usually brought forth loud protests and frequently ended in the abandonment of the block by whites.").

289. OSOFSKY, *supra* note 282, at 109-10. *Buchanan* had no direct effect on black migration to New York or Chicago because, at the time *Buchanan* was decided, no Northern city had a residential segregation law. However, Klarman may go a bit too far when he states that segregation ordinances were "never seriously contemplated" in such cities. KLARMAN, *supra* note 5, at 91. In 1917, the Chicago Real Estate Board—hardly a lightweight interest group—proposed a law segregating housing by race. PHILPOTT, *supra* note 288, at 162-64. The segregation proposal might have received serious consideration if *Buchanan* had upheld Louisville's law. *See id*. at 164; William M. Tuttle, Jr., *Contested Neighborhoods and Racial Violence: Prelude to the Chicago Riot of 1919*, 55 J. NEGRO HIST. 266, 277 (1970). Indeed, even after *Buchanan*, agitation in Chicago for such laws continued, especially in the wake of the 1919 race riot. In 1919, for example, an alderman urged the city council to create separate "residential zones for white people and colored people." PHILPOTT, *supra* note 288, at 177.

But for *Buchanan*, it is not inconceivable that Chicago and other Northern cities would have enacted residential segregation laws. Klarman reports that "[n]orthern opinion was probably as supportive of residential segregation as was southern," albeit less inclined, at least initially, to

hooligans faced less chance of conviction for engaging in violence against encroaching blacks, white homeowners in Atlanta,[290] Indianapolis, Norfolk, Richmond, New Orleans, Winston-Salem, Dallas, Charleston, and Miami's Dade County felt sufficient pressure from expanding black populations to persuade their local governments to ignore *Buchanan* and pass residential segregation laws in the 1920s.[291]

Klarman writes that "[i]n the Deep South, legal regulation was plainly unnecessary to maintain residential segregation. Blacks in cities such as Birmingham, Alabama, knew better than to enter white neighborhoods uninvited."[292] In fact, Birmingham considered and ultimately adopted a residential segregation ordinance.[293] Even in the Deep South, then, residential segregation laws were apparently seen as an important means to restrict black settlement in white neighborhoods.

In short, *Buchanan v. Warley* required white homeowners and landlords seeking to exclude blacks from their neighborhoods to overcome major collective action problems and to internalize the costs of exclusion. As a result, whites were often unsuccessful in excluding blacks.[294] As Fischel concludes,

pursue this goal through legislation. KLARMAN, *supra* note 5, at 143. As late as 1942, "84 percent of Americans—in the North as well as the South—favored residential segregation." *Id.* at 191. Northern groups with an interest in stifling black migration to cities included white homeowners seeking to protect their property values, Democrats opposed to an influx of black Republicans, KUSMER, *supra* note 258, at 176, exclusionary labor unions fearful of black competition, HENDERSON H. DONALD, THE NEGRO MIGRATION OF 1916-1918, at 56 (1921) (discussing a 1917 Philadelphia riot incited by labor unions against blacks), social Progressives eager to stifle interracial violence and limit the threat from blacks perceived as both inferior and potential economic competitors, MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920, at 182-93 (2003), and the Ku Klux Klan.

290. Atlanta's city council enacted residential segregation laws in 1922, 1929, and 1931. Each of these was challenged on constitutional grounds and invalidated. RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 55 (1996). If the only purpose of segregation laws was to impress white voters, with the laws themselves being essentially meaningless, the city council almost certainly would not have been this persistent.

291. Silver, *supra* note 210, at 195-96.

292. KLARMAN, *supra* note 5, at 90.

293. Birmingham considered residential segregation laws "[s]everal times between 1900 and 1920," rejecting the idea primarily because of constitutional concerns. Carl V. Harris, *Reforms in Government Control of Negroes in Birmingham, Alabama, 1890-1920*, 38 J. S. HIST. 567, 571 n.10 (1972). Pressure for segregation ordinances in Birmingham eventually grew sufficiently intense that, despite *Buchanan*, in 1925 the city enacted a racial zoning law "to restrict the negroes to certain districts." Silver, *supra* note 210, at 197 (internal quotation marks omitted). The city enacted one of the South's last residential segregation ordinances in 1944, and it was invalidated in 1949. Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950).

294. Beyond making it possible for blacks to move into white neighborhoods, *Buchanan* likely also benefited blacks who stayed in black neighborhoods. In the absence of segregation laws, whites who wanted to keep blacks out of their neighborhoods had an incentive to support more equitable public spending for black neighborhoods. Moreover, segregation laws would have allowed whites to impose the costs of segregation on blacks, as blacks would have had to pay exorbitant amounts for the restricted supply of housing in their assigned ghettos. Instead, when

> [I]t was, in the absence of apartheid laws like those at issue in *Buchanan*, very difficult to keep the black/white border from moving in ways adverse to whites. In fact, it must have been nearly impossible in most situations. We know this not from econometric studies about who paid what for housing, but from the simple demographic fact that the black ghetto took root and expanded in virtually every large city.[295]

E. *Why the Court Acted as It Did*

The mystery of why the Court suddenly became more protective of the rights of black Americans in the 1910s, despite increased racism in society as a whole, remains. One theory, propounded by Benno Schmidt, is that these decisions were "rooted in the institutional revival of the Supreme Court in the early part of the twentieth century, a revival which made its impact felt mainly in the aggressive tenets of laissez-faire constitutionalism, but which produced other, nobler and more lasting, if more tentative, constitutional legacies as well."[296] Yet one could more easily trace the rise in the Court's assertiveness to 1895—one year before *Plessy*—when the Court ruled the federal income tax unconstitutional,[297] limited the reach of the Sherman Antitrust Act by holding that manufacturing was not interstate commerce subject to federal regulation,[298] and approved the use of the labor injunction by federal courts.[299]

Perhaps, however, the important shift in the early twentieth century was not the Court's willingness in general to assert itself, but its newfound willingness to challenge the states' assertions of their police powers. As late as 1888, the Court, over a lone dissent by Justice Field, upheld a Pennsylvania law that completely banned the sale of margarine, even though the law was obviously naked protectionist legislation for farmers with no plausible police power rationale.[300] Even commentators who thought the Court should generally be deferential to state regulation criticized this decision.[301]

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neighborhoods began to "turn over," whites sold to blacks at bargain prices (though in some cases "blockbusting" realtors, black and white, were the prime beneficiaries of panic sales). Whites thus absorbed much of the cost of their own racism in the housing market, and blacks benefited. Bernstein, *supra* note 85, at 859-61.

