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Race and the Court in the Progressive Era

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I. INTRODUCTION

In the second decade of the twentieth century, the Supreme Court decided four prominent (groups of) cases involving race. On each occasion, the civil rights claim won in some significant sense. One set of cases involved so-called peonage legislation–laws that coerced (primarily) black labor. In *Bailey v. Alabama*,[1] the Court invalidated under the federal Peonage Act of 1867[2] and the Thirteenth Amendment an Alabama law making it a crime to enter, with fraudulent intent, into a labor contract that provided for advance payment of wages; the law made breach of the contract prima facie evidence of

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1. 219 U.S. 219 (1911).
2. Pub. L. No. 105-153, Ch. 187, 14 Stat. 546 (1867).

fraudulent intent, and Alabama evidence law did not permit laborers to rebut that presumption with their own testimony. Similarly, in *United States v. Reynolds* the Court struck down under the Thirteenth Amendment and the 1867 Peonage Act an Alabama law that criminalized breach of surety agreements under which private parties paid the costs and fines necessary to liberate convicted criminals from jail in exchange for promises to labor for a specified time.[3]

Second, the Court in *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*[4] ruled that an Oklahoma law permitting railroads to exclude blacks from first class accommodations, rather than providing separate but equal facilities, violated the Fourteenth Amendment, notwithstanding the disparate per capita demand for such accommodations among the races. Third, the Court in *Guinn v. Oklahoma*[5] and *Myers v. Anderson*[6] invalidated under the Fifteenth Amendment grandfather clauses which had protected illiterate whites from disfranchisement by exempting from literacy tests those persons who were enfranchised in the mid-1860s (before southern blacks received the right to vote) or who were descended from such persons. Finally, in *Buchanan v. Warley* the Court invalidated a Louisville, Kentucky, ordinance that segregated neighborhood blocks by race.[7]

My goal in this Article is to "contextualize" these Progressive era race cases. That is, I seek to situate these decisions within the broader social, political, economic, and ideological context within which the Supreme Court Justices operated.[8] This effort is part of a larger project of mine, which has been to contextualize twentieth-century constitutional history. In previous articles I have endeavored to understand both *Brown v. Board of Education*[9] specifically and the post-War civil rights and civil liberties revolutions generally in terms of the background extralegal forces that rendered those decisions possible.[10] Here I shall simply sketch the contours of this approach to constitutional history.

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3. 235 U.S. 133 (1914).
4. 235 U.S. 151 (1914).
5. 238 U.S. 347 (1915).
6. 238 U.S. 368 (1915).
7. 245 U.S. 60 (1917).
8. I regard this Article as a preliminary effort. The material in it ultimately will comprise parts of two chapters in a book, provisionally entitled *From* Plessy *to* Brown *and Beyond: The Supreme Court, Race, and the Constitution in the Twentieth Century.*
9. 347 U.S. 483 (1954).
10. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) [hereinafter Klarman, *Rethinking*]; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) [hereinafter Klarman, *Brown*].

The basic premise of this contextualist method is that Supreme Court Justices are part of contemporary culture. As such, they are unlikely to try to coerce the nation into adopting policies that a substantial majority opposes. It is mistaken, I think, to understand this phenomenon primarily in terms of political checks that operate upon the Court, though it is true that the Justices are not impervious to political pressure. Rather, the point is more one of countermajoritarian *inclination* than *capacity*: The Justices rarely resist a strong majoritarian impulse because their values are likely to reflect those of the majority.[11] The general indeterminacy of the constitutional text enhances the likelihood that the Justices' constitutional interpretations will reflect the values of contemporary society,[12] though plenty of examples exist to suggest that even relatively determinate text usually fails to constrain the Court from injecting contemporary norms into the Constitution.[13] That the Court's constitutional interpretations reflect broad shifts in public opinion seems difficult to deny. Consider, for example, the volte-face in race relations jurisprudence between *Plessy v. Ferguson*[14] and *Brown*,[15] the sudden acknowledgment that the Equal Protection Clause protected women in the wake of the burgeoning women's movement,[16] the Court's dramatic shift on gay rights issues between *Bowers v. Hardwick*[17] and *Romer v. Evans*,[18] the timing of *Roe v. Wade*,[19] the Court's invalidation of school prayer in the wake of the post-World War II collapse of the nation's unofficial Protestant establishment,[20] and the Court's tentative moves toward

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11. *See, e.g.*, ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 209 (2d ed. 1994); Klarman, *Rethinking*, *supra* note 10, at 16 & n.72; Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1925-26 (1991).

12. For numerous examples of this textual indeterminacy, see Michael J. Klarman, *Fidelity, Indeterminacy and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739 (1997).

13. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (interpreting the Fifth Amendment to have an equal protection component, thus enabling the Court to circumvent the textual limitation of the Fourteenth Amendment to "state" action); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (essentially nullifying the plain meaning of the Contracts Clause).

14. 163 U.S. 537 (1896).

15. I have elaborated on the causes of this shift in Klarman, *Brown*, *supra* note 10, at 13-71.

16. *See* Reed v. Reed, 404 U.S. 71 (1971).

17. 478 U.S. 186 (1986).

18. 517 U.S. 620 (1996).

19. 410 U.S. 113 (1973). By the time the Court decided *Roe*, more than half of the nation supported a woman's right to abortion. For the relevant opinion poll data, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 513, 539, 562, 605 (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 261 (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 607 n.148 (1993).

constitutionalizing minimum entitlements for the poor in the wake of the Johnson Administration's War on Poverty.[21]

None of this is to deny, of course, that the Court can produce marginally countermajoritarian results. The Justices' relative insulation from politics enables them to frustrate narrow majorities, and the gap between the values of the culturally elite Justices and the general public may incline them toward a different slant on constitutional issues than that of the political branches.[22] Moreover, in relatively rare cases, an especially determinate piece of constitutional text or an unusually entrenched precedent might induce the Justices to resist even a strong national consensus.[23] Yet when the Court resists the will of a national majority, or even that of a strong minority, its decisions usually incite determined resistance. Thus, for example, *Dred Scott v. Sandford*[24] rallied Republicans to defend the legitimacy of their party;[25] *Brown v. Board of Education* crystallized southern white resistance to changes in the racial status quo;[26] and *Roe v. Wade* arguably mobilized a right-to-life movement that previously had not played a prominent role in politics.[27]

This Article will examine the Court's Progressive era race cases in light of the paradigm sketched above. Specifically, should we regard these decisions as consonant with contemporary public opinion? If not, is the explanation for the disparity the divergent racial views of the Justices or the unusual clarity with which the challenged

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20. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); *see also* Klarman, *Rethinking*, *supra* note 10, at 46-62.

21. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia, 383 U.S. 663 (1966); *see also* Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 219 (Vince Blasi ed., 1983) (suggesting that a faction of the Warren Court, though not clearly a majority, was moving toward constitutionalizing minimum levels of subsistence, housing, and education); Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 8 (1969) (discussing the "role of courts . . . in an anti-poverty war").

22. On the latter point, see Michael J. Klarman, *What's So Great About Constitutionalism?* (forthcoming NW. U. L. REV. (fall 1998)).

23. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970) (invalidating provision of federal statute prohibiting states from denying the right to vote in state or local elections on account of age to anyone 18 or older).

24. 60 U.S. (19 How.) 393 (1856).

25. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 561-67 (1978) (concluding that the combination of *Dred Scott* and the furor raised over the Lecompton Constitution probably explains the momentous Republican gains in the lower North between 1856 and 1858, which ultimately enabled Lincoln to win the presidency in 1860).

26. Klarman, *Brown*, *supra* note 10, at 85-150.

27. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 354-59 (1994); ROSENBERG, *supra* note 19, at 188, 341-42; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992).

practices violated the Constitution?[28] Finally, how much impact did these rulings have upon actual racial practices?

I shall begin by seeking to establish a baseline against which to measure the Progressive era race cases. *Plessy v. Ferguson* and *Williams v. Mississippi*[29] will serve as that baseline. In those landmark decisions, rendered in 1896 and 1898 respectively, the Court rejected constitutional challenges to racial segregation and black disfranchisement. Two decades later, in the midst of the Progressive era, the Court issued four sets of decisions that appeared to represent significant civil rights victories. Understanding the Progressive era race decisions requires assessing both the extent to which they are in legal tension with the earlier rulings and the extent to which the surrounding extralegal context had changed in the intervening decades. So before looking closely at the Progressive era decisions, it will be necessary to canvass the state of American race relations during the 1890s and the 1910s. As to the latter period, we shall discover, paradoxically, that while incipient forces for racial transformation were at work, the actual state of race relations probably reached its post-Civil War nadir.

Assessing the Court's Progressive era civil rights victories in light of this oppressive extralegal context poses a puzzle. One possibility is that these decisions test the limits of the Court's countermajoritarian potential. Given the disjunction between the rulings and the state of racial practices at the time, it seems plausible that the Supreme Court was at least mildly out of touch with dominant public opinion on race. Alternatively, it is possible that even in the depths of Progressive era racism, national opinion continued to endorse formal compliance with constitutional norms, which is essentially all that the Court's decisions required. I conclude that the latter interpretation better fits the facts. That is, these four sets of decisions are best un-

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28. Benno Schmidt nicely states the question:

> [The White Court's] decisions upholding the constitutional rights of black people can be viewed as the first serious judicial commitment to Reconstruction principles, a commitment that after almost a half-century of neglect kept the promises of the Civil War amendments from languishing into very deep depths of repose. . . . It is also possible to take a more modest view: that the White Court happened along when the momentum of racism in American society produced laws so blatantly, even absurdly, unconstitutional that even a Court prepared to countenance racial segregation and the exclusion of black people from politics and the judicial process, so long as these aims were not proclaimed on the surface of state laws, was shamed into standing behind the formal validity of the Civil War amendments.

Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 459 (1982) [hereinafter, Schmidt I].

29. 170 U.S. 213 (1898).

derstood as minimalist constitutional interpretations—the very least that a straight-faced commitment to constitutionalism entailed. Nothing in these decisions, I shall argue, indicates any burgeoning commitment on the Justices' part to the cause of racial justice. On this view, the Fuller Court which decided *Plessy* and *Williams* might well have resolved the Progressive era race cases the same way that the White Court did.

Moreover, whatever the extent of their disjunction from popular opinion, the Progressive era race decisions were inconsequential in result. Because the rulings were concerned with form rather than substance, they were easily evaded in practice. For example, blacks continued to be almost universally disfranchised after invalidation of the grandfather clause, and American cities grew increasingly segregated notwithstanding the Court's nullification of residential segregation ordinances. Nor is it likely that decisions addressed more to substance than to form could have been efficacious at a time when southern blacks lived in an environment too dangerous to permit the development of a strong civil rights movement, and the national political branches possessed neither the inclination nor the tools with which to coerce an intensely committed white South out of its racial preferences.

II. CONTEXTUALIZING *PLESSY*

To assess whether the Progressive era decisions represented a new departure on race, I shall measure them against a baseline of the Fuller Court race decisions. Thus, it is necessary, first, to situate those earlier cases within their sociopolitical context. We shall discover that race relations generally deteriorated between the 1890s and the 1910s, while the Court's decisions improved from the perspective of racial justice. The purpose of this Article is to explore that apparent paradox.

In *Plessy v. Ferguson* the Supreme Court rejected an equal protection challenge to a Louisiana statute requiring railroads to provide separate and equal accommodations to black and white passengers. The Court denied that the purpose of the Fourteenth Amendment had been "to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality."[30] Further, the Court denied that "the enforced separation of the two races

30. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

stamps the colored race with a badge of inferiority" and insisted that if blacks thought otherwise, this was "solely because [they] cho[se] to put that construction upon it."[31]

In *Williams v. Mississippi*, the defendant challenged his murder indictment on the ground that the grand jury was selected from voter lists that systematically excluded blacks.[32] The Supreme Court rejected this indirect constitutional challenge to Mississippi's disfranchisement scheme. Eschewing the relevance of discriminatory motive, the Court brushed aside candid admissions that the Mississippi state constitutional convention of 1890 had deliberately disfranchised blacks.[33] Moreover, citing but failing adequately to distinguish *Yick Wo v. Hopkins*,[34] the Court refused to invalidate the state's literacy test based on the allegation that it vested voting registrars with virtually unfettered discretion to discriminate against blacks.[35] The *Yick Wo* Court, however, had found a constitutional violation not only in the discriminatory enforcement of the laundry ordinance but also in its grant of uncabined discretion to the board of supervisors.

Plessy in particular is a much vilified decision today. Commentators have called it "ridiculous and shameful," "racist and oppressive," and even, simply, "a catastrophe."[36] Yet I would contend that the sociopolitical context rendered the result virtually inevitable. There was roughly as much chance of the Court deciding *Plessy* differently in 1896 as there was of its protecting women's rights before the rise of the women's movement, or gay rights before the rise of the gay rights movement, or animal rights today. To portray *Plessy* as simply a product of racist judging is to fundamentally misunderstand it. Background social, political, economic, and ideological forces created a climate within which judicial invalidation of a railway segrega-

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31. *Id.* at 551.
32. 170 U.S. 213, 213 (1898).
33. *See id.* at 222-23.
34. *See id.* at 223-25 (discussing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
35. *See id.* at 225 (noting that "it has not been shown that their actual administration was evil, but only that evil was possible under them").
36. JUDITH BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 112 (1983) ("racist and repressive"); MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 145 (1994) ("ridiculous and shameful"); Paul Oberst, *The Strange Career of* Plessy v. Ferguson, 15 ARIZ. L. REV. 389, 417 (1973) ("a catastrophe"); *see also* ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 101 (1960) (calling *Plessy* "a compound of bad logic, bad history, bad sociology, and bad constitutional law"). For additional examples of recent scholarship vilifying *Plessy*, see CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 3-4 (1987).

tion law would have been dramatically countermajoritarian, and indeed virtually unthinkable.

It is useful to consider the extralegal forces responsible for the dramatic deterioration in American race relations around the turn of the century. In the South, race relations began to worsen appreciably in the late 1880s and early 1890s. Political, economic, and social unrest were manifested in the rising strength of the Farmers' Alliance and the Populist Party.[37] The growing power of poorer whites did not bode well for blacks, since the former's precarious social and economic status inclined them toward measures highlighting their racial superiority.[38] At the same time, conservative wealthier whites, who traditionally had inclined toward more paternalistic attitudes toward blacks, were now impelled to emphasize racial distinctions in order to disrupt prospective economic and political alliances between poor black and poor white farmers.[39] Whatever the precise political dynamic, the upshot was a dramatic deterioration in southern race relations during the 1890s, which assumed a variety of forms.[40] The an-

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37. *See* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION chs. 9-10 (1992).

38. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 211-12 (1951); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890, at 231-32 (1947); Patricia Minter, The Codification of Jim Crow: The Origins of Segregated Railroad Transit in the South, 1865-1910, at 62, 83, 114-15 (1994) (unpublished Ph.D. dissertation, University of Virginia).

39. *See, e.g.*, JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA 1900-1920, at 6-7 (1977); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914, at 266 (1971); Minter, *supra* note 38, at 184. For scholars understanding disfranchisement in these terms—as a response to conservative fears that a Populist economic alliance would form between blacks and lower class whites, see JOHN W. CELL, THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH 170 (1982); V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 8, 541 (1949); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 18, 36-37, 147-48, 203, 221 (1974); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 9-10 (1976); HENRY L. MOON, BALANCE OF POWER: THE NEGRO VOTE 72-73 (1948); FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 11 (1958).

40. There is a long-standing debate among historians over how to date the rise of segregation. C. Vann Woodward, in his classic account, argued that the period between the end of Reconstruction and 1890 was characterized by fluidity in southern race relations. Woodward emphasized contemporary accounts of extensive integration in southern public accommodations and railroad transportation. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 31-44 (1955) [hereinafter WOODWARD, STRANGE CAREER]. Other historians have provided similar accounts, emphasizing the significant deterioration that took place in southern race relations in the 1890s. *See, e.g.*, GEORGE BROWN TINDALL, SOUTH CAROLINA NEGROES, 1877-1900, at 292-302 (1952); WHARTON, *supra* note 38, at 230-33; CHARLES E. WYNES, RACE RELATIONS IN VIRGINIA 1870-1902, at 149-50 (1961). However, Woodward has been criticized by other historians for painting too rosy a portrait of the post-Reconstruction period. For example, Howard Rabinowitz insists that in southern cities segregation had been the rule since immediately after the Civil War. *See* HOWARD RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH, 1865-1890 (1978) [hereinafter RABINOWITZ, RACE RELATIONS]; *see also* JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION 274-75, 298-99 (1965). The

nual number of black lynchings rose dramatically, peaking early in the decade.[41] Beginning with the Mississippi constitutional convention of 1890, southern states adopted formal measures such as poll taxes, literacy tests, and residency requirements to supplement the de facto disfranchisement of blacks already accomplished through violence and fraud by the late 1880s.[42] Extensive de facto railway segregation was replaced with formal state-mandated segregation beginning with a Florida statute in 1887 that quickly set the trend for other southern states.[43] Even in contexts untouched by formal legal enactment, racial practices rapidly deteriorated around this time. For example, New Orleans in the 1880s had witnessed significant integration in first-class railroad accommodations, interracial labor solidarity

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debate between Woodward and his critics is usefully summarized in CELL, *supra* note 39, at 82-102, and J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 6-7 (1986), and is further developed in a useful exchange between Woodward and Rahinowitz in Howard Rabinowitz, *More Than the Woodward Thesis: Assessing* The Strange Career of Jim Crow, 75 J. AM. HIST. 842 (1988), and C. Vann Woodward, Strange Career *Critics: Long May They Persevere*, 75 J. AM. HIST. 857 (1988) [hereinafter Woodward, *Critics*].

Without getting into the debate over how to characterize southern race relations in the 1870s and 1880s, it seems to me difficult to deny, based on the developments described in the text, that race relations deteriorated significantly in the 1890s.

41. *See* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, at 7-8, 128, 166-69 (1993); WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861-1915, at 211 & tbl.9 (1991); FREDRICKSON, *supra* note 39, at 272. *But see* GEORGE WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE AND "LEGAL LYNCHINGS" 8 (1990) (arguing that the heyday of lynchings in Kentucky was in the period just after the Civil War). The best hook to date on the lynching phenomenon is BRUNDAGE, *supra*.

42. The classic account of black disfranchisement in the South remains KOUSSER, *supra* note 39. *See also* AYERS, *supra* note 37, at ch.11; DITTMER, *supra* note 39, at 90-109; DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS ch.1 (1979); NEIL R. MCMILLEN, BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW ch.2 (1989); OGDEN, *supra* note 39, at ch.1.

43. *See* CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 7-8 (1983); COHEN, *supra* note 41, at 217, 220; DITTMER, *supra* note 39, at 19; MCMILLEN, *supra* note 42, at 291-92; WYNES, *supra* note 40, at 75-76; Schmidt I, *supra* note 28, at 463-464; Minter, *supra* note 38, at 85 & n.63. The eastern seahoard states of Virginia, North Carolina, and South Carolina did not pass their railroad segregation laws until roughly the turn of the century. *See* Linda M. Matthews, *Keeping Down Jim Crow: The Railroads and the Separate Coach Bill in South Carolina*, 73 S. ATL. Q. 117, 121 (1974); Minter, *supra* note 38, at 161. Histerians disagree over the extent to which these segregation laws simply formalized an already existent reality. *Compare* Dale A. Somers, *Black and White in New Orleans: A Study in Urban Race Relations*, 40 J. SO. HIST. 19, 38 (1974), and RABINOWITZ, RACE RELATIONS, *supra* note 40, at 182-97, *with* WOODWARD, STRANGE CAREER, *supra* note 40, at 33-44, and WYNES, *supra* note 40, at 71-74.

None of this is to deny that in other areas of public life, segregation was deeply entrenched well before the 1890s. Public education in the South, for example, had heen almost universally segregated from the date when blacks were first admitted. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1891-92 & n.23 (1995) (collecting evidence).

on the docks and in organizations like the Knights of Labor, an interracial clientele among black and white prostitutes, interracial boxing matches and baseball games, and black jockeys at the horse races. Virtually all of this integration had disappeared from the city by the early to mid-1890s, as white racial attitudes hardened and segregation pervaded new areas of life.[44] Historians have described a similar rigidification of the color line in other southern locales at this same time.[45] A renewed interest in African migration among southern blacks testified to the contemporary perception of deteriorating race relations.[46]

The inclination of southern whites to further subordinate blacks was a necessary, but not a sufficient, condition for the deterioration in American race relations that occurred in the 1890s. Without northern acquiescence, conditions could not have worsened as much as they did.[47] Several factors explain the diminishing northern commitment to racial equality at the end of the century.

First, a significant increase in black migration northwards during the 1890s apparently caused many northern whites to adopt characteristically southern ways of thinking about race.[48] Fears among northern whites of such a black exodus from the South had been widespread around the time of the Civil War, but decreased significantly after a substantial black migration into the old Northwest in the 1860s tapered off in the 1870s and 1880s.[49] One

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44. *See* Somers, *supra* note 43, at 20-42.

45. *See, e.g.*, DITTMER, *supra* note 39, at 8 (Georgia); WHARTON, *supra* note 38, at 230-33 (Mississippi); GEORGE C. WRIGHT, LIFE BEHIND A VEIL: BLACKS IN LOUISVILLE, KENTUCKY 1865-1930, at 50, 59-60, 70-74 (1985) (Louisville, Kentucky).

46. *See* DITTMER, *supra* note 39, at 175-76; FREDRICKSON, *supra* note 39, at 263.

47. *See* COHEN, *supra* note 41, at 246; Somers, *supra* note 43, at 36. For discussion of the debate among historians as to whether the removal of external constraints was simply necessary, or necessary and sufficient, for the deterioration in southern race relations in the 1890s, see CELL, *supra* note 39, at 86.

48. *See* DAVID A. GERBER, BLACK OHIO AND THE COLOR LINE, 1860-1915, at 295 (1976); JAMES R. GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION 164 (1989); MICHAEL W. HOMEL, DOWN FROM EQUALITY: BLACK CHICAGOANS AND THE PUBLIC SCHOOLS 1920-1941, at 5 (1984); GILBERT OSOFSKY, HARLEM: THE MAKING OF A GHETTO 35, 40-42 (1963); ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920, at 7-8, 201 (1967).

49. During the Civil War, fears that emancipated slaves would migrate in large numbers across the Ohio River led to race riots in southern Ohio and Indiana, as well as renewed efforts to enforce the black exclusion laws of Indiana and Illinois. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 31-32 (1988); GERBER, *supra* note 48, at 28-29; EMMA LOU THORNBROUGH, THE NEGRO IN INDIANA BEFORE 1900: A STUDY OF A MINORITY 184-91 (1957); Leslie H. Fischel, Jr., The North and the Negro, 1865-1900: A Study in Race Discrimination 56-57 (1953) (unpublished Ph.D. dissertation, Harvard University). On black population growth in the Midwestern states, see GERBER, *supra* note 48, at 26, 41 (noting that Ohio's black population grew by 72% during the 1860s, and only by 26% in the 1870s and 9% in the 1880s);

might understand the proliferation in those decades of northern state laws barring segregation in public schools and public accommodations as a reflection of whites' relative racial tolerance in the face of small black numbers.[50] However, in the 1890s, black migration northwards increased appreciably (though not nearly as much as it would during World War I). Whereas southern black migration to northern and western states had been about 49,000 in the 1870s and 62,000 in the 1880s, it rose to roughly 132,000 in the 1890s and 143,000 in the 1900s.[51] This brought increased discrimination in public accommodations,[52] occasional efforts to introduce racial segregation into the public schools,[53] a rash of black lynchings,[54] and a general hardening of racial attitudes.[55]

A second factor contributing to this convergence of northern and southern racial attitudes was the nation's imperialist adventures of the 1890s.[56] Beginning with the clamor for the annexation of Hawaii early in the decade and culminating with the acquisition of

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THORNBROUGH, *supra*, at 206, 207 n.2 (noting little increase in Indiana's black population in the 1880s after a very large increase in the 1860s and a smaller but still significant increase in the 1870s); Roger D. Bridges, *Equality Deferred: Civil Rights for Illinois Blacks, 1865-1885*, 74 J. ILL. STATE HIST. SOC'Y 83, 84 (1981) (noting that Illinois's black population grew by nearly 270% during the Civil War years). For data detailing net black migration from the South to the North by decade from 1870 to 1930, see COHEN, *supra* note 41, at 93.

