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James W. Ely, Jr.

Reflections on *Buchanan v. Warley*, Property Rights, and Race

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I. INTRODUCTION

The landmark decision of *Buchanan v. Warley*[1] has long deserved greater attention from scholars. Decided during the so-called Progressive Era, when segregationist attitudes were at full tide, *Buchanan* combined judicial protection of individual property rights with solicitude for racial minorities. Indeed, *Buchanan* represents both the resolute defense of property owners' rights against regulation and the most significant judicial victory for civil rights during the early decades of the twentieth century.[2]

One can only speculate about the lack of scholarly interest in *Buchanan*. Possibly, the dual nature of *Buchanan* has made it difficult for scholars to assess. Perhaps the property-centered focus of *Buchanan* made the case awkward for post-New Deal liberals, who are indifferent at best to the constitutional protection of property rights. Clearly *Buchanan* does not fit neatly into post-New Deal

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* Professor of Law and History, Vanderbilt University. I wish to thank Jon W. Bruce and Nicholas Zeppos for their astuto comments on this Essay.

1. 245 U.S. 60 (1917).

2. For the background of *Buchanan*, see generally A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 119-26 (1996); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 246-51 (1996); Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179-99 (1968).

jurisprudence, with its artificial and unhistorical division between the rights of property owners and other individual liberties. Such factors may have caused scholars to overlook or intentionally downplay *Buchanan*.

II. ANALYSIS OF KLARMAN AND BERNSTEIN ARTICLES

These fine articles by Michael J. Klarman and David E. Bernstein contribute to a better understanding of *Buchanan v. Warley* and its important place in constitutional history. The pieces dovetail, complementing each other and providing fresh perspectives on property rights and race relations in early twentieth-century America.

A. Klarman

Klarman examines *Buchanan* in light of the general political and intellectual currents of the Progressive Era.[3] Theorizing that the Supreme Court usually reflects contemporary values, he considers how the justices could have decided *Buchanan* and three other cases favorably to civil rights claimants despite pervasive racist attitudes among the public. Klarman rightly concludes that the Court's dedication to property rights in *Buchanan* was consonant with a widely shared belief about the importance of property ownership and a long history of judicial activism in support of economic liberty.[4] These factors were conspicuously absent when racial segregation was raised with respect to social issues, such as schooling and railroad travel. In a sense, the fundamental value of property rights trumped popular racist views implicit in residential segregation ordinances.

Klarman is disparaging about the impact of *Buchanan*, correctly noting that the ruling did not produce much change in patterns of residential segregation. That criticism, however, strikes me as

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3. Historians have debated the nature and goals of the loose-knit reform movement before World War I known as Progressivism. *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM 131-214 (1955) (comparing rural nature of Populist movement with urban focus of Progressive era); ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917, at 1-80 (1954) (comparing New Nationalism with New Freedom and linking New Freedom to Progressivism); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 164-95 (1967) (discussing the arrival of Progressivism). A critical assessment of Progressivism is provided in ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 106-22 (1987) (questioning efficacy of Progressive confidence in experts and the drive to enlarge governmental authority).

4. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998) (tracing origin and development of interest in property rights through distinct eras in American history).

wide of the mark. No decision by the Supreme Court could undo the host of legal devices and informal arrangements that sustained racial segregation in housing. Indeed, by Klarman's standard, many acclaimed civil rights decisions could be dismissed as ineffective. For example, *Shelly v. Kraemer*, which voided racially restrictive covenants in deeds,[5] did little to overcome racial discrimination in housing. Even the Fair Housing Act of 1968 has proven unable to stem discriminatory practices or to achieve meaningful integration of predominantly white neighborhoods.[6] Courts and legislators can only do so much to bring about social change.[7]

Despite that reality, I contend, in contrast to Klarman, that *Buchanan* had both practical and symbolic significance. First, the Supreme Court made clear that there was a limit to legislation imposing racial segregation. Majority preferences could not extingnish "those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."[8] The decision cooled legislative ardor for additional segregation in other areas of American life. Second, *Buchanan* stopped the movement to enact residential segregation ordinances in American cities. It spared the United States the problems flowing from officially sanctioned neighborhood apartheid, which would have left blacks seeking housing in a much worse position.[9] Third, *Buchanan* raised the hopes of blacks for eventual redress of grievances and spurred renewed civil rights activism. In short, the impact of *Buchanan* should not be minimized. Rather, as A. Leon Higginbotham, Jr., has argued, "*Buchanan* was of profound importance in applying a brake to decelerate what would have been run-away racism in the United States."[10]

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5. 334 U.S. 1, 20-21 (1948). The problem of racial covenants is treated in CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE N.A.A.C.P. AND THE RESTRICTIVE COVENANT CASES (1967).

6. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70 (1991) (finding that racial segregation in housing appeared to be getting worse in the 1970s).

7. *See id.* (doubting the capacity of courts to achieve significant social reform).

8. Buchanan v. Warley, 245 U.S. 60, 79 (1917).

9. Indeed, there was the distinct possibility that residential segregation ordinances would have been directed against other groups as well. *See* J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 319 (rev. ed. 1993) (suggesting that Jews were threatened by segregation ordinances); *see also* Ambler Realty Co. v. Village of Euclid, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926) ("And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants.").

10. HIGGINBOTHAM, *supra* note 2, at 126.

Klarman sees *Buchanan* "as a substantive due process/property rights case, rather than as one fundamentally concerning race."[11] This penchant to pigeonhole cases is a legacy of the dubious subordination of property rights in New Deal constitutional thought.[12] It is fundamentally at odds with the historic link between property ownership and liberty. The framers of the Constitution and the Fourteenth Amendment did not distinguish property from other personal rights.[13] It would be more persuasive to treat *Buchanan* as a case which affirmed the interdependence of all individual rights. A vigorous judicial defense of individual property rights in *Buchanan* aided racial minorities by destroying legal barriers to the acquisition of housing. Indeed, given the often failed legacy of government efforts to alter embedded social practices, it may be that *Buchanan* correctly identified the central role that private choice plays in the elimination of discrimination.

The labeling of *Buchanan* as a property rights case points to a more troublesome aspect of Klarman's analysis. He is skeptical that judicial protection of economic liberty serves to safeguard civil rights. Recognizing that "laissez-faire constitutionalism may produce incidental benefits to the cause of civil rights," Klarman nonetheless maintains that the relationship between property rights "and racial justice is contingent and contextual, not necessary and universal."[14] At one level such a conclusion is hardly a surprise. Respect for the rights of property owners has been historically tied to individual liberty, not egalitarian schemes. Yet, at another level, I suggest that Klarman's approach could be turned on its head. Implicit in Klarman's analysis is the notion that free market ordering is unlikely to serve the interests of minorities. However, why should one assume that regulatory legislation is beneficial to racial minorities? Is not

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11. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 883, 937 (1998); *cf.* LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917, at 184 (1971) (describing *Buchanan* as "a case more often categorized under race relations").

12. *See* Jonathan R. Macey, *Some Courses and Consequences of the Bifurcated Treatment of Economic Rights and 'Other' Rights Under the United States Constitution*, 9 SOC. PHIL. & POL. 141, 145-55 (1992) (criticizing past and present dichotomous treatment of economic and non-economic rights); Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 399 (describing differentiation between economic and individual rights as "[t]wo-tiered scrutiny" that paved the way for interest group politics).

13. *See* Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136-43 (also discussing the Framers' view); Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43, 44-47 (Ellen Frankel Paul & Howard Dickman eds., 1989) (discussing the Framers' view of property rights).

14. Klarman, *supra* note 11, at 941.

law usually an instrument of majoritarian will? Would a larger measure of private economic ordering have better served the needs of underdogs?

A look at the growth of land use controls in the early twentieth century dispels any illusion that regulation is a consistent friend of the disadvantaged. Elitist assumptions and exclusionary policies were part and parcel of zoning from the outset, and indeed help to explain the popularity of land use regimes.[15] New York City's pioneering comprehensive zoning ordinance of 1916 was prompted by the desire of merchants to preserve the upscale character of Fifth Avenue from encroachment by the garment industry.[16] In the same vein, Progressive Era land use regulators did not attempt to disguise their views about the appropriate racial composition of neighborhoods. The appearance of residential segregation ordinances as an early land use control tool simply reflected the prevalent racial norms of the day. Like separate railroad car laws, such ordinances were an example of regulatory interference with the free market in order to advance community values.[17]

Perceiving a threat to the property rights of individuals, some courts were initially hostile to zoning ordinances. Taking aim at the exclusionary potential of land use controls, the Supreme Court of Texas declared in 1921:

> It would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures and his title subject to no servitude, that he could not erect an humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it.[18]

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15. *See* Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-*Euclid *Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 368-70 (1994) (noting that the early zoning ordinances were prompted by a desire of wealthy neighhorhoods to protect property values by excluding minorities); *see also* Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 1997-2 J. SUP. CT. HIST. 79, 82-86 (discussing exclusionary motives hehind zoning).

16. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 292-93 (1989) (discussing New York City's 1916 zoning ordinance); SEYMOUR I. TOLL, ZONED AMERICAN 172-87 (1969) (discussing the efforts of New York City's Commission on Building Districts and Restrictions, estahlished in 1914).

17. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 114 (1992) (arguing that "the success in controlling the politics of racial domination did not [require] the courts to override the behavior of private individuals in markets. It was quite sufficient for them to protect markets against legislative intervention.").

18. Spann v. City of Dallas, 235 S.W. 513, 516 (Tex. 1921).

Similarly, the trial judge in the famous case of *Village of Euclid v. Ambler Realty Co.* relied in part on *Buchanan* to invalidate zoning. He recognized that the real purpose of zoning was "to classify the population and segregate them according to their income or situations in life."[19]

The judicial emphasis on the right to acquire, use, and alienate property seemingly imposed a serious impediment to the acceptance of zoning. At least one court equated an ordinance excluding stores from a residential area with residential segregation ordinances. Finding that an ordinance which prohibited the erection of a store constituted a deprivation of property without due process, the Supreme Court of New Jersey emphatically observed:

> It is true that in growing cities there are often created what is termed "blighted areas." They may, in some instances, have come from the placing of stores in residential sections. Blighted areas, however, more frequently arise by the purchase in some residential section of a city of properties by members of a race different in color or nationality from those who have been living in that section which prompts the other residents in that section to move to other sections of the city more congenial. An ordinance which would obligate persons of different nationalities or religion or color to live in different and specified sections of a city would, we think, be held unreasonable and discriminatory.[20]

It is important to note that this property rights rationale had an inclusionary impact with respect to commercial establishments and minorities. But it represents a path that ultimately was not taken.

In *Euclid*, of course, the Supreme Court sustained the constitutionality of a zoning scheme which divided a locality into residential and commercial districts.[21] Although the decision was vaguely couched in terms of safeguarding the public health, safety, and morals, the opinion stressed the desirability of excluding commercial establishments and apartment buildings from single-family residential neighborhoods.[22] It is puzzling that the Court never mentioned *Buchanan*.[23] One may speculate that the Justices perceived that the

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19. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

20. Ignaciunas v. Risley, 121 A. 783, 786 (N.J. Sup. Ct. 1923), *aff'd sub nom.*, Ignaciunas v. Town of Nutley, 125 A. 121 (N.J. 1924).

21. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396-97 (1926).

22. *See id.* at 388-95.

23. The trial judge in *Euclid* relied partly on the property rights reasoning in *Buchanan* to invalidate comprehensive zoning. He found the arguments in favor of the Louisville racial segregation ordinance to be more compelling than those seeking to justify general land use controls under the police power. *Ambler Realty*, 297 F. at 312-13.

property rights rationale of *Buchanan* was at odds with the Euclidean concept of land use controls. In practice, zoning was employed to protect the character of existing neighborhoods, to stabilize property values, and to keep out land uses or persons deemed undesirable.[24] Zoning placed a premium on majority preferences, not on the rights of individual owners. Indeed, the exclusionary implications of *Euclid* did not escape the attention of contemporaries. The decision sparked renewed interest in passing residential segregation ordinances.[25]

Pointing to the high place of property rights in the constitutional polity, the Supreme Court in *Buchanan* invalidated the residential segregation law. But *Buchanan* proved to be something of an aberration and did not lead to careful scrutiny of zoning generally. Following *Euclid*, most courts deferred to the regulation of land use by local governments and adopted a hands-off position.[26] Local regulatory authorities enjoyed virtually a blank check free of constitutional restraint. This meant in reality that land controls were crafted by those already living within the localities to advance their goals, which often entailed preservation of the status quo. Such an environment was conducive to the spread of exclusionary zoning. After all, the impact of insider decisionmaking fell largely on outsiders and potential residents. Belatedly, liberal commentators, who for decades had been preaching judicial deference to economic and social legislation, began to express alarm about the spatial separation of the poor and minorities from middle class communities.[27] With respect to land use patterns, liberal constitutionalism produced an ironic result—disregard for the property rights of individuals had empowered communities to enact laws that effectively excluded persons according to majority sentiment.

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24. *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 11-18 (1977) (noting that the protection of neighborhood quality was the aim of zoning).

25. *See* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 749-50 (1993) (discussing racial zoning after *Euclid*).

26. *See* NELSON, *supra* note 24, at 202 ("The policy of the courts has generally been to avoid interfering in community zoning.").