295. Fischel, *supra* note 281, at 979.

296. 9 BICKEL & SCHMIDT, *supra* note 100, at 990.

297. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

298. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

299. *In re* Debs, 158 U.S. 564 (1895).

300. Powell v. Pennsylvania, 127 U.S. 678 (1888).

301. *See, e.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 62, at 57 (1904) ("Even the danger to health or safety should not justify the absolute prohibition of a useful industry or practice [such as the manufacture of oleomargarine].").

The Court's reluctance to challenge state assertions of police power soon ended. In 1905, a 5-4 majority in *Lochner v. New York* boldly second-guessed New York's claimed health rationale for a maximum-hours law for bakers.[302] The dissenting opinions acknowledged that the Court was obligated to second-guess a state's assertion of its police powers in appropriate circumstances; the dispute was over who had the burden of proof, and how difficult it should be to meet that burden.

While the aggressiveness of the Court's Lochnerian jurisprudence ebbed and flowed for the next three decades, the Court's role as the ultimate guarantor of the fundamental rights of American citizens against the states in a wide range of contexts is firmly traceable to *Lochner*.[303] Blacks were hardly the sole beneficiaries of this shift in the Court's institutional role (which, contrary to historical myth, was not limited to the realm of economic legislation).[304] Consider that in the 1920s, the Court invalidated a law inspired by nativist hysteria that banned the teaching of foreign languages,[305] an anti-Catholic law that sought to shut down private schools,[306] and a law that attempted to prevent Japanese parents in Hawaii from sending their children to Japanese-language schools.[307] All three opinions were written by the notoriously racist and anti-Semitic Justice McReynolds,[308] a fact that perhaps makes his consistent votes to invalidate residential segregation laws seem less anomalous.

While the ever-expanding edifice of Jim Crow "ran up against the fundamental American commitment to individual rights both in terms of physical and status mobility as a component of liberty and in terms of freedom of contract as a component of equality,"[309] it was not inevitable that the Court's increased willingness to challenge state assertions of the

302. 198 U.S. 45 (1905). *See generally* David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 325 (Michael C. Dorf ed., 2004) (reviewing the history of the *Lochner* case).

303. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 233. The potential for the Court's robust self-assertion in *Lochner* to aid blacks was first shown in 1908 in *Berea College v. Kentucky*, 211 U.S. 45 (1908). The *Berea College* Court was faced with a Lochnerian challenge to a Kentucky law requiring that private universities be integrated, and with Kentucky's reliance on *Plessy* and its broad view of the police power. *See* David E. Bernstein, Plessy *Versus* Lochner*: The* Berea College *Case*, 25 J. SUP. CT. HIST. 93 (2000). The Court was not yet ready to invalidate a segregation law. Rather than simply accede to Kentucky's arguments, however, the Court resolved the case on nonconstitutional grounds. In doing so, the Court refused to apply *Plessy* to a new set of facts and gave civil rights activists hope that a future decision (like *Buchanan*) involving a challenge to coerced segregation in the private sector would be resolved in their favor.

304. Bernstein, Lochner *Era Revisionism*, *supra* note 233, at 48-49.

305. Meyer v. Nebraska, 262 U.S. 390 (1923).

306. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

307. Farrington v. Tokushige, 273 U.S. 284 (1927).

308. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 132-35 (new & rev. ed. 1999).

309. WELKE, *supra* note 107, at 354.

police power would manifest itself in increased protection for blacks. With American politics and society having grown increasingly racist, one might have expected the Court to have ignored blacks' rights, even as it became more aggressive in reviewing state laws.

The Supreme Court, however, is usually somewhat behind the times relative to changes in both popular and elite opinion on a given subject. Its members belong to an older cohort than both the median adult and the median influential intellectual and are likely to have experienced their formative intellectual influences in a bygone era. In modern times, the Court's inherent conservatism has generally cut against its playing a leading role in recognizing and protecting the rights and interests of minority groups and women, as society has become increasingly sympathetic to these groups.

The Court's inherent conservatism only cuts in favor of courts failing to protect minority rights from contemporary legislation when popular and elite opinion has recently become more favorable to minorities. During the Progressive Era popular and elite opinion were becoming increasingly hostile to blacks, with the result that the median Supreme Court Justice of the 1910s may very well have had comparatively liberal opinions regarding blacks, especially when it came to legal rights and disabilities. Additionally, the Justices' relative insulation from popular pressures was apparent in *Buchanan v. Warley*. This insulation helps explain the Court's decision in the face of racist hysteria aroused in many major cities by the sudden massive increase in black in-migration.