50. There is a growing body of literature describing the northern public accommodations laws and anti-school segregation laws of the 1880s. *See, e.g.*, GERBER, *supra* note 48, at 41, 45, 56-57, 190-244; LAWRENCE GROSSMAN, THE DEMOCRATIC PARTY AND THE NEGRO: NORTHERN AND NATIONAL POLITICS, 1868-92, at 63-106 (1976); KOUSSER, *supra* note 40 (discussing litigation over segregated schools); THORNBROUGH, *supra* note 49, at 259-61, 288-346; Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-*Brown *North*, 44 UCLA L. REV. 677, 684-97, 701-04 (1997); Fischel, *supra* note 49, chs. 4-5, 7; David Martin Ment, Racial Segregation in the Public Schools of New England and New York, 1840-1940, at chs. 1-4 (1975) (unpublished Ph.D. dissertation, Columbia University).

51. *See* COHEN, *supra* note 41, at 93 tbl.4; *see also* GERBER, *supra* note 48, at 276; GROSSMAN, *supra* note 48, at 164; THORNBROUGH, *supra* note 49, at 207 n.2.

52. *See, e.g.*, DAVID M. KATZMAN, BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY 93 (1973); THORNBROUGH, *supra* note 49, at 265; Fischel, *supra* note 49, at 363.

53. *See* SPEAR, *supra* note 48, at 23, 45; THORNBROUGH, *supra* note 49, at 332; Augnst Meier & Elliott M. Rudwick, *Early Boycotts of Segregated Schools: The Alton, Illinois Case, 1897-1908*, 36 J. NEGRO EDUC. 394, 395 (1967) [hereinafter Meier & Rudwick, *Alton, Illinois*]; August Meier & Elliott M. Rudwick, *Early Boycotts of Segregated Schools: The East Orange, New Jersey, Experience, 1899-1906*, 4 HIST. EDU. Q. 22, 22-23 (1967) [hereinafter Meier & Rudwick, *East Orange*]; *see also* People v. City of Alton, 54 N.E. 421, 428 (Ill. 1899) (acknowledging that Illinois law clearly prohibits school segregation, but nonetheless declaring that "[i]t may be that the wisest of both races believe that the best interests of each would be promoted by voluntary separation in the public schools").

54. *See* GERBER, *supra* note 48, at 249-57 (noting a rise in lynchings in Ohio in the early 1890s); THORNBROUGH, *supra* note 49, at 279-82 (Indiana); Fischel, *supra* note 49, at 421, 423-24.

55. *See, e.g.*, SPEAR, *supra* note 48, at 23; THORNBROUGH, *supra* note 49, at 392.

56. *See* WOODWARD, STRANGE CAREER, *supra* note 40, at 72-73.

Puerto Rico and the Philippines after the Spanish-American War of 1898, both supporters and opponents of imperialism argued their case partly in racial terms.[57] Anti-imperialists (predominantly southerners) argued against incorporating "inferior races" into the American body politic.[58] Yet imperialism's defenders intended no such thing. They supported territorial acquisition in the racial terms of Manifest Destiny and rejected extension of full citizenship rights to persons thus incorporated into the United States—a position that the Supreme Court conveniently accommodated in the *Insular Cases*.[59] With northerners defending imperialism in white supremacist terms, it became increasingly difficult for them to criticize southern racial practices.[60] Thus, for example, one contemporary southerner doubted that the North would undertake another experiment in imposing egalitarian racial views on the South after the nation's experience in the Philippines.[61]

A third factor tending to make northern whites more sympathetic toward southern racial policies was the immigration of millions of southern and eastern Europeans (disproportionately Catholic and Jewish) beginning in the 1880s and accelerating dramatically around the turn of the century.[62] Northerners concerned about the dilution of "Anglo-Saxon racial stock"[63] were attracted to southern solutions to the race problem. One Mississippi delegate to the 1903 annual meet-

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57. *See* PAUL GORDON LAUREN, POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION 64-70 (1988).

58. *See, e.g.*, FREDRICKSON, *supra* note 39, at 305-06; LAUREN, *supra* note 57, at 60-63; Christopher Lasch, *The Anti-Imperialists, the Philippines, and the Inequality of Man*, 24 J. SO. HIST. 319 (1958).

59. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901) (limiting the Constitution's applicability to newly acquired territory). On the extent to which the *Insular Cases* represented a repudiation of traditional notions of the Constitution following the flag, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 72-89 (1996).

60. *See* THORNBROUGH, *supra* note 49, at 315; WOODWARD, STRANGE CAREER, *supra* note 40, at 72-73.

61. *See* Clarence H. Poe, *Suffrage Restrictions in the South: Its Causes and Consequences*, 175 NO. AM. REV. 534, 542 (1902); *see also* Schmidt I, *supra* note 28, at 452-53 ("As Republicans and Progressives rallied behind imperialist adventures abroad that brought eight million nonwhites under force of American arms, they took up characteristic Southern attitudes toward black people."); Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 844 (1982) [hereinafter, Schmidt III] (quoting the South Carolina politician Pitchfork Ben Tillman to similar effect).

62. *See* Schmidt I, *supra* note 28, at 453 (noting that a "growing apprehension about waves of immigrants from southern and eastern Europe found an outlet in crude racial antipathies that led many among the Northern, urban middle classes to look with quickened sympathy on the racial anxieties of Southern whites"); LAUREN, *supra* note 57, at 41, 60-64; LOFGREN, *supra* note 36, at 99.

63. CARL DEGLER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT 48-49 (1991).

ing of the National American Woman's Suffrage Association nicely captured this dynamic when she observed that

> [j]ust as surely as the North will be forced to turn to the South for the nation's salvation [on account of the purity of its Anglo-Saxon blood], just so surely will the South be compelled to look to its Anglo-Saxon women as a medium through which to retain the supremacy of the white race over the African.[64]

The demise of the Republican Party's traditional commitment to civil rights was a fourth factor in the nation's acquiescence in southern racial practices, though it is difficult to separate cause from effect. That is, deteriorating Republican Party attitudes toward civil rights are partly attributable to the growing racism of its northern constituents, which reflected some of the other factors discussed above. But the Party's slackening commitment to racial equality is also attributable to the changing political geography of the nation in the mid-1890s, and thus should be seen as an independent contributing factor in the deterioration of race relations. Specifically, the 1894 congressional elections and the 1896 presidential contest yielded an electoral realignment, from which Republicans emerged with reasonably secure control over the national government (lasting until the 1930s). Northern states that had been evenly divided between Democrats and Republicans from 1874 to 1894 now became reliably Republican, thus removing the Party's incentive to bargain for black votes, which in the 1870s and 1880s occasionally had represented the margin of difference in tightly contested states.[65]

From this perspective, the congressional defeat of the Lodge Elections Bill in 1890-91 should be seen as the last gasp effort of the old Republican Party to secure southern blacks' rights.[66] No similar exertion was made until the first serious effort to enact anti-lynching legislation in the early 1920s. The altered Republican attitude toward race in the 1890s was demonstrated in many ways, including the

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64. *See* AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 202 (1965).

65. For this paragraph, see GERBER, *supra* note 48, at 338; KATZMAN, *supra* note 52, at 196; DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970, at 70 (1982); THORNBROUGH, *supra* note 49, at 315; Meier & Rudwick, *East Orange*, *supra* note 53, at 25, 31.

For a description of blacks effectively using their balance of power leverage in the 1870s and 1880s, see *infra* note 91 and accompanying text.

66. *See* Richard E. Welch, Jr., *The Federal Elections Bill of 1890: Postscripts and Prelude*, 52 J. AM. HIST. 511, 525 (1965) (noting that the Lodge bill was "the last significant effort in behalf of equal political rights for the American Negro," and with its defeat the Republican Party "abdicated the field of civil rights legislation"). The political history of the Lodge bill is usefully described in GROSSMAN, *supra* note 50, at 143-56.

McKinley Administration's decision to court southern whites with patronage positions traditionally allocated to southern blacks; McKinley's emphasis in his second inaugural address on sectional reconciliation and his silence on black rights; the Party's retrogressive position on black voting rights in its 1900 platform; and the increasingly lily white hue of *northern* state Republican parties.[67] As we shall see, the Republican Party's historical commitment to racial equality continued to deteriorate through the Progressive years and arguably throughout the 1920s.

A fifth factor contributing to the downward spiral in American race relations was the triumph of social Darwinism and theories of scientific racism, though again it is difficult to separate cause from effect.[68] Most contemporary social scientists were convinced that higher rates of crime, venereal disease, and poverty among blacks were attributable to factors endemic to their race, rather than to environment or culture.[69] Indeed, many contemporaries, influenced by social Darwinism, predicted the ultimate extinction of the black race.[70] Whites who a generation earlier might have favored efforts to educate and improve the black race now endorsed quarantining or eliminating blacks because their social Darwinism condemned efforts at improvement as futile.[71]

A couple of other factors also contributed to the worsening of race relations around the turn of the century. A growing desire for sectional reconciliation could be satisfied only by extending "home

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67. *See* GERBER, *supra* note 48, at 247, 364; THORNBROUGH, *supra* note 49, at 315-16. It is instructive to note the progressively briefer and more tepid voting rights planks contained in Republican Party platforms from 1888 to 1900. *See* NATIONAL PARTY PLATFORMS, 1840-1972, at 80, 93-94, 109, 123 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1975) (reprinting the platforms).

68. *See, e.g.*, DEGLER, *supra* note 63, at ch.1; FREDRICKSON, *supra* note 39, at 228-56; LOFGREN, *supra* note 36, at 99, 104; Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624; Schmidt I, *supra* note 28, at 453 (noting that "[p]erhaps the most important impetus for the hardening of Northern attitudes toward black people was the vogue of Darwinism").

Degler plainly views scientific attitudes as more effect than cause. *See, e.g.*, DEGLER, *supra* note 63, at viii. Fredrickson is less explicit but seems to incline toward a similar view. *See* FREDRICKSON, *supra* note 39, at 254-55, 329-31. Hovenkamp, on the other hand, appears to regard science as more of an autonomous factor—that is, a cause, rather than effect, of deteriorating racial attitudes.

69. *See* DEGLER, *supra* note 63, at 14-19; FREDRICKSON, *supra* note 39, at 228-55; LOFGREN, *supra* note 36, at 99-111.

70. *See* FREDRICKSON, *supra* note 39, at 245-54; MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933, at 252 (1994); LAUREN, *supra* note 57, at 48; LOFGREN, *supra* note 36, at 107-11.

71. *See* DEGLER, *supra* note 63, at 23-25; LOFGREN, *supra* note 36, at 107-11; Schmidt I, *supra* note 28, at 453.

rule" to white southerners on the race question.[72] Manifest Destiny and the Spanish-American war, which produced the usual nationalist effect on Americans, may have promoted this desire for sectional reconciliation.[73] One important manifestation of this commitment was Republican President William Howard Taft's decision to elevate Associate Justice Edward D. White, a former Confederate officer and Redeemer Democrat, to the Chief Justiceship in 1910—a move that contemporaneously would not have appeared auspicious for the cause of civil rights.[74] Another factor that may have contributed to northerners' increased willingness to acquiesce in southern racial practices was the demise of the last remnants of an abolitionist generation that had been genuinely committed to racial equality.[75]

This was the extralegal context within which the Supreme Court decided *Plessy*. The Court's decision was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from the nation.[76] Our foremost academic authority on *Plessy*, Charles Lofgren, observes that "the nation's press met the decision mainly with apathy."[77] Even in an earlier era characterized by a relatively greater commitment to racial equality, state and lower federal courts generally had construed the Equal Protection Clause (as well as the common law and the Civil Rights Act of 1875) to permit separate but equal facilities.[78] The Supreme Court was not about to rule otherwise as American race relations began a long spiral downwards.

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72. *See* WOODWARD, STRANGE CAREER, *supra* note 40, at 70 (explaining the desire for sectional reconciliation as a product of northern liberals' desire to deprive "reactionary" Republican politicians of the race issue which they used to rally the Republican faithful); *id.* at 71 (explaining contemporaneous Supreme Court decisions as part of a similar effort to achieve sectional reconciliation).

73. *See* GERBER, *supra* note 48, at 361-62 (noting that President McKinley began to court the white South in 1899 as a result of the sectional reconciliation fostered by the Spanish-American War, visiting Atlanta te praise southern traditions and salute Confederate Civil War heroes); *id.* at 364 (noting that McKiuley in his Second Inaugural spoke of sectional reconciliation but not of black rights); WOODWARD, STRANGE CAREER, *supra* note 40, at 70-74.

74. *See* Schmidt I, *supra* note 28, at 460.

75. *See* HOMEL, *supra* note 48, at 5.

76. *See* Schmidt I, *supra* note 28, at 469 (noting *Plessy* "was greeted by the Nation with hardly a ripple of notice").

77. *See* LOFGREN, *supra* note 36, at 5; *id.* at 196-98; *see also* MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 482 (1988) (noting that while the *Civil Rights Cases* of 1883 had elicited a strong protest in some parts of the North, "the *Plessy* decision caused hardly a ripple").

78. *See* LOFGREN, *supra* note 36, at 200; Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896*, 28 AM. J. LEG. HIST. 17, 25-27, 30-35, 38 (1984).

III. CONTEXTUALIZING THE PROGRESSIVE ERA RACE CASES

The question for us now is how to interpret Supreme Court decisions fifteen to twenty years later that seemed to represent significant victories for the cause of civil rights. One might understand those decisions in any of three ways—as products of a changed sociopolitical context, a disparity between the racial views of the Justices and those of popular culture, or a minimalist commitment to constitutionalism. On this last account, even a Court relatively unsympathetic toward racial equality might feel bound to invalidate racist practices in plain contravention of the constitutional text and original intent. White southerners indicated their appreciation of this point by turning to disfranchisement devices that fell short of facially race-based exclusions from the suffrage, which they feared courts would invalidate under the Fifteenth Amendment.[79] *Plessy*, on the other hand, had not presented the Court with such a case. "Separate but equal" is not obviously incompatible with "equal protection of the laws," and the original understanding of the Fourteenth Amendment plainly had tolerated segregation in at least some settings, such as public education.[80] Thus, when *Brown* effectively overruled *Plessy*, one could be substantially certain that it was sociopolitical factors, rather than "law," which impelled that result.[81] With regard to the Progressive era race cases, though, one cannot reach any definitive conclusion; measuring the extent to which "law" compelled those results is impossible, and thus one has no means of distinguishing the influence upon the Justices of legal as opposed to extralegal forces. While the point is contestable, my sense is that given the continued deterioration in race relations during the Progressive era, and the limits of the potential gap between the racial views of the Justices and those of the public, the Court's decisions should be seen as a product of a minimalist commitment to constitutionalism. That is, the racial practices at issue were so obviously unconstitutional that

79. *See* Schmidt III, *supra* note 61, at 836.

80. As to whether the original understanding of the Fourteenth Amendment barred racial segregation in public schools, compare Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (affirmative), with Klarman, *supra* note 43 (negative). The weight of scholarly opinion is, as Professor McConnell acknowledges, heavily against him.

81. *See* Klarman, *Brown*, *supra* note 10, at 13-71. Interestingly, internal evidence seems to confirm that the Justices themselves appreciated both that legal sources could not readily justify the result in *Brown* and that sociopolitical factors were pushing the country toward greater racial equality. I have summarized this evidence in Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 458 (1994) (book review).

even a Court relatively unsympathetic to racial equality felt bound to invalidate them.

Having said this, one qualification is in order. The sociopolitical context of the Progressive era race cases poses something of a paradox. One can detect during this period the emergence of extralegal factors that ultimately would make possible the interment of Jim Crow. Yet these factors are discernable in the Progressive era only with the aid of historical hindsight; they were in incipient stages, and it strains credulity to suggest that they significantly influenced the Court's civil rights decisions (even if one believes, as I think is plausible, that the Justices are among the first in society to feel the force of these sorts of changes).[82] For those actually living through the Progressive era, race relations appeared to have reached a post-Civil War nadir; conditions were appreciably worse than they had been, for example, at the time of *Plessy*.[83] In light of this extralegal context, then, one must explain the Court's Progressive era race decisions as a product either of a minimalist commitment to constitutionalism or of one of the largest gaps between judicial and popular attitudes in American history.[84] I shall argue for the former interpretation. Yet whichever view one accepts, it should be possible to agree upon the decisions' limited impact on American race relations. In terms of concrete consequences, as opposed to symbolism, the Court's rulings made almost no difference in the lives of African-Americans.

A. Incipient Forces for Racial Change

I shall first describe some of the extralegal forces that, while only in preliminary stages of development during the Progressive era, ultimately would combine to transform American race relations. Then, I shall turn to a description of the sorry state of actual racial practices during the second decade of the twentieth century.

A particularly momentous force for racial change in American history was the Great Migration of southern blacks to the North and

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82. Benno Schmidt suggests that the White Court's race decisions might have been influenced by World War I and the Great Migration, but the timing is wrong. Only *Buchanan* came down after the Great Migration had commenced and the country had entered the European war. *See* Schmidt I, *supra* note 28, at 460.

83. *See* COHEN, *supra* note 41, at 297-98 (noting that just as the South was enforcing the starkest forms of racial oppression, it was simultaneously making the "barest beginning" in the opposite direction); Schmidt I, *supra* note 28, at 457 (calling the Progressive era "the worst of times and the best of times for the freedmen").

84. *See* Schmidt I, *supra* note 28, at 446 (noting that "[t]he challenge for constitutional historians is to understand why these decisions occurred at a time when race relations in law, politics, and general social contemplation hit rock-bottom levels of injustice and callousness").

West. Black migration northwards, which had appreciably increased in the 1890s and 1900s, exploded in 1916 owing to World War I. President Wilson's preparedness campaign put strains on the industrial labor force at the same time that submarine warfare dramatically curtailed European immigration. As a result, significant industrial opportunities opened for blacks in northern cities for the first time ever.[85] Half a million southern blacks migrated northwards during the second decade of the century.[86] The black population of many northern cities more than doubled as a result.[87] Over the next half-century, 500,000 would grow to 5,000,000. In 1910, 90% of American blacks lived in the South; by 1960, that figure was down to 50%.[88]

I do not mean to suggest that this Great Migration had only positive consequences for American race relations. As we already have seen, northern attitudes toward race became more southern as black numbers increased—a development confirmed by the northern race riots that accompanied World War I.[89] Yet it is impossible to miss the overall positive effect of the Great Migration on American race relations. First, the black migration northwards eventually would produce a potent northern black political presence. Blacks relocated from a region where they had been almost universally disfranchised to one where they not only voted without racial restriction but also would often represent the margin of difference between the two major political parties (after the electoral realignment of the

85. The best book on the Great Migration is GROSSMAN, *supra* note 48. I have also relied on the discussions in COHEN, *supra* note 41, at 103-08; DITTMER, *supra* note 39, at 186-91; MCADAM, *supra* note 65, at 74-75, 77-81; MCMILLEN, *supra* note 42, at 263-67; Guy B. Johnson, *The Negro Migration and Its Consequences*, 2 J. SOC. FORCES 404 (1924). Historians have disagreed about whether push or pull factors mattered more in producing the Great Migration. Grossman seems inclined to downplay pull factors. *See* GROSSMAN, *supra* note 48, at 14-18, 69. But given that southern blacks had endured oppression for a long time without leaving the South, it seems hard to deny that the proximate cause of the huge exodus that began in the 1910s was the sudden opening of industrial opportunities in the North as a result of World War I. *See* COHEN, *supra* note 41, at 108 (calling the escape from oppression, violence, and disfranchisement "fringe benefits" of a migration that was primarily driven by economic motivations); *id.* at 105 (noting the unlikelihood that the pre-Great Migration black movement northwards was driven primarily by racial oppression given how little of it originated in the deep South); *see also* Jack Temple Kirby, *The Southern Exodus, 1910-1960: A Primer for Historians*, 49 J. SO. HIST. 585, 589-90 (1983) (discussing factors leading to the migration).

86. *See, e.g.*, GROSSMAN, *supra* note 48, at 3; MCADAM, *supra* note 65, at 78 tbl.5.2; ROBERT L. ZANGRANDO, THE NAACP'S CRUSADE AGAINST LYNCHING, 1909-1950, at 36 (1980).

87. *See* GERBER, *supra* note 48, at 470 (Cleveland and other Ohio cities); GROSSMAN, *supra* note 48, at 4 (Chicago and Detroit); SPEAR, *supra* note 48, at 40 (Chicago).

88. *See* MCADAM, *supra* note 65, at 77, 78 tbl.5.2; *see also* Kirby, *supra* note 85, at 594.

89. *See, e.g.*, SPEAR, *supra* note 48, at 146.

1930s).[90] Indeed, as early as the 1870s and 1880s, when northern states had been electorally competitive and low black migration had quieted white racial fears, northern blacks had used the ballot to extract political benefits such as patronage appointments, state laws barring segregation in public accommodations and schools, and occasionally even election to public office.[91]

The much larger black political presence issuing from the Great Migration translated into correspondingly greater political clout. During the Progressive era, this political power was largely confined to the local level. In Chicago, for example, where the city's black population doubled within just a few years during the 1910s, blacks reaped the rewards of providing the margin of victory for the mayoral candidacies of Republican "Big Bill" Thompson: civil service positions proportionate to black percentages of the population, appointment of substantial numbers of black police officers, considerable school desegregation, and vocal mayoral criticism of discrimination in public accommodations.[92] Similarly, in New York City an explosion of black migration into Harlem between 1910 and 1930 produced political power sufficient to secure many concessions, including the appointment of large numbers of black policemen and firemen, access for black doctors to Harlem Hospital, the establishment of a training school for black nurses, the enactment of civil rights laws extending the reach of earlier equal accommodations provisions, the creation of the first black National Guard unit, the construction of new playgrounds and parks for the black community, and the elevation of blacks to the state legislature and state bench.[93]

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90. *See* WILLIAM C. BERMAN, THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION 80-81 (1970); LAWSON, *supra* note 39, at 346; MOON, *supra* note 39, at 10, 35, 198; NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 181-83 (1983); Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7, 12 (1965) (discussing the electoral realignment of the 1930s).

91. The best account of these developments is GROSSMAN, *supra* note 50, at 60-106. Also very helpful are GERBER, *supra* note 48, at 331-36; KATZMAN, *supra* note 52, at 175-207; THORNBROUGH, *supra* note 49, at 288-317.

92. *See* HAROLD F. GOSNELL, NEGRO POLITICIANS: THE RISE OF NEGRO POLITICS IN CHICAGO 37, 40-41, 55-56, 80-81, 200, 204, 213, 237, 250-51, 367-68 (1935); GROSSMAN, *supra* note 48, at 176-77; SPEAR, *supra* note 48, at 35-36, 120-25, 187-91; WILLIAM M. TUTTLE, JR., RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919, at 124-208 (1970); *see also* COHEN, *supra* note 41, at 103 (black patronage in Chicago and Detroit); THOMAS C. COX, BLACKS IN TOPEKA, KANSAS 1865-1915: A SOCIAL HISTORY 189-90 (1982) (Topeka, Kansas); KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930, at 245-47, 252, 271-74 (1976) (Cleveland); ROBERTA SENECHAL, THE SOCIOGENESIS OF A RACE RIOT: SPRINGFIELD, ILLINOIS IN 1908, at 81 (1990) (Springfield, Illinois).

93. *See* OSOFSKY, *supra* note 48, at 159-78.

Some years later this burgeoning black political power would make itself felt at the national level. The first inkling of what was to come was the introduction of an anti-lynching bill in 1918 by a Republican congressman from St. Louis with a large black constituency.[94] There soon followed the election in 1928 of the first black congressman in the twentieth century (from Chicago);[95] the Senate defeat in 1930 of the nomination of Judge John Parker to the United States Supreme Court partly as a result of an NAACP campaign opposing the candidate on the ground of his alleged racism;[96] the failure in 1944 of the Democratic vice-presidential nomination campaign of South Carolinian James Byrnes partly due to his unacceptability to northern blacks;[97] and President Harry S. Truman's decision after the disastrous 1946 off-year elections to bid for black votes with a strong civil rights platform, ultimately leading to his famous executive orders in 1948 desegregating the military and the federal civil service.[98] Black political power at the national level was most prominent after World War II, but it was attributable directly to the Great Migration that commenced in 1916.