The Court's ability to act as a check on the increased de jure racism of the Progressive Era was enhanced by the enormous turnover on the Court starting in 1909.[310] The generational shift was monumental, from Justices who grew up in an age when blacks were largely confined to chattel slavery[311] to those who became attorneys when basic rights for blacks were written into the Constitution and statutory law. One can speculate that the new generation of Supreme Court Justices, though hardly radical egalitarians, may very well have been disturbed by what they saw as the increasingly aggressive oppression of blacks in the 1910s.[312] Similarly,

310. The five Justices whose terms ended between 1909 and 1912 were Harlan, Fuller, Brewer, Peckham, and Moody. Moody only served for four years, and he had replaced Justice Brown, author of *Plessy*. The new Justices were Lurton, Hughes, Lamar, Van Devanter, and Pitney. Lurton resigned in 1914 and was replaced by fellow Southerner James McReynolds. Lamar and Hughes resigned in 1916 and were replaced by Brandeis and Clarke. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1543-53 (9th ed. 2001).

311. *See* MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860-1910, at 215-16 (2004) (noting that all of the Supreme Court Justices appointed through 1895 were educated or trained before the Civil War).

312. In the absence of direct evidence of why the Justices voted a particular way in a particular case, a certain amount of informed speculation is inevitable, and Klarman's own claims

libertarian and free labor principles in which the new Justices were inevitably immersed during the laissez-faire Gilded Age may have counseled opposition to statist peonage and housing segregation laws that took away basic rights thought to be guaranteed to all individuals, blacks as well as whites.[313]

Moreover, unlike the more subtle Jim Crow laws of earlier decades, laws disfranchising blacks, relegating them to peonage, consigning them to unequal accommodations on common carriers, or limiting their ability to own and alienate property could easily have been seen as an explicit attempt by Southern legislatures to undermine federal law. The presence of the first Southern Democrat (Woodrow Wilson) in the White House since Andrew Johnson—and an overtly racist Southern Democrat at that—may have particularly inclined Northern Republicans on the Court to exhibit less deference to Southern sensibilities in *McCabe* than they had in *Plessy*. In the sixteen years prior to Wilson's election the vast majority of Justices appointed were Northern Republicans, a group with no stake in supporting the Southern racism that Wilson represented. It hardly seems coincidental that five of the six Northern Republicans on the Court (save Holmes) voted to articulate a stringent standard of formal equality with respect to Southern segregation in *McCabe*, while all three Southerners on the Court declined to join the opinion. Like earlier state and local discrimination against the Chinese,[314] the Jim Crow policies that came before the Progressive Era Court may have raised nationalist hackles. Given that these laws directly challenged the Fifteenth Amendment (*Guinn* and *Myers*), the Thirteenth Amendment and the Peonage Act (*Bailey* and *Reynolds*), the federal commitment to formal equality (*McCabe*), and the federal commitment to blacks' property and contract rights reflected in the Fourteenth Amendment and the Civil Rights Act of 1866 (*Buchanan*), the Justices may have implicitly sought to defend federal power against recalcitrant states and localities.[315]

regarding why Court doctrine shifted over time rely quite a bit on speculation. *See generally* Garrow, *supra* note 7, at 699 (reviewing Klarman and noting his reliance on "well-educated guesswork").

313. Both of these factors are apparent in Justice Hughes's opinion in *Bailey*:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.

Bailey v. Alabama, 219 U.S. 219, 244-45 (1911) (citation omitted).

314. *See supra* notes 124-126 and accompanying text.

315. *See* 9 BICKEL & SCHMIDT, *supra* note 100, at 987 (attributing the outcome of the Progressive Era race cases in part to a rising sense of nationalism among the Justices, especially Chief Justice White). *See generally* LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 50

F. *The Impact of the Progressive Era Cases*

The fact that constitutional law changed in a favorable direction for blacks in the 1910s does not answer the question posed by Klarman—whether "the justices possess a significant capacity to defend minority rights from majority oppression."[316] The answer depends on what one means by "significant capacity."[317]

The Progressive Era Court was most effective in aiding blacks where its decisions invalidated laws needed to create a government-enforced cartel among private-sector actors who had collective action or cost externalization reasons to defect from voluntary commitments to "do their part." Southern planters, for example, preferred to cooperate to stifle black mobility and wage growth,[318] but *Bailey*'s invalidation of peonage laws seems to have accelerated a decline in coercive labor practices.[319] The result was an increase in black mobility. This, in turn, created market incentives among planters to raise blacks' wages, both in competition with each other and to discourage black migration to urban areas.[320] *Buchanan* could not force whites to live in the same neighborhoods as blacks, but it did prevent cities from stifling black migration by creating de jure and inflexible boundaries for black neighborhoods, and may have prevented even more damaging legislation.

Also, the effectiveness of judicial decisions in protecting a minority group depends on the legal, economic, and political resources the minority group has to act on those decisions. Blacks in the 1910s had few such resources. There is obviously an element of fortuity in such matters; if a philanthropist had provided the NAACP with a huge grant in the late 1910s[321] or the racially liberal Harding Administration had lasted two terms

(1994) (contending that "the competence, perspective, and institutional location and structure of the federal courts" makes them more likely than state courts to give a generous reading to federal constitutional rights (emphasis omitted)); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are institutionally more likely to protect federal constitutional rights from hostile local majoritarian sentiment than are state courts).

316. KLARMAN, *supra* note 5, at 62.

317. With regard to the Chinese, for example, the courts were hardly able or willing to undermine all anti-Chinese legislation—Congress halted the immigration of Chinese laborers in the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, and did not repeal that Act and permit foreign-born Chinese to become citizens until 1943, Act of Dec. 17, 1943, Pub L. No. 78-199, 57 Stat. 600. Moreover, in the absence of relevant federal legislation, the Court could do nothing about the widespread discrimination and hostility the Chinese faced from private actors.

318. *See* sources cited *supra* note 79.

319. *See supra* note 190 and accompanying text.

320. *See supra* notes 112-118 and accompanying text.

321. Unlike blacks in the 1910s, Chinese Americans in the late nineteenth century were well organized and had well-funded organizations that allowed them to use favorable court decisions to their significant advantage. *See generally* MCCLAIN, *supra* note 124 (detailing litigation engaged in by Chinese immigrants).

instead of two scandal-plagued years,[322] the Court's Progressive Era race decisions would likely have had a greater and more immediate positive impact.

IV. *BROWN* AND BACKLASH

Brown v. Board of Education is arguably the most widely discussed decision in the history of the United States Supreme Court. Klarman's detailed and insightful analysis of the case is an enormous contribution to an already extensive literature. Because previous reviewers have already discussed this part of the book in great detail,[323] we limit our focus here to two major points that earlier reviewers, Klarman himself, and the previous literature on *Brown* have largely neglected.

Klarman claims that *Brown* had little or no direct impact on school segregation, but argues that it had a major indirect impact by stimulating a huge white backlash—the notorious "massive resistance" to the implementation of *Brown*. According to Klarman, this backlash induced a Northern white counterbacklash that led to the passage of the Civil Rights Act of 1964, the legislation that—unlike judicial intervention—finally succeeded in desegregating most Southern schools.[324]

We emphasize two major reservations about Klarman's thesis. First, Klarman, like other scholars who minimize *Brown*'s impact,[325] largely ignores the fact that the mere anticipation of a *Brown*-like decision led several Southern states to enact massive increases in funding for black schools in an attempt to persuade the Court to forgo ordering full desegregation. Second, Klarman's backlash thesis raises an important question that he does not sufficiently address: If *Brown* was as ineffective in promoting integration as he claims, why did Southern whites find it necessary to launch a costly campaign of massive resistance to counter it? It is possible that massive resistance was simply a result of widespread ignorance among white Southern voters who—egged on by ambitious politicians—overestimated the threat posed by *Brown* to their cherished

322. In thinking about what might have been, consider that President Harding stunned a white audience in Birmingham in October 1921 by announcing that "I would say let the black man vote when he is fit to vote; prohibit the white man from voting when he is unfit to vote" and "I would insist upon equal educational opportunity [for whites and blacks]." DEAN, *supra* note 161, at 125-26 (internal quotation marks omitted).

323. *See* sources cited *supra* note 7.

324. KLARMAN, *supra* note 5, at 362-64. By 1964, after ten years of judicial action, only one percent of black schoolchildren in the Deep South attended integrated schools. *Id.* at 362-63.

325. See sources cited *supra* note 4 (including Rosenberg's otherwise very thorough analysis).

institutions.[326] But there is also considerable evidence suggesting that massive resistance was in fact necessary for segregationists to be able to contain *Brown*'s impact. If this is true, and Southern racists were properly afraid of *Brown*'s effect despite the obvious barriers to implementation facing the Court, it implies that judicial power can be considerably more formidable than Klarman and other skeptics suggest.

Klarman not only argues that *Brown* failed to achieve any substantial desegregation, but also suggests that massive resistance was not needed to prevent it from doing so. He contends that "massive resistance almost certainly proved a mistake" from the perspective of segregationists, and that more modest "tried-and-true evasive techniques" would probably have better achieved their goals.[327] But elsewhere in the book, Klarman argues that the Supreme Court may have held back on implementing desegregation for fear of massive resistance.[328] Based on this, it could be argued that massive resistance was a necessary element of segregationist strategy despite the risks involved.

Either interpretation of *Brown*'s impact raises serious questions for Klarman's broader argument that the federal judiciary had little ability to protect black civil rights against Jim Crow. If massive resistance *was* necessary to prevent *Brown* from having a major effect, this suggests that the Supreme Court was far less toothless than Klarman acknowledges. This point is especially significant given that massive resistance began to break down even before the Civil Rights Act of 1964 reinforced judicial intervention with federal legislative and executive efforts. As Klarman shows, massive resistance was too costly to Southern whites to persist indefinitely, and federal court decisions began to have a substantial impact

326. The possibility that political ignorance played a key role in stimulating massive resistance deserves more detailed analysis than we can give it here. Researchers have found that most citizens have little knowledge and understanding of politics and public policy. *See* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304-13 (2004) (summarizing the evidence). Public knowledge concerning the judiciary is even less than public knowledge of other political institutions. *See, e.g.*, *id.* at 1308 tbl.1 (presenting survey data showing that in 2000 only eleven percent of Americans could identify the post held by William Rehnquist, in contrast to greater familiarity with other public officials). Several studies of public familiarity with the Supreme Court conducted during the heyday of the Warren Court in the 1960s show that only a minority of Americans knew anything about recent Court decisions. *See* ROSENBERG, *supra* note 4, at 125-26 (citing studies). Moreover, political knowledge in the South has historically been lower than in other parts of the country. *See, e.g.*, MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 145, 183 (1996) (showing that Southerners have less political knowledge than residents of other regions even when controlling for other variables); Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 631-34 tbls.2-5 (2003) (showing that Southerners had lower political knowledge levels in surveys conducted in 1952, just before *Brown*).

327. KLARMAN, *supra* note 5, at 462.

328. *Id.* at 333-34.

on school desegregation once resistance began to collapse in the early 1960s. If, however, massive resistance was not necessary to prevent *Brown* from having an impact, then we must consider why it nonetheless occurred.

A. Brown*'s Neglected Anticipatory Impact*

Klarman and other *Brown* skeptics have almost completely ignored the striking fact that the case had a major positive impact on the education of Southern blacks even before it was decided. As Klarman recognizes, several Southern states, including staunchly segregationist South Carolina and Mississippi, adopted "crash equalization programs that promised rapid redress of educational inequalities in black schools."[329] Klarman acknowledges in passing that these measures were in part "a response . . . to the threat of desegregation litigation,"[330] but fails to consider the implications of this fact for his broader theory of judicial power. This evidence conflicts with the revisionist claim that seeking social justice through litigation is a purely "hollow hope."[331] At the very least, the *Brown* litigation was bound to cause a massive increase in spending on the public schools most blacks attended.