Black migration northwards augnred well for the cause of civil rights in other ways as well. Better economic opportunities had been the principal inspiration for the Great Migration. Black economic advances would facilitate the social protest movement of subsequent decades. A larger northern black population meant a broader economic base for black-owned businesses and black professionals such as teachers, ministers, lawyers, and doctors, who one day would sup-

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94. *See* ZANGRANDO, *supra* note 86, at 42-43; George C. Rable, *The South and the Politics of Antilynching Legislation, 1920-1940*, 51 J. SO. HIST. 201, 203-04 (1985).

95. *See* GOSNELL, *supra* note 92, at 80-81.

96. *See* KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER 34, 38, 48 (1990); MOON, *supra* note 39, at 109-12; Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213, 217-22, 230 (1963).

97. *See* MICHAEL BARONE, OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN 175 (1990); ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 165-68 (1994); DAVID MCCULLOUGH, TRUMAN 297, 302-03, 311-12 (1992).

98. *See* BERMAN, *supra* note 90, at 79-135; Harvard Sitkoff, *Harry Truman and the Election of 1948: The Coming of Age of Civil Rights in American Politics*, 37 J. SO. HIST. 597 (1971). Truman biographers have been understandably loath to adopt the political explanation for his civil rights conversion. *See* FERRELL, *supra* note 97, at 292-99; MCCULLOUGH, *supra* note 97, at 587-89. Berman, on the other hand, emphasizes Truman's political motives. *See also* DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT 54-55 (1990) (also emphasizing the political explanation). Other scholars have declined to choose between the political and humanitarian accounts, noting that both may have explanatory power. *See, e.g.*, LAWSON, *supra* note 39, at 120, 137; JOHN F. MARTIN, CIVIL RIGHTS AND THE CRISIS OF LIBERALISM: THE DEMOCRATIC PARTY, 1945-1976, at 78-81 (1979); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 n.14 (1988).

ply much of the leadership for the civil rights movement.[99] Participation in civil rights protest generally requires some measure of economic independence (sorely lacking for most southern blacks, who worked for white planters), leisure time, and disposable income—all of which depend upon an improved economic position, which the Great Migration ultimately afforded.[100] Moreover, blacks quickly discovered how to use economic clout as a lever for social change, beginning with the "don't shop where you can't work" boycotts of the Depression era.[101]

Relocation from South to North also meant a better educated black population—a virtual prerequisite for an effective civil rights movement. Educated people are better able to learn of or imagine a world different from the one they inhabit, and any effective social protest movement requires an educated leadership. In the South, white public opinion strongly opposed black education, black schools were obscenely underfunded, and secondary education for blacks was almost nonexistent. In the North, on the other hand, the political and business elite agreed on the importance of education for all, and black migrants eagerly took advantage of the educational opportunities made available to them. In some cases, northern schools were racially integrated, while in others they were segregated but were more nearly equal than those in the South.[102]

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99. *See* GERBER, *supra* note 48, at 318, 472; GROSSMAN, *supra* note 48, at 129; THORNBROUGH, *supra* note 49, at 360.

100. *See, e.g.*, MCADAM, *supra* note 65, at 135.

101. *See* AUGUST MEIER & ELLIOTT RUDWICK, ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 315-32 (1976); Henry Allen Bullock, *Urbanization and Race Relations*, *in* THE URBAN SOUTH 207, 218 (Rupert P. Vance & Nicholas J. Demerath eds., 1954); *see also* SPEAR, *supra* note 48, at 199 (noting such a campaign originating in Chicago in 1929). For similar use of such boycotts in the South during the civil rights movement of the 1950s and 1960s, see, for example, AMELIA P. BOYNTON, BRIDGE ACROSS JORDAN: THE STORY OF THE STRUGGLE FOR CIVIL RIGHTS IN SELMA, ALABAMA 134-36 (1979) (Selma); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 26, 53, 64 (1986) (Montgomery); NEIL R. MCMILLEN, THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-1964, at 211-12 (1971) (Orangeburg, South Carolina); ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 72, 96, 101-02, 128-29, 131 (1985) (Tuskegee); Glenn T. Eskew, *The Alabama Christian Movement for Human Rights and the Birmingham Struggle for Civil Rights, 1956-1963*, *in* BIRMINGHAM, ALABAMA, 1956-1963: THE BLACK STRUGGLE FOR CIVIL RIGHTS 68-71 (David J. Garrow ed., 1989) (Birmingham).

102. On the points in this paragraph, see JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935, at 22, 25, 95-97, 197-98 (1988); GROSSMAN, *supra* note 48, at 246-51; Michael W. Homel, *Two Worlds of Race? Urban Blacks and the Public Schools, North and South, 1865-1940*, *in* SOUTHERN CITIES, SOUTHERN SCHOOLS: PUBLIC EDUCATION IN THE URBAN SOUTH 251 (David N. Plank & Rick Ginsberg eds., 1990) (noting the reluctance of white southerners to educate blacks and the absence of black bigh schools in the South); *see also* THORNBROUGH, *supra* note 49, at 392 (noting the significant educational progress made by

The Great Migration also improved the lives of black Americans simply by making them visible to the political, economic, and social elite of the nation. In an era of relatively primitive communications, with no radio or television and little in the way of national news magazines, blacks in the southern countryside could be disfranchised, coerced in their labor, cheated out of their fair share of the public school fund, and even lynched without most northern whites being aware of what was transpiring.[103] After the Great Migration of World War I, though, the plight of blacks became more salient to the nation's policymakers. Thus, for example, the horrible northern race riots of 1919 forced the race issue upon the national consciousness to a degree not seen since Reconstruction.[104]

Finally, many historians have suggested that the Great Migration may have had the incidental consequence of tempering black mistreatment in the South. While some white southerners were happy to see blacks exit the region, many in positions of power—most notably, large planters—were not.[105] Thus the Great Migration induced many southern cities and states to promise, and apparently to some unascertainable degree to deliver, ameliorative racial policies such as anti-lynching laws, increased funding for black education, higher agricultural wages, and fairer treatment in the courts.[106]

Before World War I induced a black migration northwards in search of economic opportunity, the South had witnessed an internal migration from countryside to city inspired by similar motives. This migration also was in its incipient stages during the Progressive period, though it was farther along than was the northern migration.[107]

Indiana blacks by the turn of the century, even though the state's segregated schools generally were not equal).

103. On the importance of the twentieth-century communications revolution to the civil rights movement, see Klarman, *Brown*, *supra* note 10, at 49-51 (collecting sources).

104. *See, e.g.*, GROSSMAN, *supra* note 48, at 171-72 (noting that the race riots of 1919 altered the priorities of northern liberal reformers such as Jane Addams, who previously had focused upon problems flowing from urbanization and immigration, but after 1919 were compelled to pay greater attention to race); SPEAR, *supra* note 48, at 129-30 (noting that with the migration of African-Americans to the North, the notion that the "negro problem" would remain a Southern problem was destroyed).

105. William Cohen deftly notes the conflicts within the southern white community over the desirability of black emigration, especially in the context of differing attitudes toward labor control statutes. *See* COHEN, *supra* note 41, at 233-37, 249-50, 298.

106. *See, e.g.*, BRUNDAGE, *supra* note 41, at 209, 229-30; DITTMER, *supra* note 39, at 189; GROSSMAN, *supra* note 48, at 50, 52, 54, 60-61; MCMILLEN, *supra* note 42, at 278-81.

107. *See, e.g.*, DITTMER, *supra* note 39, at 27 (noting that the number of Georgia blacks living in urban areas increased from 160,000 in 1900 to 250,000 in 1920); GROSSMAN, *supra* note 48, at 31 (noting a gradual increase in southern black migration to cities and towns even before World War I); Raymond Gavins, *Urbanization and Segregation: Black Leadership Patterns in Richmond, Virginia, 1900-1920*, 79 S. ATLANTIC Q. 257, 259 (1980) (noting the large increase in

Indeed, it was this internal black migration that produced the residential segregation ordinances that gave rise to the Supreme Court's decision in *Buchanan v. Warley*.[108]

This phenomenon of southern black urbanization ultimately would have momentous consequences for American race relations.[109] Better economic opportunities in cities[110] ultimately led to the creation of a substantial black middle class, which possessed the disposable income and leisure time necessary for involvement in social protest activity. Urban blacks also were far more likely to be economically independent of whites, and thus were better able to challenge the racial status quo without endangering their livelihood.[111] Moreover, blacks received far better education in southern cities than in rural counties.[112]

Southern urbanization, in addition to bettering blacks' economic and educational situation, increased their political power, as suffrage restrictions never had been quite as stringent in southern cities.[113] Urbanization also loosened the restraints on social protest activity, since urban racial norms tended to be somewhat less oppres-

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Richmond's black population between 1900 and 1920). The same phenomenon of black (and white) urbanization took place in the North some decades earlier. *See, e.g.*, GERBER, *supra* note 48, at 272 (noting that the black population of Ohio was 38% urban in 1870 and 74% in 1910).

108. See *infra* noto 299.

109. *See* Bullock, *supra* note 101, at 207; *see also* AYERS, *supra* note 37, at 137 (suggesting that railroad segregation in the South was partially a product of growing urbanization and the increased penetration of railroads); Woodward, *Critics*, *supra* note 40, at 858-60 (conceding that urbanization produced Jim Crow). John Cell has usefully emphasized that segregation and white supremacy are not inconsistent with modernization phenomena such as urbanization and industrialization. *See generally* CELL, *supra* note 39. However, it is possible to believe that segregation, while consistent with and perhaps even immediately inspired by urbanization, was difficult te maintain over the long term in the face of social, political, and economic forces unleashed by urbanization.

110. *See* ANDERSON, *supra* note 102, at 152; Bullock, *supra* note 101, at 210, 215-16.

111. *See, e.g.*, HINE, *supra* note 42, at 56-57 (noting the existence of a thriving black middle class in Houston by the 1920s which was relatively immune from white economic retaliation and had the disposable income to invest in civil rights litigation); *see id.* at 74-75 (noting that Lawrence Nixon, the plaintiff in the first two Texas white primary suits to reach the Supreme Court, was an El Paso physician who was relatively immune from white economic retaliation); *id.* at 130 (noting the same point about Richard Grovey, another plaintiff in white primary litigation, who ran a black barbershop in Houston); MCADAM, *supra* note 65, at 135; Steven F. Lawson, *From Sit-In to Race Riot*, *in* SOUTHERN BUSINESSMEN AND DESEGREGATION 257, 260 (Elizabeth Jacoway & David R. Colburn eds., 1982).

112. *See* CELL, *supra* note 39, at 131-32; DITTMER, *supra* note 39, at 144 (noting that black teachers in the cities were dramatically better qualified than in the countryside); *id.* at 146 (noting that high school education was available to blacks only in the cities); MCADAM, *supra* note 65, at 97-98, 183-84.

113. *See, e.g.*, WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 32 (1989); ALEXANDER HEARD, A TWO-PARTY SOUTH? 195 (1952); LAWSON, *supra* note 39, at 19-20.

sive,[114] as evidenced by the fact that lynchings historically had been largely a rural phenomenon.[115] Finally, urbanization reduced some of the collective action barriers to a social protest movement by placing participants in greater physical proximity, improving their communication and transportation facilities, and creating social networks that could offset some of the intimidating free rider problems that confront any social protest movement.[116] As with black migration to the North, however, the phenomenon of southern black urbanization was only in its incipient stages during the Progressive era, and thus was unlikely to have had much impact on the Supreme Court's decisionmaking.

Blacks were making dramatic educational advances by the Progressive era, even apart from the gains that accrued as a result of urbanization. Black illiteracy for ages ten and over in the South fell from 76.2% in 1880 to 26% in 1920.[117] A South African observer in 1915 was impressed with the extraordinary progress southern blacks had made in terms of literacy and land ownership, which in his view disproved the notion that blacks could not improve themselves as a race.[118] Similarly, Moorfield Storey, the Boston Brahmin who served as NAACP President and appellate advocate during the Progressive era, noted in 1913 the rise in black literacy rates and property ownership and concluded: "No race in the history of the world to my knowledge has made such progress from such beginnings in so short a time."[119] Heightened black literacy was important because an educated leadership generally is necessary for successful social protest

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114. *See, e.g.*, MEIER & RUDWICK, *supra* note 101, at 134 (noting that challenges to segregation or disfranchisement were more practicable in cities like New Orleans, Richmond, or Louisville, where the social environment was less oppressive and where white lawyers handling the case were less likely to be subjected to community censure); Bullock, *supra* note 101, at 220-21; Gavins, *supra* note 107, at 257 (noting that "violent reprisals" were less prevalent in Richmond than in the rural South); Somers, *supra* note 43, at 20-21 (noting a greater fluidity and spirit of tolerance in southern cities, as contrasted with the rural South).

115. *See* AYERS, *supra* note 37, at 156-57; BRUNDAGE, *supra* note 41, at 104, 124, 126-27, 159; MCMILLEN, *supra* note 42, at 230; ZANGRANDO, *supra* note 86, at 9.

116. *See, e.g.*, CELL, *supra* note 39, at 131-32; MCADAM, *supra* note 65, at 77, 128-32 (emphasizing the importance of organizational "integration" for civil rights activity); Bullock, *supra* note 101, at 220-21.

117. *See* ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 7 tbl.2.1 (1990); *see also* ANDERSON, *supra* note 102, at 31 (noting that black illiteracy fell from 95% in 1860 to 30% in 1910); HINE, *supra* note 42, at 56 (noting that black illiteracy in Texas fell from 53.2% in 1890 to just 17.8% in 1920); MCMILLEN, *supra* note 42, at 88 tbl.3.7 (noting that black illiteracy in Mississippi dropped from roughly 50% in 1900 to around 25% in 1930); WYNES, *supra* note 40, at 132 (noting that black illiteracy in Virginia fell from 86% in 1870 to 45% in 1900).

118. *See* CELL, *supra* note 39, at 30-31.

119. Schmidt I, *supra* note 28, at 458 (quoting M. HOWE, PORTRAIT OF AN INDEPENDENT: MOORFIELD STOREY 263 (1932)).

activity,[120] because literacy enhances the chances for coordinating a social movement,[121] and because greater black literacy reduced observable differences between blacks and whites that, to some extent, had provided the impetus for segregation.[122]

Another development with implications for race relations was transpiring in the South during the Progressive era; one might label this the force of "modernization."[123] By the second decade of the twentieth century, the annual number of lynchings in the South had dropped significantly (although racial tensions inflamed by World War I produced a resurgence).[124] On one view, the phenomenon of lynching depended on weak social controls—a state of affairs that was inconsistent with the forces of urbanization and industrialization that were slowly impacting the South, as they had the North a generation or two earlier.[125] By the end of World War I, one could find southern politicians and newspapers vocally condemning lynching,[126] and the South's first significant interracial organization, the Commission on

120. *See* MCADAM, *supra* note 65, at 97-98, 183-84; JACK L. WALKER, SIT-INS IN ATLANTA: A STUDY IN NEGRO REVOLT 1-2 (1964).

121. For example, the nation's leading black newspaper, the *Chicago Defender*, circulated widely in Mississippi and played a critical role in mobilizing the Great Migration. *See* GROSSMAN, *supra* note 48, at 82-88; *id.* at 80 ("[T]he *Defender* transmitted information through the black South on a scale hitherto unknown.").

122. Thus, for example, Justice Robert Jackson's draft concurrence (never published) in *Brown* observed that segregation "has outlived whatever justification it may have had." *See* Jackson Draft Opinion, *Brown v. Board of Educ.* 1, 19-21 (March 15, 1954) (Library of Congress, Jackson Papers, Box 184, case file: segregation cases) (on file with author). He continued:

> Certainly in the 1860's and probably throughout the Nineteenth Century the Negro population as a whole was a different people than today. Lately freed from bondage, they had little opportunity as yet to show their capacity for education or even self-support and management. . . . Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man.

Justice Jackson thus concluded that black educational and cultural advances deprived school segregation of that rational basis which the Equal Protection Clause requires of all state legislation. I am grateful to William E. Jackson and Mary Jackson Craighill for permission to quote from this document.

123. Again John Cell usefully cautions against the facile assumption that segregation is the product of a rural, preindustrial, premodern society; its history in South Africa disproves this assumption. *See* CELL, *supra* note 39, at 4-5, 133-34, 232. Yet Cell does not refute the notion that the forces of modernity, while temporarily reconcilable with white supremacy, ultimately sowed the seeds of its destruction.

124. *See* ZANGRANDO, *supra* noto 86, at 6-7 tbl.2; *see also* BRUNDAGE, *supra* note 41, at 141 (noting that by 1910 lynchings were exceedingly rare in Virginia).

125. *See* BRUNDAGE, *supra* note 41, at 9, 70, 104, 126-27, 210-11.

126. *See* DITTMER, *supra* note 39, at 208-09 (noting the governor of Georgia's celebrated denunciation of lynching in 1919); ZANGRANDO, *supra* note 86, at 46.

Interracial Cooperation, had been established to campaign against it.[127]

Another important extralegal factor conducive to changed race relations was World War I, though the timing of America's entrance into the War makes it implausible to believe that this factor had any influence on the Court's Progressive era race decisions. The "war to make the world safe for democracy" had unmistakable ideological connotations for race, just as had an earlier war to end slavery[128] and as would a later war against Nazi fascism.[129] W.E.B. DuBois wrote in 1919: "Make way for Democracy! We saved it in France, and by the great Jehovah we will save it in the United States of America or know the reason why."[130] Similarly, black journalist Monroe Trotter urged that the United States focus less on making the small nations of Europe safe for democracy and more on "making the south safe for the Negroes."[131] Blacks displayed a greater militancy in asserting their rights during the War,[132] especially those blacks wearing their na-

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127. *See* BRUNDAGE, *supra* note 41, at 234; DITTMER, *supra* note 39, at 208; MCMILLEN, *supra* note 42, at 313-14; ZANGRANDO, *supra* note 86, at 11. Even before the War, the Southern Sociological Congress, founded in 1912, held interracial meetings, condemned lynching, and called for improvements in black education and better treatment in the courts. *See* BRUNDAGE, *supra* note 41, at 216; KELLER, *supra* note 70, at 259.

128. On the egalitarian ideological consequences of the Civil War, including on issues such as black voting and desegregation of common carriers, see FONER, *supra* note 49, at 8-10, 27-28; WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 81, 85 (1965); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 6 (1990); JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 29-37 (1990); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 494-97 (1988); THORNBROUGH, *supra* note 49, at 192, 200, 238; Fischel, *supra* note 49, at 288-89.

129. On the egalitarian ideological consequences of World War II, see MARTIN, *supra* note 98, at 53; AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942-1968, at 4 (1973); MCMILLEN, *supra* note 42, at 317; Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); Dudziak, *supra* note 98, at 68-70; *see also* Klarman, *Brown*, *supra* note 10, at 23-27 (listing additional sources).

Cell is right to point out that Americans managed to live with ideological dissonance for a long time—at least since the Declaration of Independence. *See* CELL, *supra* note 39, at 249. Yet it seems plain that, historically, this dissonance has become more difficult to endure during wartime.

130. Schmidt I, *supra* note 28, at 457 (quoting CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 334 (A. Blaustein & R. Zangrando eds., 1968)).

131. William Jordan, *"The Damnable Dilemma": African-American Accommodations and Protest During World War I*, 81 J. AM. HIST. 1562, 1574 (1995).

132. *See* LAUREN, *supra* note 57, at 89-90; MEIER & RUDWICK, *supra* note 101, at 232; ELLIOTT M. RUDWICK, RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917, at 221 (1964); ZANGRANDO, *supra* note 86, at 51; Gavins, *supra* note 107, at 270-71. William Tuttle attributes the race riots of 1919 partially to the increased black militancy that flowed from the war. *See* TUTTLE, *supra* note 92, at 217-22.

tion's military uniform.[133] The NAACP received a tremendous boost from this heightened militancy, expanding its membership and opening new branches in scores of southern cities.[134] The War provided an occasion for the NAACP (successfully) to urge that President Wilson speak out against lynching[135] and (unsuccessfully) to lobby the national government to abolish Jim Crow for black servicemen on southern trains.[136] Anxious whites retaliated against this new black assertiveness with a furious defense of the racial status quo.[137] One manifestation of this white backlash was a surge in the number of lynchings between 1917 and 1919,[138] an astonishing number of which involved returning black soldiers still in uniform.[139]

As we have seen, then, a variety of forces were in motion during the Progressive era that ultimately would have a transformative

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133. *See* GROSSMAN, *supra* note 48, at 178-79 (noting that returning black soldiers were angered that racial conditions had not improved after they had voluntarily suspended their grievances during the War to demonstrate loyalty to their country and that they were no longer willing to tolerate the traditional harassment inflicted by southern whites upon blacks); MCMILLEN, *supra* note 42, at 303 (noting black servicemen invoking the notion that if they were good enough to fight and perhaps die for their country, they were good enough to vote); TUTTLE, *supra* note 92, at 215-19; Stephen H. Norwood, *Bogalusa Burning: The War Against Biracial Unionism in the Deep South, 1919*, 63 J. SO. HIST. 591, 611 (1997).

The Houston race riot of 1917 was a product of the struggle between black soldiers possessed of the rising expectations that the War induced and southern whites determined to maintain the racial status quo. The leading account is ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976). For a similar conclusion, see C. Calvin Smith, *The Houston Riot of 1917, Revisited*, 13 HOUSTON L. REV. 85 (1991).

134. *See* BRUNDAGE, *supra* note 41, at 184, 230 (noting the explosion in the number of NAACP branches in Virginia and Georgia during World War I); DITTMER, *supra* note 39, at 174 (noting that the NAACP did not take hold in Georgia until World War I); *id.* at 206 (noting that several NAACP branches were organized in Georgia during the War and that NAACP membership in the state increased from 700 to 3000 over an 18-month period).

135. *See* Jordan, *supra* note 131, at 1575. Civil rights protest also forced the federal government to establish a Colored Officers' Training Camp in Des Moines, Iowa. *See* HAYNES, *supra* note 133, at 35-36.

136. *See* BARNES, *supra* note 43, at 17.

137. *See* DITTMER, *supra* note 39, at 204 (noting a Georgia senator predicting in December 1918 that blacks returning from honorable military service would demand rights like the suffrage and urging whites to take steps to prevent such agitation); HAYNES, *supra* note 133, at 65, 70, 86-87 (noting that white police officers in Houston were determined to put black soldiers encamped near the city in their place); NEIL A. WYNN, THE AFRO-AMERICAN AND THE SECOND WORLD WAR 9 (1975).

138. *See* TUTTLE, *supra* note 92, at 22; ZANGRANDO, *supra* note 86, at 35 (noting 36 lynchings in 1917, 60 in 1918, and 76 in 1919); *see also* BRUNDAGE, *supra* note 41, at 228 (noting that 39 blacks were lynched in Georgia in 1918 and 1919, and "race riots broke out in cities and towns throughout" the state).

139. *See* DITTMER, *supra* note 39, at 204; MCMILLEN, *supra* note 42, at 306 (noting that at least three of the twelve lynchings in Mississippi in 1919 were of black servicemen); WYNN, *supra* note 137, at 9-10; Norwood, *supra* note 133, at 611 (noting at least 10 such incidents in the deep South during or immediately after the War). The notoriously racist Senator James K. Vardaman from Mississippi observed that "whites are opposed to putting arrogant, strutting representatives of the black soldiery in every community." Smith, *supra* note 133, at 85.

effect on American race relations. But these forces were, at most, in their incipient stages at the time of the Court's Progressive era race cases. Of these decisions, only *Buchanan v. Warley* (November 1917) was rendered after the commencement of the Great Migration (spring 1916) and the nation's entrance into World War I (April 1917). The internal migration of southern blacks to cities, while beginning somewhat earlier, was not sufficiently advanced by the second decade of the century to have had any significant impact on the sociopolitical context within which the Justices operated. When we look in the next section at actual racial practices rather than the incipient forces for racial change that were unleashed during this period, it becomes clear that the background context for the Progressive era race cases was appreciably *worse* than that surrounding *Plessy*. Thus, the civil rights victories of the 1910s cannot be attributed to any general improvement in social mores regarding race; one must look elsewhere for an explanation.