In South Carolina in 1951, Governor James Byrnes persuaded the state legislature to pass a seventy-five-million-dollar education spending package that he said was intended to "'provide for the races substantial equality in school facilities.'"[332] This school equalization legislation was closely coordinated with South Carolina's legal strategy in the ongoing case of *Briggs v. Elliott*, the South Carolina school desegregation case that eventually became one of five desegregation cases consolidated into *Brown*.[333] Moreover, it is important to note that Byrnes not only promised an increase in spending, but actually implemented it. Spending on black schools in South Carolina and some other states "rose greatly between 1950 and 1954," the period during which *Brown* and related cases were making their way to the Supreme Court.[334]

329. *Id.* at 311.

330. *Id.* at 189.

331. The title of Gerald Rosenberg's well-known book. ROSENBERG, *supra* note 4.

332. KLUGER, *supra* note 110, at 334 (quoting Byrnes's 1951 inaugural address). For further details of Byrnes's program, see DAVID ROBERTSON, SLY AND ABLE: A POLITICAL BIOGRAPHY OF JAMES F. BYRNES 507-10 (1994).

333. For a detailed description of the links between Byrnes's legislative agenda and his litigation strategy, see ROBERTSON, *supra* note 332, at 507-25. *See also* KLUGER, *supra* note 110, at 334-35 (noting coordination between Byrnes's education reforms and South Carolina's strategy in the *Briggs* case).

334. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 38 (2001).

An almost equally large school equalization spending program was adopted by Mississippi.[335] Despite many shortcomings, the program did increase spending on black schools and raise the salaries of black teachers from thirty-nine percent of white salaries in 1950 to fifty-six percent in 1953-1954.[336] Like South Carolina's program, Mississippi's was adopted for the explicit purpose of heading off a federal court decision ordering desegregation.[337] Both programs represented a major departure from earlier policies.

Although this Review is by no means the only scholarly work to discuss these events, their implications for debates about *Brown* and judicial power have not been appreciated either by Klarman or his predecessors. The South Carolina and Mississippi programs, as well as similar though smaller efforts in other states,[338] were clearly caused by fear of federal judicial intervention rather than by autonomous political or social forces within the affected states themselves. While Byrnes was a relatively moderate segregationist who "opposed the more blatant forms of white repression" of blacks,[339] the timing of his school equalization program, its close coordination with the state's litigation strategy in *Brown*, and Byrnes's own private explanations of his motives[340] make it clear that staving off federal judicial involvement was his primary objective.

As for Mississippi, the South's poorest and perhaps most vehemently racist state[341] would not have undertaken large expenditures intended to reduce the massive inequalities between black and white schools on its own independent initiative. Thus, it is clear that the mere threat of a *Brown* decision had a large and beneficial impact on Southern black education as much as several years before the Supreme Court actually reached its decision. In this context, Derrick Bell's well-known argument that the *Brown* Court should have given up on desegregation and instead required state governments to fairly implement *Plessy*-style "separate but equal" schooling seems unintentionally ironic.[342] It was precisely the threat of

335. *See* Charles C. Bolton, *Mississippi's School Equalization Program, 1945-1954: "A Last Gasp To Try To Maintain a Segregated Educational System,"* 66 J. S. HIST. 781 (2000).

336. *Id.* at 797, 804.

337. *Id.* at 785-86 ("[W]hite Mississippians who began to call for greater equalization between white and black public schools generally made sure to emphasize that their ultimate motive remained preserving white privileges and saving school segregation.").

338. KLARMAN, *supra* note 5, at 311; *see also* Bolton, *supra* note 335, at 782 (noting that Southern states "all began or enhanced programs to improve black education" in the years immediately following World War II).

339. KLUGER, *supra* note 110, at 334; *see* PATTERSON, *supra* note 334, at 38.

340. ROBERTSON, *supra* note 332, at 507-10.

341. On Mississippi's extreme poverty and commitment to racism and segregation at the time, see KEY, *supra* note 91, at 229-30.

342. BELL, *supra* note 4. Even one leading scholar who strongly supports the holding in *Brown* has nonetheless concluded, like Bell, that an equalization strategy building on *Plessy* might

desegregation that at long last made possible even partial realization of the promise of "equality" under the "separate but equal" standard. Obviously, the funding equalization programs instituted by several Southern states could not and did not eliminate the inequality inherent in Jim Crow segregated education.[343] They did, however, mark a significant improvement over the prior status quo.

There is an even more important implication of the equalization programs for the debate over *Brown*'s efficacy. Klarman, Rosenberg, Bell, and other critics have repeatedly argued that *Brown* was largely ineffective in stimulating desegregation. Yet James Byrnes and other segregationist political leaders clearly were not so sanguine as they contemplated the prospect of a pro-integration decision by the Supreme Court. Had they expected such a decision to be ineffective, they would not have tried to head it off by allocating public expenditures for the benefit of blacks, most of whom still lacked the vote or any other form of political power. Rather, these politicians probably would have preferred to spend the money on white constituencies that could help them win reelection. The belief of Byrnes and other Southern leaders that a Supreme Court decision in favor of school integration would have significant consequences—and even more so their willingness to back that belief with large public expenditures that otherwise could have been spent on politically powerful white interests rather than powerless blacks—should give pause to scholars who claim that the Court had little ability to force Southern states to integrate.

The equalization programs also provide further support for the cost minimization theory of judicial impact.[344] Obviously, equalization was a much more expensive way to maintain segregation than the previous policy of simply assigning blacks to grossly inferior schools without making any effort at all to make them equal to white schools. It is also significant that white political leaders were willing to pay these costs in order to avoid the even greater costs (from their point of view) that were likely to be imposed by a Supreme Court decision mandating integration.

Southern leaders' expectations of the likely effects of federal court decisions on desegregation is a critical issue that we can only scratch the surface of here. Our analysis is not definitive, but it does cast serious new doubt on the claim that *Brown* had little direct impact.

have been more successful in improving southern black education than an immediate push for desegregation. *See* MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50, at 158-59 (1987).

343. *See, e.g.*, Bolton, *supra* note 335, at 793-806 (discussing serious flaws in Mississippi's equalization programs).

344. *See supra* Section II.C.

B. *Why the Backlash to* Brown*?*

1. *The Puzzle of Massive Resistance to an Ineffective Decision*

If, nonetheless, we assume that Klarman and other revisionist scholars are right to claim that *Brown* could not and did not have a significant direct effect on Southern school segregation, we must ask why Southern states mounted such an immense backlash against it. Why was there massive resistance to an empty threat?

Klarman argues that massive resistance was fueled by three factors that "radicalized southern politics" in a way that earlier court decisions had not.[345] (1) *Brown* was "harder to ignore than earlier changes" because of extensive press coverage of the decision.[346] (2) "*Brown* represented federal interference in southern race relations—something that white southerners . . . could not tolerate."[347] (3) "*Brown* commanded that racial change take place in a different order than might otherwise have occurred. . . . White southerners were more intensely committed to preserving school segregation, which lay near the top of the white supremacist hierarchy of preferences."[348] These three explanations are significant, but they cannot explain the massive scale of Southern backlash if we assume that *Brown* was not likely to have any real impact on Southern school segregation.

With regard to press coverage, it is not clear why extensive press coverage of *Brown* would necessarily lead to a massive backlash against a decision that was not having any significant effect. Indeed, one might expect that extensive press coverage would actually calm white fears as news of the decision's ineffectiveness spread more quickly than it might have otherwise. Furthermore, Klarman presents little evidence to support his claim that *Brown* received massive press coverage,[349] and neglects extensive data assembled by Gerald Rosenberg indicating that mid-1950s press attention to *Brown* and other civil rights issues was comparatively modest.[350]

345. KLARMAN, *supra* note 5, at 391.

346. *Id.*

347. *Id.*

348. *Id.*

349. The evidence cited consists of the assertion that *Brown* "received front-page coverage in virtually every newspaper in the country" and quotations from three sources—a Northern visitor to the South, a segregationist political activist, and an Alabama official—none of which provide direct evidence of press coverage. *Id.* It is surely true that *Brown* made the front page, but that is very different than saying that it led to a lasting increase in press attention to civil rights matters.

350. *See* ROSENBERG, *supra* note 4, at 111-16 (citing extensive evidence and numerous studies indicating limited press attention to civil rights matters in the years immediately following *Brown*).

Klarman is certainly right to claim that *Brown* represented an effort at federal interference in Southern race relations. But the same could be said of virtually every other pro-civil-rights decision issued by the federal courts. Yet only *Brown* stimulated such enormous resistance, a puzzling result if the decision was toothless.

Klarman is also right to note that Southern whites were particularly sensitive on the issue of school integration. Even so, it is difficult to understand why they would generate such an enormous backlash against a decision that was not actually causing any integration to occur. At the very least, one would have expected the uproar to have quickly died down as *Brown*'s ineffectiveness became more evident to Southern whites. In reality, as Klarman documents, the scale and vehemence of massive resistance actually *increased* during the first several years following *Brown*.[351]

In sum, Klarman fails to resolve the tension between the claim that *Brown* was not (and could not have been) effective in promoting school integration, and the undeniable fact that it generated a massive and unprecedented white political backlash. Klarman concludes that massive resistance was probably an irrational strategy because it "abandoned the tried-and-true evasive techniques that for decades had successfully nullified the constitutional rights of blacks, in favor of outright defiance."[352] Segregationist strategists would have been more successful in escaping the wrath of Northern whites if they had "eschewed" the use of violence and "vigilante mobs" to block desegregation orders and instead used inconspicuous "fraudulent mechanisms to circumvent school desegregation."[353] Yet it strains credulity to believe that the vast majority of political leaders and activists across most of the white South were simply irrational or bullheaded. A more plausible alternative explanation for massive resistance is that *Brown* was not as toothless as Klarman suggests. Massive resistance may in fact have been the only available means to neutralize *Brown*'s impact, albeit at the cost of eventually provoking even greater federal intervention.

351. KLARMAN, *supra* note 5, at 393-400.

352. *Id.* at 462.

353. *Id.* Klarman uses North Carolina as an example of such subtle resistance to *Brown*, one that could have been a model for other states. *Id.*

2. *Was Massive Resistance Needed To Prevent* Brown *from Having a Greater Impact?*

a. *Evidence That Massive Resistance Was Necessary To Obstruct Enforcement of* Brown

There are several pieces of evidence suggesting that only massive resistance was capable of severely constricting *Brown*'s immediate impact. While none are definitive in and of themselves, their cumulative impact seriously undermines the argument that less radical forms of resistance would have more effectively maintained segregation. First, Klarman's excellent account of the Supreme Court's decisionmaking implies that massive-resistance advocates were right to believe that drastic threats of violence and school closures played a decisive role in blocking implementation of *Brown*. In their deliberations over *Brown II*,[354] the key case determining guidelines for implementing the original *Brown* decision, Klarman demonstrates that the Justices decided to adopt the notoriously gradualist "all deliberate speed" formula in large part out of fear of violence.[355] As Klarman points out, this decision broke with prior practice in civil rights cases—including cases desegregating higher education—where the rule had been that constitutional rights must be implemented immediately.[356] While we cannot know for certain that the Court would have insisted on swifter implementation in the absence of threats of violence and school closures, such a step would have been consistent with prior practice and with the Justices' belief that segregation in education was morally abhorrent.[357] At the very least, the fact that massive resistance played a major role in the Justices' calculations suggests that they might have acted differently in its absence.