B. Actual Racial Practices

An investigation of actual racial practices during the Progressive era can be conveniently divided into northern, southern, and national arenas. At all three levels, we shall discover that race relations had deteriorated further since the turn of the century and seemed caught in an endless downward spiral.[140]

We already have noted that the gradual rise in black migration northwards that began in the 1890s had produced an increase in racial discrimination in public accommodations and burgeoning demands for the introduction of racial segregation into public schools. As black migration northwards increased in the 1900s and exploded in the 1910s, reported instances of racial discrimination and segregation escalated.[141] Even former abolitionist enclaves such as Ohio's

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140. *See* Schmidt I, *supra* note 28, at 452 (noting that racism during the Progressive era "took deeper roots in American society than at any time since the Civil War").

141. *See* COX, *supra* note 92, at 167-68 (noting the first serious effort in 1908 to extend segregation in Topeka from grade schools to junior and senior high schools, and to amend state law in 1912-13 to permit segregation of elementary schools in smaller cities); GERBER, *supra* note 48, at 257-70 (providing numerous illustrations of spreading discrimination and segregation in Ohio in the first two decades of the twentieth century); MEIER & RUDWICK, *supra* note 101, at 310 n.4 (noting black boycotts against the introduction of segregation into previously integrated schools in Wichita in 1906; East Orange, New Jersey, in 1905-06; Alton, Illinois, from 1897-1908; and Oxford, Pennsylvania, in 1909); SPEAR, *supra* note 48, at 205-07 (Chicago); Douglas, *supra* note 50, at 705-10 (noting dramatic spread of segregation during the first decades of the twentieth century in schools in New Jersey, Pennsylvania, Ohio, and Illinois); Randal M. Jelks, *Making Opportunity: The Struggle Against Jim Crow in Grand Rapids, Michigan, 1890-1927*, 19 MICH. HIST. REV. 23, 27 (1993) (noting that Grand Rapids Medical

Western Reserve began to experience racial segregation for the first time in their history.[142] A Cleveland newspaper reported in 1908 that most of the city's better downtown restaurants and hotels had closed their doors to blacks.[143] It is worth noting that although virtually all of this public accommodations discrimination and school segregation violated northern state statutes or constitutions, successful legal challenges were rare and generally produced little in the way of practical results.[144] In 1913 many northern state legislatures debated reenactment of anti-miscegenation laws that had been repealed several decades earlier—a response to the marriage of controversial black boxing champion Jack Johnson to a white woman.[145]

Economic opportunities for working class northern blacks were also contracting in the period before World War I. While industrial opportunities for northern blacks had always been scarce (except as strikebreakers), particular skilled jobs had been open, and indeed occasionally had become special black preserves—such as the occupations of barber, waiter, coachman, and chef. As immigration from eastern and southern Europe exploded in the late nineteenth and early twentieth centuries, however, many of these jobs began going to white immigrants.[146]

Blacks also suffered from the rising power of labor unions, which generally excluded them from membership and sought to secure jobs for their white members that previously had been unoffi-

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College in Michigan began refusing to admit black students in 1908); Meier & Rudwick, *Alton, Illinois*, *supra* note 53, at 394 (noting that in the wake of the Great Migration, many northern school boards actively promoted policies of racial segregation).

The trend teward northern school segregation accelerated in the 1920s and 1930s. *See* MEIER & RUDWICK, *supra* note 101, at 312-14; Douglas, *supra* note 50, at 706 n.108, 707 n.109, 708.

142. *See* Douglas, *supra* note 50, at 707 (Cleveland and Columbus); *id.* at 706 n.105 (northern New Jersey).

143. *See* GERBER, *supra* note 48, at 261 (reporting "more than a half dozen cases of hotel and restaurant refusals on account of race"); Douglas, *supra* note 50, at 701-04.

144. *See* GERBER, *supra* note 48, at 257; SPEAR, *supra* note 48, at 41-42, 44, 207; Douglas, *supra* note 50, at 704-10, 717 (noting that school segregation spread notwithstanding northern state laws to the contrary and that even successful legal challenges had little practical effect). Virtually all northern states had enacted their own public accommodations laws after the Supreme Court invalidated the 1875 Civil Rights Act in the *Civil Rights Cases*. *See* GROSSMAN, *supra* note 50, ch. 3; Fischel, *supra* note 49, at 372-87. In addition, virtually all northern states by the 1880s had enacted laws or constitutional provisions barring school segregation. *See also* Klarman, *supra* note 43, at 1904 n.58 (collecting sources).

145. *See* COX, *supra* note 92, at 167; GERBER, *supra* note 48, at 269-70; KATZMAN, *supra* note 52, at 92-93 n.23; SPEAR, *supra* note 48, at 88.

146. *See, e.g.*, COHEN, *supra* note 41, at 101-02; GERBER, *supra* note 48, at 62, 298-99, 306; SPEAR, *supra* note 48, at 31, 111; THORNBROUGH, *supra* note 49, at 350 & n.6; Fischel, *supra* note 49, at 478-79.

cially designated as black.[147] Race riots broke out in several northern cities during the first decade of the twentieth century, principally as a result of the increased competition for jobs and housing that rising black migration from the South produced.[148] These conflagrations culminated during World War I with the deadly East St. Louis race riot of 1917 and the Chicago riot of 1919, the latter of which was one of more than twenty riots that broke out that year in northern cities.[149] Northern race relations had deteriorated so badly that some blacks began questioning their traditional commitment to integrationist ideals.[150]

Race relations in the South also continued to worsen in the two decades following *Plessy*. The formal disfranchisement campaign that began with the Mississippi constitutional convention of 1890 culminated in the first decade of the twentieth century, as Alabama, North Carolina, Virginia, and finally Georgia moved to disfranchise blacks through a combination of poll taxes, literacy tests, white primaries, and other devices.[151] Blacks still were voting in significant numbers in many southern states at the time of *Plessy*; this was no longer the case by 1910.[152]

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147. *See* COHEN, *supra* note 41, at 98-100; GERBER, *supra* note 48, at 74-78, 302-03; SPEAR, *supra* note 48, at 34-35, 159; THORNBROUGH, *supra* note 49, at 351-57; David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 94-99 (1994) (describing how white-dominated labor unions used the licensing process to exclude black competition in the plumbing trade in the first decades of the twentieth century).

148. *See* GERBER, *supra* note 48, at 254 (noting race riots in three Ohio cities between 1900 and 1906); OSOFSKY, *supra* note 48, at 46-52 (describing the New York City race riot of 1900); SENECHAL, *supra* note 92, at 2 (noting race riots in Evansville, Indiana in 1903; New York City in 1900; Springfield, Ohio in 1904 and 1906; and Greensburg, Indiana in 1906); THORNBROUGH, *supra* note 49, at 284-87 (describing the Evansville, Indiana, race riot of 1903); Meier & Rudwick, *Alton, Illinois*, *supra* note 53, at 400 (describing Springfield, Illinois, race riot of 1908). Senechal rejects what she calls the conventional "social strain" explanation of these race riots, finding in Springfield, Illinois neither a sudden increase in the black population nor interracial competition over jobs and housing. *See* SENECHAL, *supra* note 92, at 60, 109, 118.

149. For the leading accounts, see RUDWICK, *supra* note 132, and TUTTLE, *supra* note 92.

150. *See* GERBER, *supra* note 48, at 395-96, 450-53.

151. *See* COHEN, *supra* note 41, at 209 (dating disfranchisement in North Carolina to 1899-1900, Alabama to 1901, Virginia to 1902, and Georgia to 1908); KOUSSER, *supra* note 39, at 239 tbl.9.1. Texas did not adopt its poll tax until 1902. *See* HINE, *supra* note 42, at 36.

152. *See, e.g.*, DITTMER, *supra* note 39, at 103 (noting that black voter registration in Georgia dropped from 28.3% in 1904 to 4.3% in 1910); EARL LEWIS, IN THEIR OWN INTERESTS: RACE, CLASS, AND POWER IN TWENTIETH CENTURY NORFOLK VIRGINIA 18 (1991) (noting that the number of black voters in Norfolk, Virginia, fell from 2000 in the early 1900s to 44 in 1910); WOODWARD, STRANGE CAREER, *supra* note 40, at 85 (noting that disfranchisement in Louisiana occurred between 1896 and 1904 with black registration decreasing 100-fold); Minter, *supra* note 38, at 174-77 (noting the extent to which blacks still exercised political power in North Carolina under the Fusion Movement until 1898).

One of the first consequences of black disfranchisement was a widening gap between government funding of black and white schools.[153] During and after Reconstruction, southern black voters, while unable to overcome intense white resistance to school integration, had achieved some success at ensuring a fair distribution of the public school fund.[154] After disfranchisement, though, spending disparities between black and white schools became enormous, especially in black belt counties, where powerful white planters had the strongest aversion to black education. In some rural counties, the disparity reached a ratio of ten-to-one and sometimes higher.[155] Efforts were increasingly made after the turn of the century to "segregate" the public school fund—that is, to earmark taxes raised from white property owners exclusively for white schools, and vice versa.[156]

The first decade of the twentieth century also saw the extension of segregation into new areas of life—most notably, local streetcar transportation. Southern streetcars generally had been desegregated soon after the Civil War, but beginning around 1900 southern states and cities began mandating their segregation.[157] Over strong resistance by blacks and the streetcar companies, segregation of local transportation had swept the South by 1906. Similarly, the Kentucky statute segregating interracial Berea College was not

153. *See, e.g.*, J. Morgan Kousser, *Progressivism–For Middle-Class Whites Only: North Carolina Education, 1880-1910*, 46 J. SO. HIST. 169, 179 (1980) (noting that after disfranchisement in North Carolina the ratio of black to white educational expenditures decreased by 53% in just 10 years). For similar results in other locales, see KELLER, *supra* note 70, at 253 (South Carolina); MCMILLEN, *supra* note 42, at 80-81 (Mississippi); Carl V. Harris, *Stability and Change in Discrimination Against Black Public Schools: Birmingham, Alabama, 1871-1931*, 51 J. SO. HIST. 375, 378 (1985) (rural Alabama); Robert A. Margo, *Race Differences in Public School Expenditures: Disfranchisement and School Finance in Louisiana, 1890-1910*, 6 SOC. SCI. HIST. 9, 11 (1982) (Alabama, Florida, Louisiana, South Carolina, and Virginia); Edgar A. Toppin, *Walter White and the Atlanta NAACP's Fight for Equal Schools, 1916-1917*, 7 HIST. EDUC. Q. 3, 3-4 (1967) (Atlanta); *see also* CELL, *supra* note 39, at 187-88 (noting that between 1901 and 1915 public financial support for black schools in southern states declined nearly everywhere in comparison with that for whites).

154. *See* RABINOWITZ, *supra* note 40, at 176, 178-81; Kousser, *supra* note 153, at 173, 178.

155. *See* DITTMER, *supra* note 39, at 143; MCMILLEN, *supra* note 42, at 72-75; Schmidt I, *supra* note 28, at 475; Horace Calvin Wingo, Race Relations in Georgia, 1872-1908, at 211-15 (1962) (unpublished Ph.D. dissertation, Emory University).

156. *See* DITTMER, *supra* note 39, at 142-43; Wingo, *supra* note 155, at 206-08 (noting increasing support in Georgia for dividing the school fund according to taxes contributed and the legislature's consideration of such a proposal in 1903 as well as the gubernatorial candidates' discussion of the issue in 1906); *see also* Schmidt I, *supra* note 28, at 476 (noting the complaint of southern politicians that white taxes went te subsidize black education).

157. The leading source here is MEIER & RUDWICK, *supra* note 101, at 267-306. *See also* BARNES, *supra* note 43, at 10-11; DITTMER, *supra* note 39, at 16-18; LEWIS, *supra* note 152, at 22; MCMILLEN, *supra* note 42, at 293-94; WYNES, *supra* note 40, at 75-76; Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893, 894 (1986).

passed until 1904.[158] A good deal of the South's most oppressive labor legislation—emigrant agent laws, vagrancy laws, anti-enticement laws, and contract enforcement laws—was enacted or reenacted during the first decade of the twentieth century.[159] Residential segregation ordinances made their first appearance in southern cities and towns the following decade.[160]

While the color line was becoming more formal and pervasive in the South during the first decades of the twentieth century, economic opportunities for skilled black laborers were disappearing. As in the North, occupations that had been traditionally designated "black"—such as barbers, masons, and train firemen—were being repossessed by whites.[161] Again, the growing power of racially exclusionary labor unions was a partial cause.[162] In the famous Georgia race strike of 1909, unionized white railway workers struck their employers in an effort to exclude blacks from their traditional jobs as train firemen.[163] Black lawyers also increasingly found themselves out of work, as a more rigid color line forbade their presence altogether in some courtrooms and rendered them a distinct liability to their clients in others (because of racist judges and juries).[164] Mississippi, which may have had as many as twenty-five black lawyers in 1900, had only about five in 1935.[165]

Southern race relations had deteriorated so far by the Progressive era that segregation and disfranchisement frequently were defended, often in perfect good faith, as progressive alternatives to racial violence, lynching, and ultimately the extinction of the black

158. *See* Berea College v. Kentucky, 211 U.S. 45, 46 (1908); Schmidt I, *supra* note 28, at 446.

159. *See* COHEN, *supra* note 41, at 245-46, 274-75, 291.

160. *See infra* note 299 and accompanying text.

161. *See* ANDERSON, *supra* note 102, at 230-34; DITTMER, *supra* note 39, at 29-33, 37-38; MCMILLEN, *supra* note 42, at 159-60, 164-66.

162. *See* ANDERSON, *supra* note 102, at 230; DITTMER, *supra* note 39, at 30.

163. Two of the leading accounts are Eric Arnesen, *"Like Banquo's Ghost, It Will Not Down": The Race Question and the American Railroad Brotherhoods, 1880-1920*, 99 AM. HIST. REV. 1601 (1994), and John Michael Matthews, *The Georgia Race Strike of 1909*, 40 J. SO. HIST. 613 (1974). *See also* DITTMER, *supra* note 39, at 33. There were other similar strikes against black trainmen elsewhere in the South in 1909 and 1911. *See* Arnesen, *supra*, at 1624-25 (describing the struggle in Tennessee); Matthews, *supra*, at 629 (describing the conflict in Texas, Cincinnati, and New Orleans).

164. *See* MCMILLEN, *supra* note 42, at 168-69; MEIER & RUDWICK, *supra* note 101, at 130 (noting that the number of black lawyers fell in every southern state between 1910 and 1940).

165. *See* MCMILLEN, *supra* note 42, at 169; *see also* MEIER & RUDWICK, *supra* note 101, at 130 (noting that from 1910 to 1930 the number of black lawyers in South Carolina fell from 17 to 5 and in Mississippi from 21 te 3).

race.[166] Apologists argued that disfranchisement alleviated the need to deploy force and fraud at elections to control the black vote.[167] Segregation separated the races and thus reduced the opportunities for interracial conflict and violence.[168] Southern critics of lynching often defended segregation and disfranchisement in precisely these terms.[169]

The developments in race relations that are most relevant to understanding the decision-making context of the Supreme Court probably are those occurring at the *national* level. The story here is similar to what we have seen in both the North and the South. For example, the Interstate Commerce Commission, which in the late 1880s had strictly construed the statutory language "undue or unreasonable prejudice or disadvantage" to require equal, if segregated, railroad accommodations, was by 1910 deferring almost entirely to railroad policies that were flagrantly unequal.[170] Similarly, the American Bar Association began excluding blacks from membership in 1912.[171]

The changing racial policies of the national political parties captures well the deterioration in American race relations over time. Many historians have noted a significant difference between the racial policies of the first (1901-1905) and second (1905-1909) Roosevelt Administrations.[172] During the former, Teddy Roosevelt conspicuously

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166. *See* BRUNDAGE, *supra* note 41, at 126-27, 156, 200, 209; CELL, *supra* note 39, at x, 19, 171-83; FREDRICKSON, *supra* note 39, at 293-94.

167. *See* COHEN, *supra* note 41, at 207; OGDEN, *supra* note 39, at 8; WYNES, *supra* note 40, at 56, 63; Schmidt III, *supra* note 61, at 843 (noting that for southern progressives "disfranchisement and electoral reform were sides of the same coin"). For a contemporaneous statement of this view, see Poe, *supra* note 61, at 537-38 (justifying disfranchisement as necessary to avert mob violence); *id.* at 541 (arguing that "the removal of the Negro question from politics" carries away with it "the most fruitful source of bitterness between the races").

168. *See* BRUNDAGE, *supra* note 41, at 200 (noting that an Augusta newspaper urged streetcar segregation after a violent confrontation between a black man and a white, and that the city council quickly acted upon the suggestion); Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WISC. MAG. HIST. 30, 34 (1970) (noting that President Woodrow Wilson defended segregation as necessary to avoid "friction" between the races); Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44 J. NEGRO HIST. 158, 163-64 (1959) (same); *see also* Jane Dailey, *Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia*, 63 J. SO. HIST. 553, 587 (1997). Residential segregation ordinances, such as the one invalidated in *Buchanan*, were defended in precisely these terms—preserving racial peace by separating the races. *See, e.g.*, Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 289 (1982).

169. *See* BRUNDAGE, *supra* note 41, at 200.

170. *See* BARNES, *supra* note 43, at 13; Schmidt I, *supra* note 28, at 486 n.153.

171. *See* KELLER, *supra* note 70, at 259; MEIER & RUDWICK, *supra* noto 101, at 164 n.31.

172. *See* DITTMER, *supra* note 39, at 104; FREDRICKSON, *supra* note 39, at 299-301; GERBER, *supra* noto 48, at 365; LEWIS L. GOULD, THE PRESIDENCY OF THEODORE ROOSEVELT 22-24, 118-

invited black leader Booker T. Washington to the White House for dinner—a gesture connoting social equality that was widely condemned in the South. The President also went to battle over black patronage appointments to local postmasterships that encountered fierce resistance in Mississippi and South Carolina. In his second administration, by way of contrast, Roosevelt largely ceased appointing blacks to patronage positions in the South, remained silent in the wake of the Atlanta race riot of 1906, declined to speak out against black disfranchisement during his southern tour, appeared to attribute responsibility for the lynching epidemic to black rapists, and took a hard line in defense of the military's invocation of the concept of "group guilt" in its dismissal of three companies of black soldiers in the infamous Brownsville incident of 1906.[173]

If possible, the Republican Party's position on black rights worsened under Roosevelt's successor, William Howard Taft (1909-1913).[174] In 1908 Taft became the first Republican presidential candidate to actively campaign in the South (in search of white votes).[175] The little federal patronage for southern blacks awarded during the second Roosevelt administration ceased entirely under Taft, who consciously endeavored to broaden the party's appeal to southern whites.[176] Taft also permitted racial segregation to permeate several government office buildings in the District of Columbia and publicly confessed that the nation's experiment in black suffrage undertaken with the Fifteenth Amendment had been a failure. His administration initially opposed challenging the grandfather clause in Oklahoma for fear of alienating southern whites; that position changed only after an insubordinate local United States Attorney forced the administration's hand. This challenge eventually led to the Supreme Court's invalidation of the practice in *Guinn*.[177]

22, 236-44 (1991); ANN J. LANE, THE BROWNSVILLE AFFAIR: NATIONAL CRISIS AND BLACK REACTION 104, 135 (1971); MCMILLEN, *supra* note 42, at 61-62.

173. The Brownsville affair began with a racial melee in the fall of 1906 in which 10 to 20 black soldiers stationed in Brownsville, Texas, were alleged to have gone on a rampage, killing at least one white person. When all members of the three black companies stationed there refused to incriminate their peers, President Roosevelt, at the army's behest, decided to dismiss them all with dishonorable discharges. The incident attracted national attention, including Senate hearings, and black leaders throughout the nation condemned the administration's invocation of the concept of group guilt. The most complete account of the episode is LANE, *supra* note 172; *see also* GOULD, *supra* note 172, at 236-44.

174. On Taft's racial policies, see DITTMER, *supra* note 39, at 94, 106-07; GERBER, *supra* note 48, at 365; MCMILLEN, *supra* note 42, at 62-63.

175. *See* Schmidt I, *supra* note 28, at 455.

176. *See* KELLER, *supra* note 70, at 255; Sosna, *supra* note 168, at 31.

177. *See* Schmidt III, *supra* note 61, at 851-56. Oklahoma Republicans had pressured the local U.S. Attorney to challenge the grandfather clause, which they viewed as a partisan device

The political nadir for race relations may have come in the 1912 presidential election and its aftermath. The Republican Party candidate, President Taft, told southern blacks that their best friend was southern whites, and the party platform dispensed with its ritual invocation of the sanctity of black voting rights.[178] The Progressive Party candidate, Theodore Roosevelt, reiterated Taft's advice to blacks, while successfully opposing their seating as delegates to his party's national convention.[179] Faced with such unattractive options, many civil rights advocates, including W.E.B. DuBois and Oswald Garrison Villard (William Lloyd Garrison's grandson and chairman of the board of the NAACP), actually supported a native southerner and Democrat, Woodrow Wilson, in the presidential election that year.[180] One black newspaper editor characterized the choice for black voters—among Taft, Roosevelt, and Wilson—as "three dishes of crow."[181]

Wilson promised during the presidential campaign to extend to blacks "justice executed with liberality and cordial good feeling."[182] He made good on that pledge by presiding over an administration that immediately introduced racial segregation for civil servants in the Treasury, Post Office, and Navy Departments in their working, eating, and bathroom facilities.[183] The Wilson Administration also authorized the Civil Service Commission to begin requiring photographs of job applicants to enable racial identification.[184] Federal patronage for blacks fell to a post-Civil War low under the

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that enabled Democrats in a closely divided state to disfranchise the nine percent of the state's population that was black (and generally voted Republican) without disfranchising illiterate whites.

178. *See* Republican Platform of 1912, *in* NATIONAL PARTY PLATFORMS, *supra* note 67, at 183-88.

179. *See* DITTMER, *supra* note 39, at 108; FREDRICKSON, *supra* note 39, at 301; MCMILLEN, *supra* note 42, at 63-64; William E. Leuchtenburg, *Progressivism and Imperialism: The Progressive Movement and American Foreign Policy, 1898-1916*, 39 MISS. VALLEY HIST. REV. 483, 499 (1952); George Mowry, *The South and the Progressive Lily White Party of 1912*, 6 J. SO. HIST. 237, 241-42 (1940).

180. *See* DITTMER, *supra* note 39, at 181; OSWALD GARRISON VILLARD, SEGREGATION IN BALTIMORE AND WASHINGTON 13 (1913); Sosna, *supra* note 168, at 32; Kathleen Long Wolgemuth, *Woodrow Wilson's Appointment Policy and the Negro*, 24 J. SO. HIST. 457, 457 (1958).

181. *See* Gavins, *supra* note 107, at 270 (quoting John Mitchell, Jr. of the *Richmond Planet*).

182. Nancy J. Weiss, *The Negro and the New Freedom: Fighting Wilsonian Segregation*, 84 POL. SCI. Q. 61, 63 (1969) (quoting Woodrow Wilson).

183. The leading accounts are Sosna, *supra* note 168; Weiss, *supra* note 182; and Wolgemuth, *supra* note 168. *See also* DITTMER, *supra* note 39, at 181; AUGUST HECKSCHER, WOODROW WILSON: A BIOGRAPHY 292 (1991).

184. *See* DITTMER, *supra* note 39, at 181; Sosna, *supra* note 168, at 33; Weiss, *supra* note 182, at 164; Wolgemuth, *supra* note 168, at 161.

Wilson Administration, as the President refused to create friction with southern senators such as Vardaman and Tillman, who opposed any black federal officeholders whatsoever.[185] Southern congressmen took advantage of the Democratic party's atypical control of the national government to introduce a series of bills designed to nationalize southern solutions to the race problem—segregating all federal employees and streetcars in the District of Columbia, barring interracial marriage (so much for states' rights!), and even repealing the Fifteenth Amendment.[186]

This is the sociopolitical context within which the Court confronted the race cases of the Progressive era. Incipient forces were at work that ultimately would ameliorate the oppressive conditions under which American blacks lived, yet contemporary racial practices were in many ways worse than ever.[187] The South was back "in the saddle" for the first time since the Civil War, with control of the presidency and the Chief Justiceship and utter domination of congressional committee chairs.[188] To contemporaries, there must have appeared a realistic prospect that the racial practices of the South, not the North, would come to dominate the nation.[189]

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185. *See* Wolgemuth, *supra* note 180, at 463.

186. *See* DITTMER, *supra* note 39, at 182; Sosna, *supra* note 168, at 35, 37; Weiss, *supra* note 182, at 66.

For other examples of this "southernization" of American racial attitudes, see GERBER, *supra* note 48, at 418 (noting that some Ohio blacks attributed worsening race relations in the North to efforts by the South to nationalize its system of segregation); *id.* at 421 (noting that the notoriously racist Ben Tillman of South Carolina made speaking tours of the North around 1906); KRADITOR, *supra* note 64, at 213 (noting a 1913 incident in which Ida Wells-Barnett was asked not to march with the Chicago delegation of a national women's suffrage organization in the annual suffrage parade in Washington, D.C., because southern women had refused to march with racially integrated contingents).

Woodrow Wilson was the second Democratic President since the Civil War. During Grover Cleveland's two administrations in the 1880s and 1890s, the South had not prevailed on race issues nearly to the same extent. For example, significant federal patronage had continued to flow to blacks, notwithstanding the protests of southern congressmen. *See* GROSSMAN, *supra* note 50, at 121-41; RICHARD E. WELCH, JR., THE PRESIDENCIES OF GROVER CLEVELAND 66-67 (1988); *see also* Wolgemuth, *supra* note 180, at 464 (noting that DuBois and Villard wrote open letters to President Wilson criticizing his appointments policy and favorably contrasting President Cleveland's willingness to appoint blacks in the face of southern senators' opposition).

187. *Cf.* MCMILLEN, *supra* note 42, at 302-06 (noting that World War I initiated forces that ultimately would produce significant changes in race relations, but that these changes would not come te fruition until after World War II).

188. *See* Sosna, *supra* note 168, at 36 (quotation); *id.* at 35 (noting that southerners held 11 of 13 committee chairs in the House and 12 of 14 in the Senate).

189. *See* Schmidt I, *supra* note 28, at 455 (noting that "[b]lacks and whites alike saw in the Wilson administration the vindication at the federal level of the South's policies toward black people").

IV. THE PROGRESSIVE ERA RACE CASES

We turn our attention now to the four (sets of) decisions that comprise the Court's Progressive era race cases. Our goals are to understand how civil rights victories were possible in such an inauspicious sociopolitical context and to assess the practical significance of these decisions.

A. Guinn v. Oklahoma *and* Myers v. Anderson

The Supreme Court in *Guinn* and *Myers* invalidated grandfather clauses from Oklahoma and Annapolis, Maryland. The Oklahoma version of the grandfather clause exempted from the state's literacy test all persons who were qualified to vote in 1866 "under some form of government" or who were lineal descendants of such persons.[190] The undisguised purpose of this statutory provision was to insulate illiterate whites from the disfranchising effect of a literacy test.[191] As Benno Schmidt has observed, "the approach was not subtle, but subtlety was not thought to be required."[192]

How is one to understand *Guinn*—as a significant advance indicative of the Court's growing commitment to racial equality or as a minimalist constitutional interpretation that invalidated a blatant subterfuge of the Fifteenth Amendment? Characterizing *Guinn* is not difficult. The decision is notable in only two senses. First, it represents the Court's inaugural intervention against a southern disfranchisement scheme. Previously, the Fuller Court in *Giles v. Harris* had suggested that it would not intervene in such "political" questions.[193] *Giles* involved Alabama's disfranchisement scheme which included both a grandfather clause and a "good character and understanding" test designed and administered to exclude blacks from voting. The *Giles* Court rejected the plaintiff's request for an injunction ordering his registration on two grounds. First, to grant the requested relief would make the Court "a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists."[194] Second, if the alleged conspiracy among Alabama whites to disfranchise blacks were real, the Court would be powerless to enforce an injunction against the scheme. Thus, the Court opined, if effective relief were to be

190. Guinn v. Oklahoma, 238 U.S. 347, 356 (1915).
191. *See* Schmidt III, *supra* note 61, at 836.
192. *Id.*
193. 189 U.S. 475 (1903).
194. *Id.* at 486.

granted, it must come from the political branches of the state or federal government.[195] One could read *Giles*, then, as an indication of the Court's unwillingness to intervene in any disfranchisement case. On this view, *Guinn* necessarily represented a step forward.

Second, constitutional infirmities to one side, the grandfather clause arguably was insulated from attack by the absence of a federal *statute* upon which to ground the challenge.[196] Reconstruction era civil rights statutes contained several express protections for the right to vote, but these provisions had been either invalidated by the Supreme Court in the 1870s[197] or repealed by Congress in the 1890s.[198] As of the Progressive era, all that remained of the 1870 Force Act were the catch-all provisions forbidding conspiracies to interfere with federally-protected rights. Strong arguments existed that these catch-all provisions were intended to reach neither voting[199] nor state officials administering state law (as opposed to violent interferences with federal rights by private individuals).[200] In rejecting substantial statutory arguments against Guinn's prosecution, the Court can be seen as reaching out to decide a constitutional question that would have been easy (and perhaps appropriate) to avoid. In light of the *Giles* precedent and the statutory interpretation difficulty in *Guinn*, Benno Schmidt criticizes scholars who conclude that the outcome of the grandfather clause challenge was "foreordained."[201]

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195. See *id.* at 487-88.

196. *See* United States v. Mosley, 238 U.S. 383, 388 (1915) (Lamar, J., dissenting); Schmidt III, *supra* note 61, at 837-39, 870-75.

197. *See* United States v. Reese, 92 U.S. 214 (1875) (invalidating two sections of the 1870 Force Act, one criminalizing refusals of state election officials to receive ballots properly cast and the other criminalizing interferences by private individuals with the right to voto through force, threat, or intimidation, on the ground that neither section expressly required a racial motivation).

198. Act of February 8, 1894, 28 Stat. 36 (1894).

199. The 1870 Force Act contained several provisions expressly protecting voting rights and other, more open-ended provisions criminalizing conspiracies to interfere with rights protected by the Constitution and federal law. Since the voting provisions carried less severe punishments, there is a strong argument that Congress did not intond the catch-all provisions to cover interference with voting rights. Moreover, since the Democratic Congress repealed the voting provisions in 1894, there is also a strong argument that the catch-all provisions, even if intended to cover voting when enacted, were no longer intonded to do so in the 1890s. *See Mosley*, 238 U.S. at 389-93 (Lamar, J., dissenting); *see also* Schmidt III, *supra* note 61, at 838-41.

200. The relevant statutory provision criminalized conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." It plainly was addressed toward Klan-like intimidation, as demonstrated by the phraseology, "[i]f two or more persons conspire . . . or . . . go in disguise on the [public] highway." Guinn v. Oklahoma, 238 U.S. 347, 354 (1915); *see Mosley*, 238 U.S. at 392-93 (Lamar, J., dissenting); Schmidt III, *supra* note 61, at 839.

201. *See* Schmidt III, *supra* note 61, at 878 (stating that the outcome of the grandfather clause challenge was "far from inevitable"). Schmidt also notes contemporary commentary that

I shall consider later the Court's repeated willingness to circumvent procedural hurdles to reach the merits of Progressive era race cases; the point is not a trivial one. As to the substantive constitutional issue in *Guinn* and *Myers*, though, it seems hard to imagine a more blatant subversion of the Fifteenth Amendment, short of a facially race-based suffrage restriction. Rather than employing a patent racial classification, the grandfather clause used a virtually perfect surrogate—one's status as a voter before the 1867 Reconstruction Act enfranchised southern blacks. Of the more than 55,000 blacks residing in Oklahoma in 1900, only fifty-seven came from northern states that had permitted blacks to vote in 1866—the relevant date under the grandfather clause.[202] Chief Justice White thus had little difficulty concluding that incorporating the suffrage standards of 1866 was equivalent to nullifying the Fifteenth Amendment, which had not been ratified until 1870.[203] White noted the absence of any "serious dispute"[204] and proclaimed the Court's unwillingness to permit frustration of the Fifteenth Amendment by "mere forms of expression."[205]

Nor was it necessary for *Guinn* to impeach the validity of *Giles*. The allegation in *Giles* had been of a conspiracy to disfranchise blacks using facially neutral electoral qualifications. In *Guinn*, however, the Court avoided any questioning of legislative or administrative motive by denying the facial validity of the classification.[206] Moreover, the remedy sought in *Guinn*, unlike in *Giles*, did not undermine the state's entire voter registration scheme, but only its grandfather clause.[207]

In terms of practical consequences, moreover, the grandfather clause cases were truly trivial. First, Oklahoma was the only southern state that used a grandfather clause as a permanent feature of its suffrage scheme.[208] Thus the Court in *Guinn* was only suppressing an

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viewed the decision as extraordinarily significant. *See id.* at 879 (noting that *The Nation* deemed *Guinn* to he of equal significance with *Dred Scott*, while a writer in the *North American Review* called the decision "one of the most important judgments pronounced by the Court in fifty years").

202. *See id.* at 862.

203. *See Guinn*, 238 U.S. at 359.

204. *Id.* at 363.

205. *Id.*

206. *See id.* at 359-60 (noting the limited nature of the United States government's challenge to the grandfather clause).

207. *See id.* at 360, 366; *see also* Schmidt III, *supra* note 61, at 865 (noting how the district court judge in *Myers* distinguished *Giles* in invalidating the Annapolis, Maryland, grandfather clause).

208. *See* Schmidt III, *supra* note 61, at 852, 861.

outlier, not challenging a prevalent southern practice.[209] As one Richmond newspaper cooly observed after the ruling, the South's grandfather clauses already had accomplished their purpose and were no longer necessary.[210]

Second, as already noted, the Court in *Guinn* found the grandfather clause to be a surrogate racial classification on its face and thus avoided any inquiry into legislative motive. In light of southern ingenuity and intransigence, the judicial battle against Jim Crow had little chance of success until courts became willing either to undertake motive inquiries or to shift the constitutional focus from purpose to effect. *Guinn* reflected no movement at all in this direction. Third and relatedly, the Court explicitly noted that a literacy test divorced from the grandfather clause posed no constitutional difficulty.[211] Yet, this conclusion gave away the ballgame. Several southern states already had discovered that a literacy test without a grandfather clause could be used successfully to disfranchise blacks.[212] Thus a New Orleans newspaper correctly observed that the Court's ruling would enfranchise no blacks and was "not of the slightest political importance in the South."[213] So long as the literacy test was subject to discretionary enforcement by voter registrars committed to preserving white supremacy, illiterate whites would gain registration while literate blacks would not. As late as the 1940s and 1950s, Alabama registrars were finding black PhDs from Tuskegee to be illiterate.[214] This problem could be solved only at the level of the system where discretion inhered—a lesson eventually learned by Congress and applied with extraordinary effectiveness in the 1965 Voting Rights Act.[215] Further, *Guinn* had no bearing on the numerous alternative disfranchisement techniques employed by southern states—poll taxes,

209. For the prevalence of this model of Supreme Court constitutional decisionmaking, see Klarman, *Rethinking*, *supra* note 10, at 16-17.

210. *See* Schmidt III, *supra* note 61, at 879.

211. *See Guinn*, 238 U.S. at 366; *see also* Schmidt III, *supra* note 61, at 898 (noting that the Court in *Guinn* "took pains to protect from any implication of judicial disapproval" literacy tests and other methods of disfranchisement). *Guinn* did, however, invalidate Oklahoma's literacy test on the ground that it was not severable from the unconstitutional grandfather clause. *See* 238 U.S. at 367.

212. *See* Schmidt III, *supra* note 61, at 845 (discussing Mississippi and South Carolina); *id.* at 861 (suggesting that the knowledge that other states had successfully disfranchised blacks without a grandfather clause might explain the Wilson Administration's willingness to press forward with *Guinn*).

213. *See id.* at 879 (quoting from the TIMES-PICAYUNE, *quoted in* 51 LITERACY DIGEST 200 (1915)).

214. *See* NORRELL, *supra* note 101, at 112.

215. Pub. L. No. 89-110, §§ 6-7, 79 Stat. 437, 439-41 (1965).

white primaries, complex registration requirements, or criminal exclusions designed to catch blacks but not whites.

The immediate consequences of *Guinn* in Oklahoma were, if anything, even more trivial. The state legislature responded to the ruling by "grandfathering" the grandfather clause. That is, under a new statute, voters in the 1914 congressional election (when the grandfather clause invalidated in *Guinn* had been in effect) were automatically registered; all other eligible voters were given an opportunity to register between April 30 and May 11, 1916, or else suffer perpetual disfranchisement.[216] The federal government failed to challenge this bald-faced evasion of the Supreme Court's mandate, and the Court itself was presented with no opportunity to invalidate the revised suffrage scheme until 1939.[217] Thus *Guinn* had absolutely no effect on black voter registration in Oklahoma.

B. Bailey v. Alabama *and* United States v. Reynolds

To understand the peonage cases of the Progressive era, it is useful to begin with some background on the history of coerced black labor in the South. After the Civil War and the Thirteenth Amendment abolished the formal institution of slavery, southern states moved quickly to enact Black Codes that perpetuated the substance, if not the form, of black bondage.[218] These codes included, at their core, mandatory contract laws backed up with vagrancy provisions. A typical law required blacks to enter agricultural labor contracts (usually of a year's duration) by January or run the risk of being arrested and convicted as a vagrant and compelled to work for a planter under a criminal surety arrangement. The market for black labor was also constricted by criminal anti-inducement laws (forbidding employers from hiring away one another's workers), exclusions from other occupations, convict lease laws, and so forth. These Black Codes generally were invalidated by 1868 either by the Freedmen's Bureau, military governors of southern states, or reconstructed southern state legislatures.[219]

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216. *See* Schmidt III, *supra* note 61, at 880.

217. *See* Lane v. Wilson, 307 U.S. 268 (1939) (invalidating this Oklahoma law under the Fifteenth Amendment); *see also* Schmidt III, *supra* note 61, at 880-81 (discussing *Lane*).

218. For descriptions of these black codes, see COHEN, *supra* note 41, at 28-33; FONER, *supra* note 49, at 199-201; MCMILLEN, *supra* note 42, ch. 4; DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY ch.1 (1978); THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH chs. 3, 5 (1965).

219. *See* COHEN, *supra* note 41, at 34. The point in the text requires some qualification. Even most Republicans accepted traditional stereotypes regarding black labor and thus were

Between Redemption and the Progressive era, though, southern state legislatures reestablished a variety of legal mechanisms for coercing black labor:[220] convict labor (the chain gang),[221] convict lease,[222] criminal surety laws the fodder for which was supplied by vagrancy or petty theft prohibitions,[223] contract enforcement laws,[224] false pretenses laws,[225] criminal anti-inducement laws, and prohibitive taxes on emigrant labor agents.[226]

In *Bailey v. Alabama*, the Supreme Court invalidated a false pretenses law.[227] In 1885 Alabama had become the first southern state to adopt such a law. This particular statute criminalized entering into a labor contract with the fraudulent intent to subsequently breach it after receiving advance payment of wages.[228] In the southern tradition, these agricultural labor contracts generally were of long duration; they typically ran for a year and almost always provided for some advance payment of wages. Punishing the fraud rather than the contractual breach itself was necessary because every southern state but one had a constitutional provision barring imprisonment for debt.[229] The Alabama Supreme Court in 1891 had interpreted this false pretenses law to require proof that the fraudulent intent existed upon the contract's formation. A half dozen

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not averse to embracing those coercive labor practices that they deemed appropriate. *See* FONER, *supra* note 49, at 208-09; *see also* NOVAK, *supra* note 218, ch. 2; Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage Cases, 82 COLUM. L. REV. 646, 650-51 (1982) [hereinafter Schmidt II].

220. The leading sources on the subject are COHEN, *supra* note 41; PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969 (1972); and NOVAK, *supra* note 218.

221. On the chain gang, which at this point in history was predominantly black, see also Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict as a Slave"*, 59 J. SO. HIST. 85 (1993); Schmidt II, *supra* note 219, at 652-53.

222. On convict lease, see EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH ch. 6 (1984); DITTMER, *supra* note 39, at 82-86; MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996).

223. Under criminal surety, indigent persons convicted of minor criminal offenses would have their fines and court costs paid by a surety in exchange for contracting to work for him; breach of such a surety agreement was, in turn, a criminal offense, which generally would lead to another surety contract. *See, e.g.*, United States v. Reynolds, 235 U.S. 133 (1914).

224. For example, it was a crime in Alabama te enter inte a contract to cultivate lands without providing notice that the party was currently in breach of another similar contract. *See* Toney v. State, 141 Ala. 120 (1904) (invalidating the law).

225. Such laws made it a crime to breach a labor contract for which one had fraudulently accepted advance wages.

226. *See* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans*, 76 TEX. L. REV. 781 (1998).

227. 219 U.S. 219 (1911).

228. The rest of this paragraph is drawn from COHEN, *supra* note 41, at 230-31; NOVAK, *supra* note 218, at 56-60; Schmidt II, *supra* note 219, at 651, 676-77.

229. *See* NOVAK, *supra* note 218, at 38.

southern states, including Alabama, had responded to this and other similar judicial interpretations by adopting new false pretenses laws in the years from 1903 to 1908. This new generation of statutes created a presumption of fraudulent intent from the fact of the breach. Moreover, Alabama had a rule of evidence that barred the alleged breacher from testifying as to uncommunicated motives. The Supreme Court in *Bailey* invalidated Alabama's revised false pretenses law under the federal Peonage Act of 1867 and the Thirteenth Amendment. The Court ruled that Alabama's statutory scheme effectively criminalized simple contractual breaches, since fraud was presumed from the fact of the breach, and the defendant was barred from testifying in refutation of the presumption.[230]

In a similar case, *United States v. Reynolds*, the Court invalidated a criminal surety statute.[231] Such laws authorized the hiring out of minor criminals to private parties (sureties) who paid their fines and court costs in exchange for a contractual commitment to perform labor at a specified rate (usually lasting for several months) to pay off the sureties' expenses. Breach of a surety contract was itself a criminal offense, which would usually lead to another surety contract of longer duration. Those performing labor under such surety agreements often had first been convicted of vagrancy or some other misdemeanor such as petty larceny.[232] Apparently it was common for local law enforcement officers to be in cahoots with planters and to conduct "vagrancy roundups" or otherwise "mannfacture" petty criminals during harvesting season when labor was much in demand.[233]

How should one interpret *Bailey* and *Reynolds*? Benno Schmidt calls them "the most lasting of the White Court's contributions to justice for black people, and among its greatest achievements."[234] One might cite in support of this judgment the fact that *Bailey* apparently was not as easy for the Justices as *Guinn* had been; the decision was only five to two. Holmes, ever the majoritarian,[235]

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230. *See Bailey*, 219 U.S. at 234.

231. 235 U.S. 133 (1914).

232. One might be convicted and hired out for crimes as minor as use of offensive language. For this crime, one might be fined $10 plus $25 in court costs, which together would take eight months to work off. *See* DANIEL, *supra* note 220, at 26 n.15.

233. *See* COHEN, *supra* note 41, at 242-43; NOVAK, *supra* note 218, at 52-53.

234. Schmidt II, *supra* note 219, at 646; *see also id.* at 718 (calling *Bailey* and *Reynolds* "landmarks in the slow process of exorcizing the vestiges of slavery from American law").

235. I have always been amazed at the extraordinary reputation Justice Holmes commands among modern liberals. As far as I can tell, it is based almost entirely on his dissenting opinions in *Lochner v. New York*, 198 U.S. 45 (1905), and *Abrams v. United States*, 250 U.S. 616 (1919). Holmes's votes to uphold maximum hour legislation (on explicitly redistributive

dissented because he could not understand why it should be unconstitutional for a state to criminalize breach of contract. And if a state could do so directly, how could Alabama's indirect method of accomplishing that result be objectionable?[236] Holmes found this especially puzzling in light of the majority's insistence that race was irrelevant to the case.[237] How, he asked, could one reasonably doubt a jury's willingness to fairly apply the statutory presumption if race was assumed not to be an issue? If Holmes is right, then the result in *Bailey* seems dependent on the Court's recognition of the relevance of race to the operation of Alabama's false pretenses law, which might indicate an increased racial sensitivity on the part of the Justices. Furthermore, the uncharacteristic failure of either Hughes for the majority or Holmes in dissent to invoke the notion of judicial deference to legislative policy judgments (i.e., the decision to repudiate traditional contract law doctrine) arguably suggests an implicit acknowledgment of the relevance of race.[238] Finally, at least some contemporary commentators identified the decision as tremendously important.[239]

With regard to *Reynolds*, one might deem it significant that the Court rejected the argument that criminal surety laws provided a more humane alternative to convict lease laws, which were undeniably constitutional.[240] In rejecting this claim, one might argue, the Court necessarily was influenced by the actual social conditions under

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grounds) and to invalidate free speech restrictions sit well with today's liberals. But the rest of Holmes's majoritarianism should appall these people. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (upholding law authorizing the storilization of the mentally retarded); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (Holmes, J., dissenting) (dissenting from opinion invalidating a law prohibiting the teaching of foreign languages in schools); Weems v. United States, 217 U.S. 349, 382 (1910) (White, J., dissenting) (joining an opinion dissenting from the majority's holding that a particular Philippine criminal punishment was cruel and unusual and thus invalid under the Eighth Amendment); Giles v. Harris, 189 U.S. 475 (1903) (rejecting a constitutional challenge to black disfranchisement).

236. *See* Bailey v. Alabama, 219 U.S. 219, 246-47 (1911) (Holmes, J., dissenting, joined by Lurton, J.). For a detailed discussion of whether the majority or the dissent had the better of the contract doctrine argument, see Schmidt II, *supra* note 219, at 705-13.

237. *See Bailey*, 219 U.S. at 231 (majority opinion) ("No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho."); *id.* at 245 (Holmes, J., dissenting) ("We all agree that this case is to be considered and decided in the same way as if it arose in Idaho or New York.").

238. *See* Schmidt II, *supra* note 219, at 713-15.

239. *See id.* at 688-89; *see also* NOVAK, *supra* note 218, at 63 (noting that contemporary commentator Ray Stannard Baker regarded *Bailey* as a second *Dred Scott* case); *id.* at 63 n.1 (noting a similar tendency in contemporary law review commentary to emphasize the decision's significance).

240. *See* United States v. Reynolds, 235 U.S. 133, 138 (1914) (presenting the argument of Alabama); Schmidt II, *supra* note 219, at 698 (discussing Alabama's argument).

which these surety arrangements took place—a significant advance over the Court's usual formalistic approach to race issues.

I find these arguments, at best, only partially persuasive. *Bailey* and *Reynolds* are better understood, I think, as analogous to *Guinn*: They represent minimalist interpretations of the Thirteenth Amendment—the very least the Court could do short of acquiescing in southern nullification of the amendment. With the exception of Louisiana, all southern state courts agreed that simple breach of contract could not be criminalized under the Thirteenth Amendment or under state constitutions which (with the exception of Louisiana's) barred imprisonment for debt.[241] These state courts had, accordingly, invalidated several contract enforcement laws that were deemed to have the effect of criminalizing contractual breach.[242] Yet, in substance, the law invalidated in *Bailey* did no more. Since fraudulent intent was presumed from the fact of breach, and the defendant's testimony to the contrary was barred, Alabama effectively criminalized breach of any labor contract where advance wages had been paid—that is, essentially all long-term agricultural labor contracts. Thus it was possible for the Court to invalidate the law without mentioning the race of the defendant.[243]

Reynolds required little additional creativity. Criminal suretyship appeared constitutionally unobjectionable—as a more humane alternative to the (concededly constitutional) system of convict lease—only if one ignored the patent fraud in a system that routinely "manufactured" black criminals. Moreover, in practice the surety system invited "an ever-turning wheel of servitude," as breach of surety agreements resulted in new contracts of longer duration, and convicts ended up forced to labor for periods far in excess of what the original violation authorized.[244]

Even were one inclined to discern in these decisions an indication of growing judicial receptivity toward civil rights claims, it is important to recognize the difference between peonage and other racial practices such as segregation and disfranchisement. A great many people who tolerated, or even endorsed, the latter practices

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241. *See* Schmidt II, *supra* note 219, at 674 n.104.