A second source of evidence indicating that massive resistance may have been necessary to stymie the enforcement of *Brown* was the experience of the border states, where state governments did not engage in major resistance to *Brown*. As a result, *Brown* greatly reduced school segregation in these states long before the Civil Rights Act of 1964. Even Rosenberg, the most thoroughgoing of academic *Brown* skeptics, concedes that "[t]he Supreme Court appears to have had an important impact on school desegregation in the six border states and the District of

354. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).
355. KLARMAN, *supra* note 5, at 314-16.
356. *Id.* at 314.
357. *See id.* at 292-312.

Columbia."[358] Klarman too, acknowledges that *Brown* was successful in desegregating the border states, though he also notes—correctly—that significant pockets of segregation remained.[359]

Rosenberg concludes that *Brown* was effective in the border states because "there was little in the way of large-scale, hard-core opposition"[360]—precisely the kind of opposition that, further south, was supplied by the forces of massive resistance. From a cost minimization standpoint, border state whites, because of their lesser commitment to Jim Crow, were more price sensitive than those in the Deep South. When the price of maintaining school segregation was raised by *Brown*, border state whites were unwilling to pay it by adopting a strategy of massive resistance.

A third piece of evidence is drawn from Klarman's account of the demise of massive resistance in the Deep South in the early 1960s.[361] Massive resistance collapsed because Southern whites began to find constant violence and school closings too great a price to bear.[362] White business leaders in particular began to oppose massive resistance because they "dreaded the economic impact of closed schools."[363] As a result, they were forced to switch to less aggressive tactics, such as admitting "token" numbers of black students while trying to use administrative machinery to keep out the rest.[364] The collapse of massive resistance led to a substantial increase in the pace of desegregation in 1962-1963, prior to the passage of the Civil Rights Act of 1964.[365] In the fall of 1963, 161 school districts desegregated, "by far the largest number since 1956."[366] We cannot know how fast desegregation would have proceeded had the Civil Rights Act not been adopted and the judiciary been forced to continue to battle school segregation largely on its own. However, as Klarman notes, it is clear that the collapse of massive resistance "had increased the pace of desegregation."[367]

358. ROSENBERG, *supra* note 4, at 50. While only about one percent of Southern black schoolchildren were attending integrated schools as late as 1964, in the border states almost fifty-five percent were doing so. *Id*.

359. KLARMAN, *supra* note 5, at 346-48.

360. ROSENBERG, *supra* note 4, at 104.

361. KLARMAN, *supra* note 5, at 417-20.

362. *Id*. White Southern leaders themselves noted that massive resistance had collapsed because its cost was too great. As segregationist Virginia Governor J. Lindsay Almond put it in 1962, "[T]he only way to defeat integration was to close down every single, solitary school in this state, and keep them closed." JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD MACHINE AND THE POLITICS OF MASSIVE RESISTANCE 126 (1976).

363. 11 NUMAN V. BARTLEY, A HISTORY OF THE SOUTH: THE NEW SOUTH, 1945-1980, at 245 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1995).

364. KLARMAN, *supra* note 5, at 417-19.

365. *Id*. at 361-63.

366. *Id*. at 362.

367. *Id*. at 363.

b. *Why Evasion Might Not Have Been Enough*

If massive resistance was needed to stop *Brown* from having a major impact, this raises the question of why the subtle evasion tactics that Klarman suggests Southern states might have adopted instead were not sufficient. Obviously, we cannot know for sure what would have happened had Southern state governments abjured massive resistance from the very beginning and instead concentrated on more moderate tactics of evasion. Although historians are more receptive to counterfactuals than they have been in the past,[368] counterfactual analysis remains an inexact science at best. Nonetheless, we tentatively suggest two reasons that subtle evasive tactics would not have been effective: greater transparency of school policy as compared to some other aspects of Jim Crow and lower judicial tolerance for subterfuge caused by the changing composition of the federal judiciary.

Unlike in the areas of criminal procedure and voter registration, where subtle evasion had been highly effective, discrimination in school enrollment was comparatively more transparent. In criminal procedure, for example, courts could relatively easily detect and reverse flagrant cases where defendants were railroaded to conviction, but could not readily ferret out more subtle forms of discrimination against black defendants and potential jurors.[369] Similarly, in a context in which Supreme Court decisions affirmed the legality of literacy tests, poll taxes, and other facially race-neutral methods of excluding voters, it was very difficult for courts to tell whether local registrars—who generally had broad discretionary authority—were implementing these policies in a discriminatory way in any given case.[370] By contrast, the ongoing exclusion of all or nearly all black schoolchildren from white schools located in close geographic proximity to them could not easily be hidden or explained away in the face of even mildly skeptical judicial scrutiny.[371]

Despite the relative transparency of school segregation, there were probably enough subterfuges available to Southern authorities that federal

368. *See, e.g.*, VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS (Niall Ferguson ed., 1997) (presenting analysis of a range of counterfactual scenarios by leading historians).

369. *See, e.g.*, KLARMAN, *supra* note 5, at 274-83.

370. *See* KEY, *supra* note 91, at 560-76 (showing how discriminatory exclusion of black voters was usually accomplished by the exercise of discretionary authority at the local level).