242. *See, e.g.*, Toney v. State, 141 Ala. 120 (1904); State v. Armstead, 103 Miss. 790 (1912); *Ex parte* Hollman, 79 S.C. 9 (1908); *see also Ex parte* Drayton, 153 F. 986 (D.S.C. 1907); Peonage Cases, 123 F. 671 (M.D. Ala. 1903); Schmidt II, *supra* note 219, at 665, 668-69, 675 n.106.

243. *See* Schmidt II, *supra* note 219, at 718 ("It is a sign of the times that the White Court made its most lasting contributions to the constitutional law of race relations in two decisions that, on the surface of their opinions, seemed to have nothing to do with race.").

244. *Reynolds*, 235 U.S. at 146-47; *see id.* at 150 (Holmes, J., concurring); Schmidt II, *supra* note 219, at 699.

nonetheless condemned the former.[245] Southern Progressives, for example, strongly criticized peonage as atavistic; they were embarrassed by it and feared that it would inhibit foreign immigration to the South (especially since some celebrated peonage cases involved white immigrants).[246] Indeed, the legal assault on peonage was led by southern white Progressives, among whom were a couple of federal district judges with impeccable southern credentials, including service in the Confederate army.[247] Likewise, the Assistant Attorney General appointed in 1906 to investigate and prosecute southern peonage was a Virginian of unquestioned loyalty to southern racial practices.[248] Among blacks as well, leaders such as Booker T. Washington, who was willing to make temporary concessions to segregation and disfranchisement while blacks worked to better themselves economically, fought vigorously against peonage because it obstructed black efforts at economic advance.[249] Peonage bore a close resemblance to slavery. It would be mistaken to infer that a Court striking a blow against it was on the verge of undermining other aspects of Jim Crow that enjoyed far broader support in national opinion.[250]

Whether one regards the Court's peonage decisions as resulting from a newly found concern for racial justice or a minimalist commitment to constitutionalism, it seems clear that the rulings had little impact on the prevalence of coerced black labor in the South. First, in at least a couple of southern states—most notably, Florida and Georgia—the Court was openly defied by state courts and legislatures that disingenuously distinguished *Bailey*[251] and preserved for another thirty years false pretenses laws that were essentially identical to the one invalidated by the Court.[252] Yet after *Reynolds* in 1914, the Court decided no other peonage cases until World War II, when it

245. *See* Schmidt II, *supra* note 219, at 659; Schmidt III, *supra* note 61, at 898 (noting "a Progressive consensus" against peonage).

246. *See* Schmidt II, *supra* note 219, at 658, 718; *see also id.* at 671-72 (noting the Italian ambassador in Washington, motivated by reports that labor agents in New York were sending large numbers of immigrants to southern turpentine camps, complaining about southern peonage).

247. *See id.* at 658, 663-64.

248. *See id.* at 671.

249. *See* DANIEL, *supra* note 220, at ix, 65; Schmidt II, *supra* note 219, at 659, 677.

250. *See* Schmidt II, *supra* note 219, at 718 ("Of the various paths away from racial injustice open to the Supreme Court in the Progressive era, opposition to peonage was the least difficult to traverse.").

251. *See, e.g.*, Wilson v. State, 138 Ga. 489, 493 (1912); 1919 Fla. Laws ch. 7917, sect. 2; *see also* COHEN, *supra* note 41, at 190; NOVAK, *supra* note 218, at 64-68; Schmidt II, *supra* note 219, at 689-90.

252. *See* COHEN, *supra* note 41, at 190; DANIEL, *supra* note 220, at 180-85; NOVAK, *supra* note 218, at 78.

finally invalidated the laws from these recalcitrant states.[253] The analogy to *Guinn* seems irresistible: Supreme Court decisions cannot accomplish much when the Justices vacate the field for decades afterward, enabling states to defy or evade the ruling at their pleasure. At a time when carrying civil rights cases to the Court was difficult, isolated victories generally bore little in the way of concrete consequences.

Most southern states greeted *Bailey* and *Reynolds* with evasion rather than defiance.[254] Several states simply reenacted false pretenses laws without the objectionable presumption[255] and left it to white supremacist juries—blacks were entirely excluded from southern juries at this time—to determine whether black agricultural laborers had accepted advance wages with the fraudulent intent subsequently to breach their contracts. It is difficult to believe that the absence of the statutory presumption affected the result in many cases.[256] The bottom line was that blacks contemplating breach of long-term labor contracts always faced the threat of criminal prosecution.

Moreover, *Bailey* and *Reynolds* left in place many alternative mechanisms for coercing black labor.[257] Not only were false pretenses laws without the statutory presumption still valid, but so were convict labor, convict lease, vagrancy laws, anti-enticement laws,[258] and anti-labor agent laws.[259] Given the capacity and inclination of officials administering the southern legal system to manufacture black "criminals" for convict labor and convict lease, one hardly needed

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253. *See, e.g.*, Taylor v. Georgia, 315 U.S. 25 (1942); Pollock v. Williams, 322 U.S. 4 (1944); *see also* NOVAK, *supra* note 218, at 78-83; Schmidt II, *supra* note 219, at 690.

254. *See* COHEN, *supra* note 41, at 292-93 (noting that other southern states removed from their books these "fake" false pretenses laws after *Bailey*); NOVAK, *supra* note 218, at 68 (noting that most southern state courts either struck down such laws or modified them so as to be consistent with *Bailey*); *see also* State v. Armstead, 60 So. 778, 780-81 (Miss. 1913) (invalidating peonage statute); State v. Griffin, 70 S.E. 292, 294 (N.C. 1911) (same).

255. *See* NOVAK, *supra* note 218, at 63-64; Schmidt II, *supra* note 219, at 689.

256. *See* NOVAK, *supra* noto 218, at 64 (noting an "almost absolute certainty of conviction at the trial court level" and little likelihood of an appeal).

257. *See* Schmidt II, *supra* note 219, at 648-49, 716-17.

258. *See* NOVAK, *supra* note 218, at 63-64, 69, 109 n.25 (noting that *Bailey* did not affect the legality of anti-enticement laws and noting cases rejecting constitutional challenges to such laws).

259. *See* COHEN, *supra* note 41, at 238, 273 (noting that the Supreme Court in *Williams v. Fears*, 179 U.S. 270 (1900), rejected a constitutional challenge to an anti-labor agent law and that numerous southern states passed such laws during the Progressive era); Bernstein, *supra* note 226, at 820 n.289. There was also a good deal of harassment of labor agents seeking to arrange emigration of southern blacks during World War I. *See* COHEN, *supra* note 41, at 271-72; DITTMER, *supra* note 39, at 188-89; *see also* GROSSMAN, *supra* note 48, at 44-48 (noting illegal white efforts to block black migration during World War I); MCMILLEN, *supra* note 42, at 272-73.

contract enforcement laws to coerce black labor.[260] Historians of the subject have amply documented instances of state legislatures manufacturing "black crimes" and of local law enforcement officials conniving with planters to manufacture black "criminals" when agricultural labor was scarce.[261] The high visibility of the mostly-black chain gang, moreover, provided a powerful inducement for blacks to remain as agricultural laborers rather than risk conviction for loitering or vagrancy.[262]

Furthermore, one should not neglect those instances of coerced black labor that indulged no pretense of legality. Historians have documented numerous instances of such practices, which closely resembled antebellum slavery. Black laborers worked under the shotgun, were locked up at night, and were tracked down with hunting dogs if they escaped.[263] Ironically, such behavior violated no federal statute, because the Peonage Act covered only coerced labor for *debt*.[264] The chances of such activity being prosecuted under state law at this time were remote, to say the least.

The basic point is that in an era when most southern whites continued to believe that they had a proprietary interest in black labor and that blacks would not work unless coerced to do so, the Court's invalidation of a couple of peonage laws did not have much effect.[265] Blacks prosecuted under unconstitutional state peonage

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260. *See* Schmidt II, *supra* note 219, at 649, 716-17.

261. *See* COHEN, *supra* note 41, at 225-26, 275; DANIEL, *supra* note 220, at 30-32, 172; *id.* at 46 (noting a Justice Department investigation in relation to the Alabama *Peonage Cases* of 1903 which found that blacks would be convicted on trumped-up charges and given the option of avoiding convict lease to the mines by working for a planter under a labor contract); DITTMER, *supra* note 39, at 72-74 (noting specific instances of manufactured black "crimes" and "criminals"); NOVAK, *supra* note 218, at 32 (noting how post-Reconstruction southern state legislatures converted what were previously minor offenses into felonies in order to provide a pool of labor for convict lease); Schmidt II, *supra* note 219, at 651 (describing findings of the Assistant Attorney General in 1908 that convict lease in Georgia and Florida was essentially involuntary servitude for persons who had committed no crime).

262. *See* Lichtenstein, *supra* note 221, at 93-94, 109; Schmidt II, *supra* note 219, at 649.

263. *See* DANIEL, *supra* note 220, at 26; MCMILLEN, *supra* note 42, at 123-27; Schmidt II, *supra* note 219, at 672; *id.* at 717.

264. *See* Clyatt v. United States, 197 U.S. 207 (1905); COHEN, *supra* note 41, at 279-80; NOVAK, *supra* note 218, at 63, 76-77. Cohen goes so far as to suggest that prosecutions under the federal peonage statute might have induced a reversion to more direct forms of involuntary servitude that did not involve forced labor for debt and thus could not be reached under the federal statute. *See* COHEN, *supra* note 41, at 285-86.

265. *See* DANIEL, *supra* note 220, at 23 (noting how hard it was to prosecute for peonage given that many southerners saw nothing wrong with it); NOVAK, *supra* note 218, at 89 (noting that as long as the stereotype of blacks being unwilling to work unless forced to do so persisted, peonage would continue to retain significant support in the South); *see also* State v. Armstead, 60 So. 778, 780-81 (Miss. 1913) (sympathizing with the Mississippi legislature's "purpose of requiring the fickle laborers in our cotton country to reasonably observe their contracts").

laws were among the least likely defendants to command the financial resources necessary to appeal their convictions to a court not under the sway of local planters.[266] Nor, at this date, was the NAACP or any similar organization operating in the South that might be able to render legal assistance. Federal intervention, in the form of prosecutions under the 1867 Peonage Act, was unlikely to prove significant since it depended on the enthusiasm of federal prosecutors, judges and jurors, all of whom were likely to share the prevailing southern white attitudes toward coerced black labor.[267] Federal prosecutions also generally depended on the testimony of black witnesses, who were often under the economic and social control of white planters, and thus not difficult to intimidate.[268] Such witnesses also were unlikely to enjoy much credibility with southern white juries.[269] In any event, the federal government's enthusiasm for peonage prosecutions did not last long, especially after the southern-sympathizing Wilson Administration assumed office in 1913.[270] Even in the few peonage prosecutions that did result in convictions, judges tended to impose exceptionally lenient sentences.[271]

Leading historians of black coerced labor agree that it is difficult to know how pervasive the practice was in the South at this time.[272] But there seems to be a consensus that plenty of it remained after *Bailey* and *Reynolds*[273] and that there is little reason to believe

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266. *See* NOVAK, *supra* note 218, at 64; Schmidt II, *supra* note 219, at 655.

267. *See* COHEN, *supra* note 41, at 283 (noting the difficulty of getting juries to convict in peonage cases); DANIEL, *supra* note 220, at 33 (same); *id.* at 52-53 (noting that many federal prosecutors were lukewarm about prosecuting peonage offenses and that sympathetic juries often refused to convict); DITTMER, *supra* note 39, at 79 (noting the unwillingness of white grand juries te indict in peonage cases); NOVAK, *supra* note 218, at 44 (noting that federal prosecutors and judges avoided bringing peonage cases because they generally shared the southern consensus regarding the need te coerce black labor); *id.* at 86 (noting the difficulty in abolishing peonage when juries would not convict men of practices which were prevalent in the community); Schmidt II, *supra* note 219, at 654-55, 673 (noting the problem of jury nullification in peonage prosecutions).

268. *See* DITTMER, *supra* note 39, at 78-79.

269. *See* DANIEL, *supra* note 220, at 32.

270. *See id.* at 138-39; NOVAK, *supra* note 218, at 64, 72 (noting the quick dissipation of the federal government's interest in prosecuting peonage and the Wilson Administration's aversion te embarrassing southern allies); Schmidt II, *supra* note 219, at 648, 715 (noting that the second Wilson Administration's concern with peonage "lapsed inte apathy").

271. *See* DANIEL, *supra* note 220, at 52-64; Schmidt II, *supra* note 219, at 663, 667-68.

272. *See* COHEN, *supra* note 41, at 24 (conceding that he, Daniel, and Novak have not been terribly successful at calculating how much involuntary servitude there was).

273. *See id.* at 292 (noting a statement by a Justice Department agent early in the twentieth century that one-third of the large planters in Georgia, Alabama, and Mississippi held workers in peonage); DANIEL, *supra* note 220, at 138-40, 148 (concluding there was a great deal of peonage in the South, even after World War I); DITTMER, *supra* note 39, at 77, 80-81 (noting that peonage was widespread in Georgia); *id.* at 81 (noting the Attorney General's report in 1921 that peonage existed "to a shocking extent" in Georgia); *see also* Schmidt II, *supra* note

that judicial intervention—as opposed to economic and social changes—had any significant impact on its prevalence.[274]

C. McCabe v. Atchison, Topeka & Santa Fe Ry. Co.[275]

In *McCabe* the Supreme Court was confronted with an Oklahoma law permitting railroads to provide first class accommodations only to white (or only to black) passengers, rather than the usual statutory requirement of separate but equal facilities. The Justices ultimately rejected the constitutional challenge on procedural grounds. Specifically, the plaintiffs had not requested and then been denied the services at issue, nor had they shown that an injunction was appropriate because of the inadequacy of a remedy at law.[276] In dicta, though, five of the nine Justices expressed an opinion on the merits, finding that the statute violated the Equal Protection Clause. The majority rejected the state's argument that requiring the provision of equal first class accommodations to blacks would be unreasonable, since per capita demand for such facilities was far lower among blacks than whites. This argument was flawed, these Justices concluded, because the Fourteenth Amendment guaranteed "personal" rather than "group" rights.[277] Four justices—Holmes, Lamar, McReynolds, and White—concurred in the result without opinion. In all likelihood, they were dissenting from the view expressed by the majority on the merits.[278]

It is possible, I think, to view *McCabe* as a more significant advance than *Guinn* or *Bailey/Reynolds*.[279] First, the majority's repu-

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219, at 648 (noting that the Court's decisions "left matters pretty much unchanged in the fields and lumber camps"). *But cf.* COHEN, *supra* note 41, at 297-98 (noting that the fact of the Great Migration indicates that large numbers of blacks must not have been held in involuntary servitude).

274. *See* NOVAK, *supra* note 218, at 64; Schmidt II, *supra* note 219, at 717 (noting that it was black migration northward, intensified by the needs of World War I "that broke the wheel of black servitude in the South"); *cf.* COHEN, *supra* note 41, at 292-93 (concluding that involuntary servitude was in decline by the time of *Bailey* and suggesting that, like lynching, the practice may have been a "barbaric atavism").

275. 235 U.S. 151 (1914).

276. *See id.* at 162-64.

277. *See id.* at 161.

278. *See* Schmidt I, *supra* note 28, at 488-91 (reaching this conclusion partly on the basis of archival evidence and partly by deduction from these Justices' positions on other racial issues).

279. Benno Schmidt takes his characteristically balanced approach in evaluating the significance of *McCabe*. He calls overstated a *Harvard Law Review* Note's description of the decision as marking " '[a] new phase of the Jim Crow question,' " yet he maintains that the ruling "captured an important shift." Schmidt I, *supra* note 28, at 487. *Compare id.* at 493 (noting that one can find in *McCabe* "the beginnings of corrosion in the constitutional mandate

diation of the "per capita demand" argument in defense of Oklahoma's law seems in tension with positions taken by the Court in the 1890s. In 1899 the Court in *Cumming v. Richmond County Board of Education* rejected a constitutional challenge to a Georgia county school board's decision to cease funding a black high school while continuing to provide high school education for whites.[280] The board defended its decision on the ground that the funds were better spent educating a larger number of black children at the primary school level. The Court rejected the constitutional challenge to this separate-and-*un*equal scheme on the ground that the board's actions had not been motivated by malice toward blacks and that it was reasonable to redistribute existing funds within black schools in a way that maximized the educational opportunities of the black community as a whole.[281]

In holding that separate-and-unequal was constitutional if reasonable, the Court arguably was seizing upon an option left open in *Plessy* three years earlier. It is often forgotten that *Plessy* did not hold that the Constitution required that racially separate facilities be equal; it was the Louisiana statute under review that imposed the equality requirement, and the Court simply held that the statute satisfied the Constitution. There was no occasion in *Plessy* to decide whether separate-and-*un*equal could be constitutional, though language in the opinion suggested that the Constitution required reasonableness, not equality.[282] In *McCabe* Oklahoma had a reasonable argument that railroads ought not to be required to operate largely empty first class accommodations for blacks; that is, the per capita demand argument surely had a factual basis. Thus the majority's insistence in dicta that separate facilities must be equal seems to represent a departure from *Cumming* and perhaps from *Plessy* as well.[283]

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for racial separation"), *with id.* at 494 (noting that it is also possible to read *McCabe* "as a decision of rather modest significance for the future of Jim Crow").

280. 175 U.S. 528 (1899).

281. For detailed background to *Cumming*, see generally J. Morgan Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. SO. HIST. 17 (1980); *see also* Schmidt I, *supra* note 28, at 470-72 (discussing *Cumming*). Kousser criticizes Justice Harlan's *Cumming* opinion on precisely the grounds noted in the text—that the Court was permitting separate-and-unequal so long as it was reasonable and not maliciously motivated. *See* Kousser, *supra*, at 38-39.

282. *See, e.g.*, LOFGREN, *supra* note 36, at 190; MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 22 (1987); Schmidt I, *supra* note 28, at 468-69; *id.* at 469-70 (noting that *Plessy* seemed to use a vague rule of reason in determining what racial classifications were permissible).

283. *See* Schmidt I, *supra* note 28, at 493.

Moreover, the Court's broad language regarding "personal" rights had logical implications that, if pursued with sufficient rigor, would doom segregation, not just the concept of separate-and-*un*equal.[284] Subsequent decisions would indeed invoke that language in the course of invalidating a state scheme for financing black graduate education out of state and judicial enforcement of racially restrictive covenants on land.[285] If equality rights truly were "personal"—that is, if persons were entitled to individualized treatment rather than being categorized as members of a group—segregation plainly was doomed. Viewed in this light, one might deem it significant that Justice Hughes's majority opinion in *McCabe* refrained from expressly endorsing *Plessy*, noting simply that "there is no reason to doubt the correctness" of the lower court's rejection of the segregation challenge on the basis of that decision.[286]

Finally, *McCabe* might be seen as significant because the Court seemed to reach out to decide it. As noted above, plaintiffs sought to enjoin enforcement of the Oklahoma statute before it went into effect, leading the Court to dismiss the suit for a lack of standing.[287] Yet rather than simply dismissing for lack of jurisdiction, the majority seemingly went out of its way to announce that the statute violated the Equal Protection Clause. It is possible that the Justices' determination to state a view on the merits indicated a changing attitude toward race.[288]

While these points cannot be dismissed out of hand, ultimately I think it is wrong to regard *McCabe* as a significant departure; rather, the decision is only slightly less minimalist than *Guinn* and *Bailey/Reynolds*. *McCabe* demonstrates, as do these other decisions, that the White Court was unwilling to legitimize the worst excesses of Jim Crow by nullifying the Reconstruction amendments. Yet *McCabe* went no further than this and in terms of practical effect was utterly inconsequential.

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284. *See id.* at 523 (noting that the doctrinal basis of *McCabe* "had potentially monumental consequences").

285. *See* Shelley v. Kraemer, 334 U.S. 1, 22 & n.29 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350-51 (1938); *see also* Schmidt I, *supra* note 28, at 492 (noting that *McCabe* later would be treated "as a major precedent").

286. *McCabe*, 235 U.S. at 160. Benno Schmidt makes more of this way of dealing with *Plessy* than I think justified. *See* Schmidt I, *supra* note 28, at 487, 493 n.165.

287. Awareness of this procedural flaw led Moorfield Sterey and the NAACP to decide against participating in the case. *See* Schmidt I, *supra* note 28, at 492.

288. *See id.* at 493 (calling the majority's reaching out to decide the case an effort "to amplify the signal of change").

First, *McCabe* in no sense threatened the constitutionality of segregation. While Justice Hughes did not expressly reaffirm *Plessy*, he did say that he had no reason to question its soundness. Moreover, while the logic of the "personal rights" dicta doomed segregation, it is inconceivable that the Justices intended to embrace those implications in the 1910s. The Court would sustain public school segregation in the 1920s,[289] and as late as the 1930s would affirm the permissibility of segregation in higher education so long as opportunities were equal.[290] "Personal rights" dicta notwithstanding, the Justices in 1914 were nowhere near ready to overrule *Plessy*.

Second, *McCabe* represented another instance of the suppression-of-outliers paradigm of constitutional law. Most southern state railroad segregation laws required that separate be equal. Only Oklahoma and three other states statutorily permitted inequality in first class accommodations.[291] These outlier statutes should be seen as further evidence of the deterioration of southern race relations—segregation was no longer sufficient, but now must be made formally unequal as well. Thus one can view the Court in *McCabe* as simply holding outlier southern states to the formal norm that all of the South had accepted a generation earlier and that most of the South continued to adhere to during the Progressive era.

Finally, in terms of practical consequences, *McCabe* probably had no effect on black accommodations on southern railroads. So long as state *law* did not authorize inequality, the Constitution was satisfied because of the state action requirement of the Fourteenth Amendment. Actual conditions on southern railroads were regulated not by the Constitution but by a combination of state common law (of common carriers), state statutory law (generally providing that railroad facilities be "separate but equal"), and federal statutory regulation (under the Interstate Commerce Act provision forbidding "undue or unreasonable prejudice or disadvantage"). Through the mid-1880s, state common law challenges to unequal railroad accommodations for blacks frequently had succeeded,[292] but these cases virtually disappeared after 1885. Similarly, the Interstate Commerce Commission in the late 1880s had enforced the federal statutory nondiscrimination

289. *See* Gong Lum v. Rice, 275 U.S. 78 (1927).

290. *See Gaines*, 305 U.S. at 337.

291. *See* BARNES, *supra* note 43, at 10.

292. *See* Riegel, *supra* note 78, at 25-27; Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*, 13 LAW & HIST. REV. 261 (1995); Minter, *supra* note 38, at 79-83, 107-08; *see also* WRIGHT, *supra* note 45, at 65 (noting an 1882 federal circuit court opinion insisting on equal funding of segregated schools).

requirement with some rigor.[293] But by the Progressive era, the tenor of these ICC decisions had changed dramatically. While still imposing a formal requirement of equality, the Commission now deferred almost entirely to statements by southern railroads denying that facilities were unequal.[294] State court lawsuits challenging inequality under state statutes requiring "separate but equal" facilities apparently never were brought, for obvious reasons.[295]

Thus the effect of *McCabe* was to invalidate a handful of southern state laws that departed from the norm of formal equality. Where legislatures were more circumspect, railroad regulation remained a matter for state common law and federal statutory regulation. Well before the Progressive period, these fora had ceased offering much hope for black passengers seeking genuine equality. This state of affairs remained fairly constant until World War II.[296] Thus it is difficult to view *McCabe* as the harbinger of racial change that some commentators have portrayed it to be.[297] The lesson of *McCabe* for southern state legislatures was that so long as they refrained from codifying inequality—a fairly minimalist interpretation of the Fourteenth Amendment—black passengers could be subjected to pretty much any treatment the railroads liked.

D. Buchanan v. Warley

Buchanan involved a Fourteenth Amendment challenge to a residential segregation ordinance from Louisville, Kentucky.[298] The

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293. *See* BARNES, *supra* note 43, at 13; Schmidt I, *supra* note 28, at 463 n.69; Minter, *supra* note 38, at 112.

294. *See* BARNES, *supra* note 43, at 13-14 (noting that in all but one case decided between 1900 and 1920, the Interstate Commerce Commission ruled against black travelers complaining about inequality in railroad accommodations, accepting the railroad company's word that it did not discriminate); Schmidt I, *supra* note 28, at 486 n.153 (noting that the Interstate Commerce Commission loosened up on the equality requirement after 1909).

295. Only one state "separate but equal" railroad law was passed at a time when it plausibly might have been enforced to secure equality; the others were passed mainly from 1887-1894, by which point the political and social climate no longer was ripe for successful equality challenges. *See* Minter, *supra* note 38, at 144, 206-07 (noting that separate but equal was never the reality). The one state law dating from an earlier period—Tennessee's 1881 statute—apparently produced no state prosecutions for railroad violations. *See id.* at 71-72. On the peculiar political origins of the Tennessee law, see generally Stanley J. Folmsbee, *The Origin of the First "Jim Crow" Law*, 15 J. SO. HIST. 235 (1949); Minter, *supra* note 38, at 63-68.

296. *See* Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); BARNES, *supra* note 43, at 23, 42-43.

297. *See, e.g.*, Schmidt I, *supra* note 28, at 493 (concluding for the reasons noted in the text that "*McCabe* must be viewed as a significant departure in the law of race relations").

298. Several historians have investigated the background to these residential segregation ordinances, and my account relies upon their studies. See Power, *supra* note 168, at 289; R.L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SO. HIST. 179 (1968); George C. Wright,

law provided that houses sold on city blocks that were majority white (or black) could be occupied only by whites (or blacks). The first ordinance of this kind had been enacted in Baltimore in 1910, and similar laws spread like wildfire during the decade, especially in the border states and the peripheral South.[299] These ordinances were a product of the black migration to the cities. As existing neighborhoods became congested, black families, often middle class, sought to escape crime and substandard housing by moving into formerly white areas. Residential segregation ordinances were enacted in response and were defended as necessary to preserve social peace and to protect property values which deteriorated as racial residential patterns destabilized.[300] The Supreme Court invalidated the Louisville ordinance on substantive due process grounds.

Should one regard *Buchanan* as a significant advance for the cause of racial equality or as a minimalist constitutional interpretation? Of the four (sets of) cases considered in this Article, *Buchanan* is the one most plausibly regarded as significant. Ultimately, though, I would reject that evaluation. To the extent that *Buchanan* does not lend itself to a minimalist interpretation, it should be understood as a substantive due process/property rights case, rather than as one fundamentally concerning race. Thus, only to the extent that one regards laissez-faire constitutionalism as a dependable ally of the civil rights cause—a dubious proposition[301]—does *Buchanan*, with its property rights focus, represent a significant advance in the Court's race relations jurisprudence.

As already noted, a nontrivial case can be made that *Buchanan* was a significant departure. Most importantly, two recent Supreme Court precedents had sustained racial segregation in the contexts of

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The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917, 78 REG. KY. HIST. SOC. 39 (1980); *see also* Lawrence O. Christensen, *Race Relations in St. Louis, 1865-1916*, 78 MO. HIST. REV. 123, 129 (1984) (describing background to the St. Louis segregation ordinance of 1916).

299. *See* DITTMER, *supra* note 39, at 13-14 (discussing Atlanta's segregation ordinance of 1913); LEWIS, *supra* note 152, at 69 (noting that in 1914 Virginia state officials "instructed local municipalities to follow Baltimore's lead" and devise plans for residential segregation); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 51 (1959) (quoting from the NAACP annual report of 1917 to the effect that these laws were "sweeping the country"); Schmidt I, *supra* note 28, at 499-500. For a contemporary categorization of the variety of these ordinances, see generally Gilbert T. Stephenson, *The Segregation of the White and Negro Races in Cities*, 13 SO. ATL. Q. 1 (1914).

300. *See Buchanan*, 245 U.S. at 73-74; *see also* LEWIS, *supra* note 152, at 77 (noting residents' concern at the possibility of falling property values).

301. *See infra* note 323.

railway transportation and higher education.[302] If state-mandated racial separation was permissible under the Equal Protection Clause in some contexts, why not in others? So long as the state could generate reasonable arguments to defend racial separation in housing—such as preserving social peace and protecting property values[303]—*Plessy* and *Berea College* seemed to settle the constitutionality of segregation.[304] Indeed, the *Buchanan* Court failed to distinguish these precedents convincingly.[305] Thus one might regard the decision as inconsistent with prior pronouncements and therefore an appreciable advance. Moreover, Justice Day's opinion for the Court featured a lengthy quotation from *Strauder v. West Virginia*,[306] which seemed to condemn racial classifications across-the-board.[307]

Further, as in *McCabe* and *Guinn*, the *Buchanan* Court's willingness to evade a potentially fatal procedural problem possibly indicates an enthusiasm for the result suggestive of an emerging commitment to racial justice. The actual transaction in *Buchanan* looked like this: Buchanan, a white real estate agent, agreed to sell a house on a predominantly white block to Warley, a black man who headed the local branch of the NAACP.[308] The contract explicitly authorized Warley to repudiate if the sale turned out to be illegal for any reason. Warley promptly invoked this clause on the ground that the Louisville ordinance rendered the sale illegal. Buchanan then sued under the

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302. *See* Berea College v. Kentucky, 211 U.S. 45 (1908) (higher education); Plessy v. Ferguson, 163 U.S. 537 (1896) (railway transportation); *see also* Pace v. Alabama, 106 U.S. 583 (1882) (rejecting an equal protection challenge to a statute imposing more severe penalties for interracial than intraracial cohabitation).

303. *See, e.g.*, Stephenson, *supra* note 299, at 3. The *Restatement of Property* in 1940 declared that racial restrictions on the alienation of property were reasonable because of two benefits: avoiding unpleasant racial incidents and stabilizing property values. *See* VOSE, *supra* note 299, at 4.

304. This was the basis of the lower court decision, which had upheld the Louisville ordinance. *See* Harris v. City of Louisville, 177 S.W. 472 (Ky. 1915).

305. *See* 245 U.S. at 79-81; *see also*, S.S. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81, 85-86 (1917) (arguing that the Court in *Buchanan* had things backwards, since segregation in education and transportation should be more constitutionally problematic than segregation in housing, as only the former involves daily insult to blacks); Rice, *supra* note 298, at 195-96 (noting some of the commentary criticizing Justice Day's opinion for failing convincingly to distinguish *Plessy* and *Berea College*); Note, *Constitutionality of Segregation Ordinance*, 16 MICH. L. REV. 109, 111 (1917). *But see* T.R. Powell, *Constitutionality of Race Segregation*, 18 COLUM. L. REV. 147, 149-51 (1918) (seeking to supply the distinction between housing and education/transportation that was missing from the Court's opinion).

306. 100 U.S. 303 (1880).

307. *See Buchanan*, 245 U.S. at 77 (quoting *Strauder*). Benno Schmidt emphasizes the importance of Justice Day's use of this quotation. *See* Schmidt I, *supra* note 28, at 507, 520.

308. The transaction is described in Rice, *supra* note 298, at 185-86, and in Schmidt I, *supra* note 28, at 498.

contract and invoked the Fourteenth Amendment in reply to Warley's defense based on the ordinance. *Buchanan* thus had all the markings of a "friendly," nonadversarial suit, with jurisdiction barred under Article III's "case or controversy" requirement.[309] Indeed, Justice Holmes initially was inclined to dismiss the suit on these grounds.[310] It is common knowledge that occasionally the Justices finesse procedural hurdles when they feel strongly about the merits, so perhaps we should regard the Court's willingness to decide *Buchanan* as evidence of a burgeoning egalitarian commitment.

While these are serious argnments, I am not convinced that *Buchanan* was a pathbreaking decision. First, a strong case can be made that residential segregation ordinances represent a core violation of the *Fourteenth* Amendment, in the same way that *Guinn* involved a core violation of the Fifteenth and *Bailey/Reynolds* of the Thirteenth. While modern commentators vehemently disagree about the original understanding of the Fourteenth Amendment,[311] a consensus exists that, at a bare minimum, it was intended to supply a constitutional basis for the 1866 Civil Rights Act.[312] That statute provided that blacks were to enjoy the same rights as whites with regard to property ownership, contract, court access, and protection of the law. The 1866 Act was responsive to the Black Codes adopted by southern states in 1865-66, some of which sought, inter alia, to exclude black access to real estate ownership outside of cities and towns.[313] Equality with regard to property rights, then, was at the core of the Fourteenth Amendment, in a way that equality with regard to education (*Berea College*) and transportation (*Plessy*) was not.

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309. One must distinguish this procedural problem from another that was more apparent than real. Since Buchanan, a white man, was challenging the constitutionality of the ordinance, it was not clear that he should be permitted to raise the equal protection objection—that the law involved discrimination against blacks. Yet certainly he was entitled to raise the objection that the ordinance interfered with his own property rights. *See Buchanan*, 245 U.S. at 72-73 (stating that the ordinance "directly involved and necessarily impaired" Buchanan's rights); Schmidt I, *supra* note 28, at 506, 515-17.

310. *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 498-500 (1991); Schmidt I, *supra* note 28, at 512-13 (reproducing Holmes's draft dissent).

311. I have summarized some of this scholarship in Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235 n.95 (1991).

312. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 18-19, 22-23, 163-65, 169, 173, 239 (1977); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 170 (1975); MALTZ, *supra* note 128, at 109, 113, 117; WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 104 (1988); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 12-13, 16-17, 46-47, 56-58 (1955); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389, 1409 (1992).

313. *See, e.g.*, FONER, *supra* note 49, at 198-200; WILSON, *supra* note 218, at 66, 79.

The only sense in which *Buchanan* was not an obvious Fourteenth Amendment violation, then, was in its careful (disingenuous) provision for formal equality—whites could not purchase real estate on majority black blocks any more than blacks could on majority white blocks. If the Court could see past this formal equality to the substance of what was happening[314]—that is, blacks were being excluded from white neighborhoods to which they sought access—then the Louisville ordinance represented a core violation of the Fourteenth Amendment.[315]

In the late twentieth century, we tend to think about equal protection in terms of a broad presumptive rule against racial classifications. But this is not how Reconstruction Republicans, with their trifurcation of rights into the categories of civil, political, and social, thought about race discrimination. Indeed, this was not how the Court thought about race discrimination even as late as *Brown v. Board of Education*—a case in which the Court expanded the category of rights protected against race discrimination, rather than adopting a broad presumptive rule against racial classifications.[316] Only the post-*Brown* per curiam opinions[317] implicitly, and *McLaughlin v. Florida*[318] and *Loving v. Virginia*[319] explicitly, embraced a presumptive rule against racial classifications, regardless of the nature of the right being impinged.[320] Thus to the extent that the Fourteenth Amendment was addressed toward ending race discrimination with regard to the civil rights that Reconstruction Republicans identified as fundamental—property ownership, contract, court access, and pro-

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314. In *Plessy*, where the Court declined to pierce the veil of formal equality, property rights were not involved. Moreover, it seems plausible that segregated railway cars could be made materially equal in a way that segregated neighborhoods could not be.

315. Similarly, in 1890 a federal judge in California had invalidated a San Francisco ordinance excluding the Chinese from Chinatown and relocating them elsewhere in the city. *See In re* Lee Sing, 43 F. 359 (N.D. Cal. 1890). Judge Lorenzo Sawyer thought the ordinance was an obvious violation of the Fourteenth Amendment, and the issue apparently was so clear that no appeal was taken from his decision and no other California municipality attempted to enact a similar ordinance. *See* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 230-33 (1994).

316. *See* Klarman, *supra* note 311, at 226-40.

317. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (public transportation); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches).

318. 379 U.S. 184 (1964) (invalidating a state law criminalizing cohabitation by unmarried interracial couples).

319. 388 U.S. 1 (1967) (invalidating a state law criminalizing interracial marriage).

320. *See* Klarman, *supra* note 311, at 254-57. Professor Ortiz makes the interesting argument that even today's ostensible across-the-board presumptive ban on racial classifications turns out, in practice, to resemble the old, particularistic approach which protected different rights differently. *See generally* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

tection of the law—a residential segregation ordinance posed a far easier issue for the Court than transportation or education segregation.

Viewing *Buchanan* as a landmark civil rights decision seems misguided for a second reason. Even if one regards the ruling as inconsistent with precedent and in excess of what a minimalist interpretation of the Fourteenth Amendment would require, it does not necessarily follow that the Court was effecting any significant departure with regard to *race*. Justice Day's *Buchanan* opinion is a straightforward property rights decision sounding in substantive due process. It was issued in the midst of the *Lochner* era, when the Court's commitment to protecting contract and property rights from legislative impairment was at its zenith.[321] While laissez-faire constitutionalism may produce incidental benefits to the cause of civil rights,[322] it is important not to confuse the former with the latter. That is, the relationship between laissez-faire constitutionalism and racial justice is contingent and contextual, not necessary and universal.[323]

Considerable evidence supports this property rights interpretation of *Buchanan*. First, the doctrinal hook for the decision is due

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321. Benno Schmidt notes that most contemporary and subsequent commentators have regarded *Buchanan* as primarily a property rights decision, though he maintains that a contrary view is defensible. *See* Schmidt I, *supra* note 28, at 517-22.

322. Some commentators have made a stronger claim about the linkage hetween laissez-faire constitutionalism and the interests of racial minorities. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 99 (1992) ("Mr. Herbert Spencer's Social Statics is just the right antidote to Jim Crow."); Bernstein, *supra* note 147; Bernstein, *supra* note 226, at 831-39; David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 799, 875-81 (1998); Roback, *supra* note 157. Benno Schmidt makes a more complicated argument about this relationship, but concludes that *Lochner*-style activism significantly contributed to the civil rights victories of the Progressive era. Schmidt's principal points are these: (1) that Jim Crow statutes are inconsistent with a commitment to laissez-faire, (2) that one sort of judicial activism feeds upon another, and (3) that a "hard" conception of individual rights in the economic sphere might have spin-off effects in other constitutional contexts. *See* Schmidt I, *supra* note 28, at 456; Schmidt III, *supra* note 61, at 905. I find Schmidt's argument unpersuasive. For most of American constitutional history, a strong emphasis on economic rights failed to yield siguificant protection for other rights such as free speech or privacy. Conversely, since 1937 a strong commitment te protecting other rights has coexisted with a substantial evisceration of constitutional protection for economic rights.

323. Whether laissez-faire constitutionalism is more of a friend or a foe to the civil rights cause depends entirely on one's calculation as to whether existing legislation is more likely to be advantageous or disadvantageous to racial minorities. The same substantive due process notions that invalidate residential segregation ordinances can be invoked to invalidate civil rights statutes on the ground that the state should not interfere with the contractual freedom of employers or owners of places of puhlic accommodation. Moreover, to the extent that racial minorities are poorer than the societal average, they arguably stand to suffer from a laissez-faire constitutionalism that presumptively bars government redistribution of wealth.

process, not equal protection. While Justice Day's opinion is muddled and conclusory, its consistent theme is the importance of property rights.[324] Second, one of the Justices making up the unanimous Court in *Buchanan*, James McReynolds, was never known to be an enthusiast for civil rights and indeed dissented from most subsequent decisions protecting them.[325] Perhaps most significantly, several southern state courts had themselves invalidated residential segregation ordinances (again, entirely on substantive due process rather than equal protection grounds).[326] It is virtually inconceivable that any southern state court at this date would have had constitutional qualms about public school or transportation segregation laws. Thus state court decisions invalidating residential segregation ordinances must be understood as evincing a commitment to property rights, not to the civil rights of blacks generally.[327]

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324. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 74, 78-79 (1917). The NAACP had argued the case largely in property rights terms, seeking thus to distinguish *Plessy* and *Berea College*. *See* Schmidt I, *supra* note 28, at 504-05.

325. *See* Schmidt III, *supra* note 61, at 901 (noting that "McReynolds's support for property rights overcame his commitment to racial separation"); Schmidt I, *supra* note 28, at 519 (noting that McReynolds's vote is less puzzling if the case is seen as a property rights one). For McReynolds's opinions hostile to civil rights claims, see *Lane v. Wilson*, 307 U.S. 268, 277 (1939) (McReynolds, J., dissenting); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 353-54 (1938) (McReynolds, J., dissenting); *Powell v. Alabama*, 287 U.S. 45, 77 (1932) (McReynolds, J., dissenting); *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (McReynolds, J., dissenting); *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (McReynolds, J., dissenting). I do not mean to suggest that McReynolds invariably rejected civil rights claims, but only that he usually did. The most prominent exceptions were *Brown v. Mississippi*, 297 U.S. 278 (1936), and *Nixon v. Herndon*, 273 U.S. 536 (1927). *Cf.* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 571-84 (1997) (showing that the Four Horsemen were not consistently hostile to civil rights and civil liberties claims).

326. *See, e.g.*, State v. Gurry, 88 A. 546, 549-52 (Md. Ct. App. 1913) (invalidating a residential segregation law on substantive due process grounds while rejecting an equal protection challenge on the basis of *Plessy*); Carey v. City of Atlanta, 84 S.E. 456, 460 (Ga. 1915) (invalidating a residential segregation law under the Due Process Clause as an interference with property rights); *see also* State v. Darnell, 81 S.E. 338, 339 (N.C. 1914) (invalidating a residential segregation ordinance as beyond the power of town commissioners while also raising vested property rights objections). These state cases are summarized in Schmidt I, *supra* note 28, at 501-02.

Conversely, those state courts sustaining residential segregation ordinances usually did so on Progressive, anti-*Lochner* grounds—that individual property rights must yield to the common good (in preserving racial peace and white property values). *See* Harden v. City of Atlanta, 93 S.E. 401 (Ga. 1917); Harris v. City of Louisville, 177 S.W. 472, 476, 477 (Ky. 1915) ("[N]o extended discussion is necessary to establish that reasonable restraints upon the use of private property and upon the liberty to contract are not subversive."); Hopkins v. City of Richmond, 86 S.E. 139 (Va. 1915). The same is true generally of commentators criticizing *Buchanan*. *See, e.g.*, Field, *supra* note 305, at 83-85; Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393 (1918); Note, *supra* note 305, at 109.

327. One obvious objection to the interpretation propounded in the text is that the same year the Court decided *Buchanan*, it appeared to overrule *Lochner* sub silentio in *Bunting v. Oregon*, 243 U.S. 426 (1917). *See* Schmidt I, *supra* note 28, at 521. Moreover, *Buchanan*'s author, Justice Day, had dissented in *Lochner*. *See id.* at 520. On the other hand, the Court

Whether one regards *Buchanan* as a significant departure in the area of race or as a minimalist constitutional interpretation (or as something in between), it should be possible to reach agreement that the decision's impact on residential housing patterns was ultimately insignificant. Yet, surprisingly, some commentators have reached a different conclusion. Benno Schmidt suggests, for example, that had *Buchanan* come out the other way, the result might have been racial apartheid in southern cities and perhaps in the southern countryside as well. In support of this claim, Schmidt observes that cities throughout the South were awaiting the result in *Buchanan* before deciding whether to adopt their own residential segregation ordinances.[328] One might add as well that many southern cities, and at least one northern one, subsequently enacted or reenacted residential segregation laws in spite of *Buchanan* (most of which were quickly invalidated in court).[329]

The obvious problem with this argument is that American cities did become racially segregated—indeed, far more segregated than they were in 1917—notwithstanding *Buchanan*.[330] Historians agree that in those cities where residential segregation ordinances were invalidated, no significant desegregation occurred[331]—precisely

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hardly had abandoned substantive due process by 1917, and Justice Day was not a consistent foe of the doctrine. *See, e.g.*, Adams v. Tanner, 244 U.S. 590 (1917) (invalidating Washington's law restricting employment agency fees); Wilson v. New, 243 U.S. 332, 364 (1917) (Day, J., dissenting) (rejecting on substantive due process grounds the federal government's establishment of a minimum wage for railroad employees).

One might also argue that since the Court rejected a takings challenge to a general zoning ordinance a decade later, *see* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), *Buchanan* should be seen as a race, rather than a property rights, case. *See* Schmidt I, *supra* note 28, at 521. It seems likely, though, that whatever the economic merits of the distinction, the Justices would have seen a big difference between restricting the use and the sale of land.

Benno Schmidt plausibly concludes that both the racial segregation and the property rights components were necessary to the result in *Buchanan*. *See id.* at 521-22; *see also* Schmidt III, *supra* note 61, at 904 ("It was the combination of a racial restriction addressed to personal property rights of substantial importance . . . that produced the result in *Buchanan*.").

328. *See* Schmidt I, *supra* note 28, at 501 (noting that "cities around the country stood on the brink of residential apartheid as the nation awaited the response of the Supreme Court"); *id.* at 523 (noting that had *Buchanan* come out the other way, residential segregation "would surely have swept through the cities and towns of the South and probably beyond into the countryside"); *see also* Bernstein, *supra* note 322, at 800.

329. *See, e.g.*, City of Richmond v. Deans, 37 F.2d 712 (4th Cir. 1930); City of Dallas v. Liberty Annex Corp., 19 S.W. 2d 845 (Tex. Ct. App. 1929); DITTMER, *supra* note 39, at 14; LEWIS, *supra* note 152, at 77; VOSE, *supra* note 299, at 51-52; Emma Lou Thornbrough, *Segregation in Indiana During the Klan Era of the 1920's*, 47 MISS. VALLEY HIST. REV. 594, 598-601 (1961); *see also* GROSSMAN, *supra* note 48, at 174 (noting that the Chicago Real Estate Board in 1917 petitioned the city council to pass an ordinance prohibiting further black migration to Chicago).

330. Benno Schmidt concedes this point, *see* Schmidt I, *supra* note 28, at 522, which makes his insistence on *Buchanan*'s practical importance puzzling.

331. *See* LEWIS, *supra* note 152, at 78-79; WRIGHT, *supra* note 45, at 236; Power, *supra* note 168, at 314-20.

as southern newspapers had predicted in the wake of *Buchanan*.[332] And in northern cities where such laws had never been enacted, such as Chicago and New York, extraordinary increases in residential segregation took place in the 1910s and 1920s.[333]

This residential segregation had several causes—some plainly attributable to public action, some to private, and some to forces that challenge the coherence of the public/private distinction. A certain amount of racial residential segregation was attributable to private choice; ethnic communities have always had good reasons, in addition to coercion and fear of violence, for congregating together.[334] But, of course, private choice cannot account for the prevalence of segregation in the face of black efforts to exit the ghetto. Racially restrictive covenants—held to be judicially enforceable without constitutional constraint by virtually every court to consider the issue until *Shelley v. Kraemer*[335] in 1948[336]—may have played an important role in segregating the races.[337] Such covenants began to appear in significant numbers around the same time that residential segregation laws were first being enacted.[338] In addition, formal and informal agreements among real estate agents prevented black families from moving into

332. *See, e.g.*, RICHMOND NEWS LEADER, Nov. 6, 1917, at 4; Schmidt I, *supra* note 28, at 509.

333. *See, e.g.*, GOSNELL, *supra* note 92, at 256-58; GROSSMAN, *supra* note 48, at 123-26; HOMEL, *supra* note 48, at 5, 30; SPEAR, *supra* note 48, at 14-17, 142, 145 tbl.11; *see also* GERBER, *supra* note 48, at 289-93 (noting that notwithstanding the increased black migration of 1890-1910, there was considerable residential integration in all Ohio cities before World War I).

334. *See* GROSSMAN, *supra* note 48, at 127 (noting the ethnocentric pull of familiar institutions to migrating blacks); KATZMAN, *supra* note 52, at 55 (discussing ties of birth, culture, and language that stimulate ethnic congregation).

335. 334 U.S. 1 (1948).

336. The Supreme Court held in *Corrigan v. Buckley*, 271 U.S. 323 (1926), that racially restrictive covenants were not themselves state action, and thus could not violate the Fourteenth Amendment; the Court did not reach the question of whether judicial enforcement would amount to state action. Over the next two decades, approximately 20 state supreme courts considered the question, and they *unanimously* held, often relying (erroneously) on *Corrigan*, that judicial enforcement of such covenants did not amount to state action; the United States Supreme Court repeatedly denied certiorari in these cases until after World War II. *See* VOSE, *supra* note 299, at viii, 19, 28, 156.