371. Obviously, a much different situation arose in later cases, where school segregation existed as a consequence of housing segregation rather than as a result of discriminatory assignment of students to segregated schools far from their homes. *See, e.g.*, DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995) (describing and criticizing judicial decisions using forced busing of students as a remedy for school segregation caused by housing segregation). In the Jim Crow-era South of the 1950s and 1960s, however, the main focus of reform efforts was on the more blatant discrimination embodied in state efforts to force black students to attend more distant segregated schools even in situations where white schools were located nearby.

lower courts could have found grounds for ignoring persistent segregation had they been strongly inclined to do so. A vital element of the desegregation story was therefore the refusal of numerous lower court judges to accept excuses and subterfuges. In particular, the Fifth Circuit Court of Appeals, which at that time covered most of the Deep South, invalidated a wide range of efforts to get around desegregation requirements and eventually imposed detailed integration requirements on recalcitrant school officials.[372]

A key factor in the Fifth Circuit's reluctance to endorse Southern state governments' efforts at obstructionism as much as its predecessors had done was the court's composition. Five of the circuit's judges were appointed by President Eisenhower in the 1950s.[373] Three of the five Eisenhower nominees—John Minor Wisdom, Elbert Tuttle, and John Brown—"became prominent supporters of desegregation" on the bench.[374] Wisdom in particular became highly influential as the leader of desegregation efforts in the lower courts.[375]

The emergence of Eisenhower appointees as champions of desegregation was not accidental. Although Eisenhower himself was at best lukewarm with respect to *Brown*,[376] members of the "Republican Party's eastern liberal wing" who supported *Brown* were represented in his Justice Department.[377] In choosing judicial nominees for Southern federal courts, the administration sought to pick judges who would support *Brown* or, at

372. The best known of the Fifth Circuit decisions striking down subterfuges was *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) (en banc) (per curiam), which struck down a "freedom of choice" plan and imposed detailed integration guidelines on school officials. But the Fifth Circuit had cracked down on various subterfuges well before then. Between 1955 and 1960, federal judges in the South held over 200 hearings on the subject of school desegregation. PATTERSON, *supra* note 334, at 96. For detailed accounts of the Fifth Circuit's role, see HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981 (1984); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 90-91, 111-14 (1979); and Jack Bass, *The Fifth Circuit in Southern History*, 19 GA. L. REV. 473 (1985).

373. Data calculated from Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf (last visited Nov. 24, 2004). Eisenhower also appointed three judges to the Fourth Circuit, which included much of the Upper South. *Id.*; *see also* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 129 (1997).

374. GOLDMAN, *supra* note 373, at 129.

375. For a recent account of Wisdom's impact, see Joel Wm. Friedman, *The Emergence of John Minor Wisdom as Intellectual Leader of the Fifth Circuit: Reflecting Back on the Forty-Fifth Anniversary of His Joining the Court*, 77 TUL. L. REV. 915 (2003).

376. Eisenhower privately stated, "I personally think the decision was wrong." ARTHUR LARSON, EISENHOWER: THE PRESIDENT NOBODY KNEW 124 (1968) (internal quotation marks omitted). Publicly, he expressed support for judicial enforcement of the decision without commenting on whether the Supreme Court's reasoning was correct or not. GOLDMAN, *supra* note 373, at 127.

377. GOLDMAN, *supra* note 373, at 127.

the very least, exclude strong supporters of segregation.[378] Perhaps even more importantly, one of Eisenhower's main goals in selecting judges was to ensure the selection of as many Republicans as possible in order to rectify the "acute political imbalance" in the federal judiciary resulting from twenty years of Democratic control of the nomination process.[379] In the Democrat-dominated South of the 1950s, the Republican Party had for a long time been more receptive to desegregation than had the Democrats. Thus, the policy of appointing Republican judges led to the creation of a federal judiciary more sympathetic to integration and less willing to permit evasions of *Brown* than would otherwise have been the case. This is a striking example of how political imperatives unrelated to race might nonetheless lead to the selection of judges who disproportionately come from groups relatively sympathetic to civil rights enforcement.[380] While not all of Eisenhower's Southern judicial appointees supported desegregation,[381] the combination of the President's partisan objectives and his Justice Department's integrationist sympathies ensured that the new judges were, on average, much more liberal on racial issues than those they replaced.[382]

C. *Cost Minimization and* Brown*'s Impact*

Although *Brown* failed to achieve immediate desegregation in the South of the kind that was accomplished in the border states, it did greatly increase the cost of maintaining school segregation. By the early 1960s, most Southern whites were no longer willing to go on paying it.[383] The cost minimization hypothesis is thus supported by the evidence: *Brown* promoted school desegregation by greatly increasing the cost of preventing it. While the Court certainly was not the omnipotent force for good of traditional *Brown* hagiography, Klarman's own meticulous research suggests that he understates its effectiveness.

CONCLUSION

From Jim Crow to Civil Rights is an outstanding contribution to the literature on both civil rights law and judicial power more generally. The

378. *Id.* at 127-30.

379. *Id.* at 112, 112-13, 130-31.

380. *See supra* Subsection II.E.3.

381. *See, e.g.*, GOLDMAN, *supra* note 373, at 129 (noting that one of Eisenhower's appointees to the Fifth Circuit was an "ultra segregationist" (internal quotation marks omitted)).

382. For evidence of the major changes wrought by Eisenhower's lower court appointees, see sources cited *supra* note 372.

383. *See supra* notes 361-364 and accompanying text.

book should be, and likely will be, at the forefront of debate over these topics for the foreseeable future. Future research on the Supreme Court's role in American society should emulate Klarman's emphasis on the importance of social context for constitutional law and supplement it with equally rigorous attention to collective action problems, cost externalization, cost minimization, and other factors that can augment the impact of judicial decisions invalidating laws. As Klarman persuasively demonstrates, judicial power is no panacea for the troubles of the oppressed. Judges lack the capacity to comprehensively uproot and reform entrenched social systems. But there is also much evidence, some of it provided by Klarman himself, that judicial power can do more for oppressed minorities than today's skeptics are willing to admit.