337. On the importance of racially restrictive covenants in the creation of segregated cities, compare VOSE, *supra* note 299, at 5, 9 (emphasizing their importance); WRIGHT, *supra* note 45, at 236 (suggesting their importance in segregating Louisville); Lawrence B. DeGraaf, *The City of Black Angels: Emergence of the Los Angeles Ghetto, 1890-1930*, 39 PAC. HIST. REV. 323, 349 (1970) (suggesting their importance in segregating Los Angeles in the 1920s), with ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960, at 16, 29-30 (1983) (questioning their significance).

338. Racially restrictive covenants initially began to appear in St. Louis around 1911, *see* VOSE, *supra* note 299, at 100, just one year after the first residential segregation ordinance was passed in Baltimore.

white neighborhoods.[339] City planning officials also continued unofficially to zone according to race, *Buchanan* notwithstanding; litigation challenging racially motivated but facially neutral zoning decisions generally proved futile.[340] Some years later, explicitly discriminatory federal home loan policy prevented blacks from relocating to white neighborhoods, while at the same time encouraging white flight to the suburbs.[341]

Finally, old-fashioned physical intimidation and violence should not be discounted as a factor either. As one historian has noted, working class whites, who felt most threatened by black competition for jobs and who were most dependent upon the property investments they had made in their houses, used force instead of resorting to sophisticated legal devices like restrictive covenants to maintain segregation in their neighborhoods. Historians have copiously documented instances of mob violence, bombings, and other physical harassment directed against black families daring to enter previously all-white residential enclaves.[342] Fifty-eight bombings in opposition to relocation efforts by black families took place in Chicago between 1917 and 1921.[343] Police forces that were overwhelmingly white almost invariably declined to provide protection to the black "intruders" and generally failed even to investigate the attacks.[344]

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339. *See* SPEAR, *supra* note 48, at 26, 209-10; VOSE, *supra* note 299, at 66-67, 106-07, 223-25; Power, *supra* note 168, at 318-19, 325.

340. *See* Bernstein, *supra* note 322, at 864-67.

341. *See* HIRSCH, *supra* note 337, at 10; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198-214 (1985); VOSE, *supra* note 299, at 225-26.

342. See DITTMER, *supra* note 39, at 14 (noting that restrictive covenants and terrorism were *more effective* than residential segregation ordinances at segregating neighborhoods in Georgia cities); GERBER, *supra* note 48, at 293-94 (noting the violence that confronted more affluent blacks trying to escape Cleveland's poorer neighbhorhoods in the 1890s); GROSSMAN, *supra* note 48, at 127 (noting white resistance in Chicago to even a "respectable" black family's resettlement in a traditionally white neighborhood); LEWIS, *supra* note 152, at 77-78 (noting several incidents in the 1920s of white mobs in Norfolk, Virginia, preventing black families from moving inte white neighborhoods); SPEAR, *supra* note 48, at 20-22, 201, 208, 211-12, 219-20 (describing numerous such incidents in Chicago); TUTTLE, *supra* note 92, at 161 (noting that "the most effective enforcer of residential segregation in Chicago was organized white resistance"); WRIGHT, *supra* note 45, at 237 (stating that harassment included the smashing of windows and threatening calls and letters); DeGraaf, *supra* note 337, at 336, 346, 348 (describing mob actions directed against blacks in white neighborhoods); *cf.* MCMILLEN, *supra* note 42, at 12-14 (noting that Mississippi did not need residential segregation ordinances because blacks there did not dare to challenge the status quo by moving into white neighborhoods).

343. *See* GROSSMAN, *supra* note 48, at 174; SPEAR, *supra* note 48, at 211; *see also* TUTTLE, *supra* note 92, at 159 (noting 26 bombings of isolated black residences in formerly all white neighborhoods between 1917 and 1919).

344. *See* GROSSMAN, *supra* note 48, at 178; SPEAR, *supra* note 48, at 212; TUTTLE, *supra* note 92, at 159, 178.

Thus *Buchanan* barred only formal state-mandated racial segregation in housing. It had nothing to say about and no effect upon other public and private mechanisms that accomplished the same result with equal or perhaps even greater efficacy.

V. ASSESSING THE SIGNIFICANCE OF THE PROGRESSIVE ERA RACE CASES

How, then, shall we assess the significance of the Progressive era race decisions? I am persuaded by Benno Schmidt's argument that, at a minimum, these rulings reflect an attitudinal shift on the part of the Justices. Ironically, the principal evidence for this claim lies not in the case results, which I believe demonstrate only a minimalist commitment to constitutionalism, but in the Justices' willingness even to reach the merits in cases that were procedurally flawed.[345] As we have seen, three of these cases easily might have been dismissed on procedural grounds. *Buchanan* had all the markings of a contrived case. Similarly, since the Justices unanimously agreed that the lawsuit in *McCabe* was not ripe, they easily could have (and arguably should have) declined to express a view on the merits. Finally, there was a strong argument in *Guinn* that no federal statute authorized the criminal prosecution, whatever the constitutionality of the grandfather clause. The Court's apparent eagerness to reach the merits in these cases and render decisions favorable to the civil rights cause seems significant, although Schmidt's conclusion that "the Supreme Court executed a dramatic shift by its simple willingness to decide"[346] perhaps is overstated.

On the merits (as opposed to the Court's willingness to reach the merits), though, I would maintain that the Progressive era decisions neither indicated a significant advance in the Justices' thinking about race nor produced any notable changes in racial practices. *Guinn* blocked a rather obvious effort to circumvent the Fifteenth Amendment and had absolutely no ameliorative effect on southern black disfranchisement. *Bailey* and *Reynolds* invalidated two peonage schemes that plainly contravened the spirit of both the Thirteenth Amendment and state constitutional prohibitions on imprisonment

345. *See* Schmidt III, *supra* note 61, at 899; *see also* Schmidt I, *supra* note 28, at 460 (noting that the Court "went out of its way to protect claims of racial justice"); *id.* at 487-88 (describing *McCabe*'s importance in this sense); *id.* at 508 (noting contemporary commentary on *Buchanan* to this effect).

346. Schmidt III, *supra* note 61, at 899.

for debt; the rulings had no discernible impact on the prevalence of coerced black labor in the South. *McCabe* held only that a statutory mandate of separate-and-*un*equal violated the Equal Protection Clause and in no sense undermined the constitutionality of segregation. Nor did the ruling secure actual equality for blacks on southern railroads, since it had no bearing on railroad (as opposed to state) policies, and the Interstate Commerce Commission was unwilling at this time to enforce a stringent equality requirement. Finally, *Buchanan* applied the Fourteenth Amendment to a core concern of its Framers—race discrimination with regard to property rights—at a time when the Court was most solicitous of those rights; the ruling had no integrative effect on housing patterns owing to a host of public and private factors pushing toward greater segregation. Overall, therefore, it seems plausible to regard the Court's Progressive era race decisions as minimalist constitutional interpretations with little if any real world impact. It is an understatement to say, as Benno Schmidt does, that the White Court "did not take the axe to the root of the tree of legalized racism."[347]

In an era in which the South politically could get away with lynching, massive black disfranchisement, the formalization of segregation, and the reenactment of statutory codes for coercing black labor, the Court stood as a barrier to the adoption of schemes that came too near to formal nullification of the Constitution. Yet because the Court was unwilling to question the substance—as opposed to the form—of southern racial practices, nothing really changed for blacks.[348] Grandfather clauses were not necessary to accomplish black disfranchisement while immunizing illiterate whites. False pretenses laws with phony presumptions were not necessary to coerce black labor. Statutory invitations to separate-and-*un*equal were not essential to providing inferior railroad accommodations to southern blacks. And formal residential segregation ordinances were not needed to segregate American neighborhoods, North and South.

The Supreme Court eventually would discover that it could begin to make a dent in the southern system of race relations known as Jim Crow only by penetrating form to substance. Thus, over the

347. *Id.* at 898.

348. *See* Schmidt I, *supra* note 28, at 460 (conceding that none of the decisions "had much practical consequence in alleviating the desperate legal and political situation of black people in this period").

decades the Court began to investigate legislative motives,[349] question the factual findings of southern trial courts,[350] pierce the public/private distinction,[351] bar practices with a disparate impact even in the absence of proof of discriminatory purpose,[352] and generally to question the good faith of white southerners and the panoply of devices they used to subordinate blacks.[353] The Court was not about to undertake such tasks during the Progressive era. Moreover, even after later Courts evinced greater willingness to penetrate form for substance, their interventions had only marginal significance until Congress followed up with more aggressive enforcement measures, such as threats to withhold federal funds from discriminators, the replacement of southern state voting registrars with federal ones, and the application of antidiscrimination rules to private actors. A Congress that could not be prompted even to pass anti-lynching legislation in 1918 was not about to enlist in a judicial battle against Jim Crow. With national race relations approaching their historical nadir, it is unsurprising that the Progressive era Court's race decisions were as minimalist as they were and that their concrete effects were so trivial.

Court decisions can, of course, matter in ways other than their practical significance. For example, while *Brown v. Board of Education* had virtually no impact on southern school segregation until after 1960, its importance to the civil rights movement—whether in the form of energizing blacks or educating

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349. *See, e.g.*, Griffin v. School Bd., 377 U.S. 218 (1964) (invalidating school closures in Prince Edward County, Virginia, because of an unconstitutional motive to resist a desegregation order).

350. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (reversing under the Due Process Clause a criminal conviction based on a coerced confession after rejecting the state court's finding of voluntariness); Moore v. Dempsey, 261 U.S. 86 (1923) (reversing under the Due Process Clause a criminal conviction obtained in a mob-dominated trial after rejecting the state court's finding that the jury had not been influenced by the mob atmosphere).

351. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants is state action); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the Democratic Party's exclusion of black voters from its primaries is state action).

352. *See, e.g.*, Green v. School Bd., 391 U.S. 430 (1968) (invalidating a "freedom-of-choice" desegregation plan on the ground that it had failed to secure integrative results).

353. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963) (invalidating under the First Amendment a Virginia law prohibiting any organization to retain a lawyer in connection with litigation to which it was not a party after taking judicial notice of "the intense resentment and opposition of the politically dominant white community of Virginia" to the NAACP); *id.* at 445 (Douglas, J., concurring) (noting the legislature's "purpose to penalize the NAACP because it promotes desegregation of the races"); NAACP v. Alabama, 357 U.S. 449 (1958) (invalidating under the First Amendment Alabama's effort to coerce production of NAACP membership lists on the ground that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility").

whites—is almost universally assumed.[354] Is it possible that the Court's Progressive era race decisions had a similar sort of significance?[355] On this view, the ability of blacks to secure court victories was especially important at a time when the other branches of the national government were so derelict in their duty to provide racial justice. Since the success of a social protest movement may depend, first of all, on its ability to convince potential participants of its feasibility, a small ray of hope in the form of minimalist Court victories could be a critical first step in the right direction.[356]

This claim regarding the symbolic or educative significance of Court decisions is, by its nature, difficult to confirm or reject. Some evidence exists to support this interpretation. *Buchanan* specifically seems to have had an energizing impact on the NAACP, which had played a vital role in the litigation[357] (although disaggregating the impact of *Buchanan* from that of World War I is impossible). The NAACP's national membership increased after *Buchanan* from just under 10,000 to roughly 45,000; locally, the Louisville branch that had conducted the *Buchanan* litigation increased its membership by about 1350.[358] Thus, victories like *Buchanan* might not only have inspired blacks to believe that the racial status quo was changeable but also have provided concrete organizational gains to the group that became the litigation arm of the civil rights movement.[359]

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354. *See, e.g.*, David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 152-53 (1994); Mark V. Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 175-77 (1994); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 869 (1964).

355. This seems to be Benno Schmidt's ultimate conclusion regarding the significance of these cases. *See* Schmidt I, *supra* note 28, at 445 (noting that the Progressive era race decisions were "more symbols of hope than effective bulwarks against the racial injustice that permeated American law"); *see also* Bernstein, *supra* note 322, at 874; Wright, *supra* note 298, at 50-52 (regarding *Buchanan* specifically).

356. *See* MCADAM, *supra* note 65, at 105-06, 111; *cf.* Schmidt I, *supra* note 28, at 459 (noting that "the White Court shook the illusion that this arrangement [the existing state of southern race relations] was permanent").

357. *See* WRIGHT, *supra* note 45, at 197-98, 238.

358. *See* Wright, *supra* note 298, at 52.

359. On the importance of the NAACP as the litigation arm of the civil rights movement, see generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); TUSHNET, *supra* note 282; VOSE, *supra* note 299. The NAACP's contributions to the civil rights movement were both crucial and varied. The organization afforded free legal assistance to civil rights claimants lacking the financial resources to raise their claims independently, educated blacks about their legal rights, performed an insurance function for litigants facing economic retaliation by challenging the racial status quo, and publicized black mistreatment (e.g., by investigating lynchings) at a time when it would have been too dangerous for individuals to take on such a task. On the last point, see BRUNDAGE, *supra* note 41, at 232-34; *see also* HINE, *supra* note 42, at 46 (noting that an NAACP officer sent to Longview, Texas, in 1919 to investigate a

While the symbolism of these decisions may have advanced the civil rights cause, one should not ignore two possible countervailing effects. First, judicial victories may have had the insidious consequence of legitimizing an unjust status quo. One can imagine two ways in which this might happen. Much as the Justices' invalidation of a practice stamps it with their disapproval, so the Court's implicit or explicit validation of a different practice lends it a veneer of legitimacy.[360] Thus, for example, while *Guinn* condemned grandfather clauses, it explicitly endorsed literacy tests. It is hard to see why the symbolic or educational effect of Court decisions would run only in one direction. If what the Court condemns is delegitimized, then what it approves, implicitly or explicitly, is legitimized. Second, when the Court purports to solve a constitutional problem, but the underlying grievance remains unredressed, it is plausible that the legitimacy of that grievance is diminished. Mike Seidman has suggested that landmark decisions such as *Brown* and *Miranda* may have had this effect.[361] For example, *Brown* defined the Equal Protection problem to be one of de jure segregation; if, after *Brown*, formally desegregated black schools remained unequal, this could not, by definition, be attributable to any constitutional flaw.[362] Similarly, if residential segregation persisted after the Court invalidated segregation ordinances in *Buchanan*, this could not be because of any constitutional vice, and thus the legitimacy of the grievance arguably was undercut.

Judicial victories may have a second, more concrete deleterious effect: They may persuade participants in a social protest movement to devote additional energy and resources to the path that has proven successful—namely, litigation. Yet it has become commonplace among legal academics and political scientists in the 1990s to question the ability of courts acting alone to produce significant social change.[363] Much of the agenda of the modern civil rights movement probably was beyond the capacity of courts to deliver in two senses. First, conventional doctrinal tools would not permit a court, for example, to pierce the public/private distinction in the way that a

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race riot was severely beaten, and the state's governor responded to NAACP protests by blaming northern interventionists who stirred up trouble with southern race relations).

360. *See, e.g.*, J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1729, 1732 (1997) (arguing that our need to believe that the Constitution is "a basically good and just document" leads us to treat grievances not plausibly addressed by that document as "not seriously and profoundly great injustices").

361. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992).

362. *See id.* at 717.

363. *See generally* ROSENBERG, *supra* note 19; Friedman, *supra* note 19; Klarman, *Rethinking*, *supra* note 10; Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

legislature could. Thus, the Supreme Court was unwilling to give the sit-in demonstrators of the 1960s what they wanted—a pronouncement that it was unconstitutional for the state to prosecute demonstrators protesting racial segregation in public accommodations for trespass or breach of the peace.[364] Congress, of course, not only could but ultimately did supply a federally-protected right of access to public accommodations in the 1964 Civil Rights Act. Similarly, the Court lacked the doctrinal tools to declare private employment discrimination unconstitutional, while Congress plainly possessed constitutional power, under the Commerce Clause if not Section Five of the Fourteenth Amendment, to make it illegal.

Second, even litigation victories that were within the reach of conventional doctrine generally meant little in practical terms until Congress supplied effective enforcement mechanisms. Thus, *Brown*'s invalidation of de jure segregation had little impact until Congress in 1964 authorized the withholding of federal educational funds from school districts maintaining segregation.[365] Similarly, neither the Fifteenth Amendment nor Court decisions implementing it meant much in the deep South until Congress in 1965 appointed federal voting registrars to ensure nondiscriminatory registration of black voters.[366] To the extent that court victories might have induced a diversion of scarce resources from political mobilization to litigation, one might question how well they served the long-term interests of the civil rights movement.

While I am generally persuaded by this line of analysis, one important qualification is necessary. Civil rights litigation may have been important not simply in terms of the *results* it achieved—whether concrete or symbolic—but also as part of a *process* for mobilizing group consciousness.[367] It is clear that by the 1930s some NAACP leaders entertained precisely this view of litigation.

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364. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964) (ducking the state action question and remanding the case to state court on other grounds). *Bell* was the culmination of several years worth of evasions, as the Justices consistently found legal bases for reversing the convictions of sit-in demonstrators, while declining to resolve the state action issue. For a brief history of the Court's internal deliberations on these cases, see Klarman, *supra* note 311, at 272-76.

365. *See* ROSENBERG, *supra* note 19, at 50, 97-100; *see also* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT ch. 3 (1995).

366. *See* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 19 tbl.1-3, 189 tbl.6-1 (1978).

367. Mark Tushnet hints at, but does not develop, this interpretation in his biography of Thurgood Marshall. *See* TUSHNET, *supra* note 359, at vi; *cf.* ZANGRANDO, *supra* note 86, at 38 (noting that the NAACP's political campaign against lynching was as important for its indirect effect of stimulating broader struggles for racial justice as for its direct effect, since no anti-lynching legislation ever was secured).

The Margold Report, which in 1930 formulated an overall NAACP litigation strategy, stressed that litigation would "stir . . . the spirit of revolt among blacks" and cause whites to view them with greater respect.[368] A memorandum by Special Counsel Charles Houston in 1934 warned that "isolated suits mean little unless the communities and persons affected believe there is an unexpended reserve available to maintain a persistent struggle" and declared that a principal objective of the litigation campaign should be "to arouse and strengthen the will of local communities to demand and fight for their rights."[369] Jack Greenberg, in his recent memoir of his years with the NAACP Legal Defense Fund (1949-1984), describes how litigation efforts in local communities could "provide[ ] branch-building and fund-raising vehicles."[370] Indeed, several NAACP branches apparently were formed specifically to challenge the racial segregation ordinances that ultimately were invalidated in *Buchanan*.[371] Professor Mark Tushnet in his recent biography relates how Thurgood Marshall frequently was conscripted into making public speeches at mass rallies after journeying to local southern communities for a court appearance. "On occasion," Tushnet observes, Marshall "appears to have been brought to town nominally to work on pending litigation but actually to rally the troops."[372] Furthermore, for local blacks to observe a skilled black lawyer subjecting the white county sheriff to a grueling cross-examination may have accelerated the emergence of their civil rights consciousness.[373] As Tushnet notes, perhaps Marshall's most important audience on such occasions was neither judge nor jury, but rather "the African-American community observing the trial."[374] It is possible, then, that the principal

368. JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 59 (1994); *accord id.* at 212, 511-12.

369. Memorandum from Charles Houston to Joint Committee of NAACP and the American Fund for Public Service 1-2 (Oct. 24, 1934) (NAACP Papers, microfilm collection, Part III, series A, reel 1, frames 859-60); *see also* CELL, *supra* note 39, at 15 (citing DuBois and Biko for the view that the first and most crucial stage of the freedom struggle is liberating victims from the oppression existing in their own minds); *id.* at 240-41 (noting that one of the obstacles the civil rights movement had to overcome was the tendency of southern blacks to internalize deference and subordination to whites as a way of guarding against temporary lapses that could have deadly consequences).

370. GREENBERG, *supra* note 368, at 102; *see id.* at 511-12 (noting that the Legal Defense Fund's efforts stirred "the 'spirit of revolt' among black people").

371. *See* Schmidt I, *supra* note 28, at 503, 514 (noting that the Baltimore and Leuisville branches were organized in order to challenge segregation ordinances).

372. TUSHNET, *supra* note 359, at 30.

373. *See id.* at 62-63. On contemporary perceptions of the importance to the black community of seeing black lawyers arguing civil rights cases, see MEIER & RUDWICK, *supra* note 101, at 149-52.

374. TUSHNET, *supra* note 359, at 66.

significance of the Progressive era race cases was neither the concrete legal change they produced (which was relatively trivial) nor the symbolic effect of civil rights victories (which was a double-edged sword), but rather the vehicle they provided for the incipient mobilization of a black protest movement.

Particularly at a time when street protests might not have been practicable, owing both to the dearth of participants and the related likelihood of violent resistance,[375] it was vital that blacks be able to voice their protests somehow. Litigation did not require mass participation to succeed, and it offered a relatively safe venue for challenging the racial status quo. Viewed from this perspective, it is useful to reconsider where the Progressive era race cases came from and what sort of lawsuits they involved. *Guinn* and *McCabe* both were from Oklahoma; *Buchanan* was from Kentucky; *Myers v. Anderson*, a companion case to *Guinn*, was from Maryland. These were border states that had institutionalized Jim Crow but nowhere near as high black population percentages as the southern states and nowhere near as antediluvian race relations. The only race cases of the Progressive era that issued from the real South were *Bailey* and *Reynolds*. The latter involved a federal government prosecution of a white man for peonage. Only *Bailey* involved a black litigant challenging racial practices in the South (Alabama), and he enjoyed significant white financial and legal assistance, including that provided by a federal judge.[376] Peonage, it should be recalled, was opposed by Progressives in the South as well as the North.

That blacks outside of the border states failed to bring legal challenges to Jim Crow during this period suggests how utterly inconceivable street protests would have been. It is no accident that the only significant direct action protests of this period—the streetcar boycotts of 1900-06—assumed a nonconfrontational form that insulated the protestors from retaliation.[377] In the rural deep South at

375. *See* BRUNDAGE, *supra* note 41, at 204 (noting that the "pervasiveness of white violence and white scrutiny of black conduct" in rural Georgia around the turn of the century relegated blacks to "furtive means" of condemning lynching); DITTMER, *supra* note 39, at 22 (noting that blacks' efforts to change the "caste system" were limited by "the very system they were fighting"); MCMILLEN, *supra* note 42, at 285-88 (noting that no civil rights movement was possible in Mississippi at this time); MEIER & RUDWICK, *supra* note 101, at 348 (noting sociologist E. Franklin Frazier predicting that Gandhi's form of nonviolent resistance would lead to a massacre of defenseless blacks in the South).

376. *See* Schmidt II, *supra* note 219, at 677.

377. *See* MEIER & RUDWICK, *supra* note 101, at 279, 309-10; MCMILLEN, *supra* note 42, at 294; *see also* MEIER & RUDWICK, *supra* note 101, at 348 (noting that as late as World War II southern blacks considered it too dangerous to protest railroad segregation by entering white coaches and waiting rooms, and thus chose instead to boycott offending railroad lines). It is also

this time, merely establishing an NAACP branch was putting one's life in jeopardy.[378] It is possible, then, to regard the courtroom as the only feasible arena for civil rights protest in an era when blacks were still lynched for expressing dissatisfaction with the racial status quo. Whether litigation resulted in Supreme Court victories or not, it represented one of the few forums in which black protest could, with *relative* safety, take place during the Progressive era.

notable that the streetcar boycotts were a conservative protest movement, in the sense that they sought to preserve the status quo, not to change it. For discussion of the more subtle, private acts of black resistance that characterized everyday life in the Jim Crow South, see Robin D.G. Kelley, *"We Are Not What We Seem": Rethinking Black Working-Class Opposition in the Jim Crow South*, 80 J. AM. HIST. 75 (1993).

378. *See* DITTMER, *supra* note 39, at 206 (noting that smaller Georgia towns would not tolerate an NAACP branch and that one had to be disbanded in Thomasville in 1920 after whites threatened to kill its president); MCMILLEN, *supra* note 42, at 314-16 (noting that the establishment of NAACP branches in Mississippi, unlike in Atlanta or Birmingham, simply was not conceivable at this time, owing to the threat of retaliatory violence by whites).