27. This concern has achieved its most aggressive expression in the protracted Mount Laurel litigation in New Jersey. Reversing decades of deference to local zoning bodies, the New Jersey Supreme Court adopted a variety of sweeping remedies intended to compel communities to rezone and accept low-income housing. Rather than reconsidering the basic issue of public controls over privately-owned land, the New Jersey court in effect imposed an additional level of regulation. *See generally* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATIONS 53-111 (1993) (discussing the Mount Laurel litigation); CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996) (also discussing this litigation).

As this brief sketch indicates, land use controls have tended to reinforce the exclusionary impulse shared by most homeowners, and given scant heed to civil rights concerns. I suggest that meaningful judicial review of zoning, in order to vindicate the property rights of individuals, would permit individual owners and consumers to have a larger voice in determining housing patterns. Under such an approach, insistence upon property rights could become a vehicle to benefit the less affluent by curbing land use controls.[28] Surely, the experience of land use controls should make one cautious about assuming that regulation necessarily promotes some broad public interest.

B. Bernstein

In opposition to Klarman, Bernstein pictures *Buchanan* as a signal victory for both blacks and property rights. He advances the striking thesis that blacks have suffered disproportionately from governmental interference with the operation of the free market. Bernstein has convincingly developed elsewhere the argument that licensure requirements,[29] emigrant agent laws,[30] and wage regulations[31] systematically handicapped blacks in the marketplace. He contends, therefore, that judicial protection of economic liberty was of particular assistance to racial minorities with little political influence.

Bernstein applies this insight to his treatment of *Buchanan*. He traces in detail the emergence of residential segregation laws, starting with the Baltimore ordinance of 1910.[32] Bernstein emphasizes that legal experts almost universally maintained that such laws were a valid exercise of the police power and were unconcerned about the negative impact on individual property rights. The reaction to *Buchanan* was revealing. Bernstein points out that prominent law reviews were astonishingly hostile to the decision. Writers attacked

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28. *See* EPSTEIN, *supra* note 17, at 116 (noting "the close connection between the constitutional protection of property rights and the protection of members of minority groups").

29. *See* David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994).

30. *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).

31. *See* David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276 (1994); David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993).

32. *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 799 (1998); *cf.* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinance of 1910-1913*, 42 MD. L. REV. 289, 289-323 (1983) (discussing the emergence of residential segregation laws).

the Supreme Court for upholding property rights in the face of both community sentiment and social science evidence which stressed the desirability of residential segregation.[33]

Throughout his article Bernstein takes aim at Progressive jurisprudence. The Progressives downplayed individual rights, accenting instead collective action and the common good. They displayed boundless confidence in expert management of the economy to achieve economic justice.[34] As Herbert Hovenkamp has explained: "Progressive legal thought was characterized by a belief that government regulation often allocates resources better than private markets."[35] Zoning, with its promise of scientific management to replace the haphazard municipal development of the past, was congenial with the Progressive fondness for planning and reliance on experts.[36] Consequently, Progressives rejected rights language in favor of governmental controls.[37] It followed that Progressive jurisprudence looked with disfavor on judicial efforts to enforce constitutional limits on governmental authority.

The claims of property owners were not the only rights adversely affected by Progressive ideology. For instance, Progressives displayed little interest in free speech during the years preceding World War I. As Mark A. Graber has explained, "[m]ost prominent early twentieth-century proponents of federal and state economic regulation also supported federal and state speech regulations."[38] In the same vein, David M. Rabban has cogently observed: "The com-

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33. *See, e.g.,* George D. Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances*, 33 W. VA. L.Q. 332, 345-49 (1927) (discussing state court adherence to *Buchanan* and questioning whether the decision was a desirable one); Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393, 395-96 (1917) (discussing impact of decision on ownership market for unimproved real estate and characterizing *Buchanan* as a restraint on alienation); Note, *Constitutionality of Segregation Ordinances*, 16 MICH. L. REV. 109, 111 (1917) (citing earlier Supreme Court precedent that would justify an overruling of *Buchanan*).

34. *See* Bernstein, *supra* note 32, at 816-17; *see also* HALL, *supra* note 16, at 196-97 (discussing the Progressives); WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, at 14, 106-09 (1994) (discussing the Progressives' faith in scientific management by an educated elite in government).

35. Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 149 (1995).

36. *See* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY, AND ECONOMIC CHANGE IN AMERICA, 1900-1933, at 186-91 (1990) (noting that "[c]itywide zoning found ready nourishment in the prevailing mind-set of the Progressive years").

37. *See* Daniel T. Rodgers, *Rights Consciousness in American History*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 3, 12-13 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) (discussing abandonment of rights rhetoric by Progressive Party in its platform).

38. MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 78-79 (1991).

mitment of progressives to the creation of a harmonious community also limited their conception of free speech. While often recognizing the social value of criticism, Progressives ignored and occasionally condemned dissent that did not contribute to the community."[39] Likewise, Progressives placed great faith in the use of government to police moral norms. As David J. Langum has pointed out, Progressives believed that by "the proper use of social engineering, often employing the coercion of the federal government, individual human behavior could be controlled and changed through legislation."[40] The Progressive Era saw an outpouring of morals regulation designed to strengthen the community by eliminating social problems. In areas of personal behavior, individual freedom was subordinated to the perceived needs of the society. Drawing no distinction between economic and other liberties, the Progressives viewed with suspicion all claims of individual right.[41]

Bernstein has rendered a valuable service by casting a critical eye on the supposed reforms of the Progressive Era. Historians have for too long assumed the benevolent character of the economic legislation urged by the Progressives. Moreover, the treatment of property rights in the early twentieth century has commonly been presented within the simplistic discourse of a conflict between the public interest and a judiciary devoted to big business.[42] Yet it unfairly loads the historical deck to presume the benign purpose and effect of Progressive legislation. The actual picture is much less tidy. The expanded power of government, promoted by Progressives, proved no panacea for economic problems and created new possibilities to infringe property rights and private economic decisionmaking.[43] Not

39. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 212 (1997).

40. DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 6 (1994).

41. *See* Rodgers, *supra* note 37, at 12-13.

42. *See* ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910, at 81-84 (1951) (arguing that the Supreme Court sacrificed the weak and the poor for the strong and the wealthy); ARTHUR SELWYN MILLER, THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION 45-46 (1976) (charging the early twentieth century courts with not caring about laborers); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 7 (1992) (criticizing "the standard mode of explanation").

43. *See* Hovenkamp, *supra* note 35, at 157 ("Government regulation proved to be one of the great embarrassments of Progressive legal thought."). It has been argued, for example, that Progressive era railroad legislation was ill-considered and severely hurt the rail industry. *See generally* ALBRO MARTIN, ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897-1917 (1971). Similarly, historians have become increasingly skeptical about the efficacy of Progressive measures to curb trusts and the Progressive faith in expert management of the economy. *See* HIGGS, *supra* note 3, at 106-22.

content with the usual platitudes about reform, Bernstein invites a fundamental reassessment of the judiciary and economic liberty during the age of Progressivism.

As both Klarman and Bernstein show, the relationship between property, liberty, and race is complex and ambiguous. If the workings of the free market have not always aided racial minorities, they have done so at least as often as governmental regulation. The overlooked legacy of *Buchanan* is that principled adherence to the constitutional norm of private property has a liberating potential for individuals.[44]

III. THE PLACE OF PROPERTY RIGHTS IN THE POLITY

In addition to contributing to a better understanding of *Buchanan v. Warley*, these articles raise broader questions concerning the place of property rights in the polity. Two such issues deserve particular attention. The first is the relationship between private property and liberty. The second is the need for a fresh look at the history of the concept of due process as a check on governmental power.

A. Property and Liberty

A better appreciation of *Buchanan* should help us to reclaim the vital role of property rights in the constitutional scheme. Historically, private property served as a bulwark of individual liberty and marked the constitutional boundaries of legitimate government.[45] Protection of property was consistent with a central tenet of American constitutionalism—restraint of governmental authority over individuals. A constitutional system based on private property tends to diffuse power throughout society, and thus to limit coercive power in the hands of government. It reflected the traditional view that liberty was best preserved by restraining the reach of government.

This high standing of property ownership in political thought was reflected in numerous provisions of the Constitution and the Bill of Rights. Foremost among these were the Contract Clause, the Due Process Clause, and the Takings Clause. Likewise, a number of state

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44. *See* COYLE, *supra* note 27, at 238-62 (arguing for the protection of private property rights).

45. *See* ELY, *supra* note 4, at 43 (discussing the importance of property ownership as a "fundamental tenet" of Anglo-American legal thinking).

constitutions embraced the natural law tradition that all persons have the right of "acquiring, possessing and protecting property."[46] Not surprisingly, therefore, for much of American history the Supreme Court and state tribunals championed economic liberty against legislative interference. As Jennifer Nedelsky has aptly observed:

> But the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth-century advocates of laissez-faire. And the idea that property and contract could define the legitimate scope of governmental power was a basic component of constitutionalism from 1787 to 1937.[47]

This did not mean that the courts invalidated economic regulations on a wholesale basis. On the contrary, the majority of regulations passed constitutional muster.[48] Still, judges carefully scrutimized economic regulations and required lawmakers to justify exercises of the police power which infringed upon the property rights of individuals.

Buchanan forcefully demonstrates that regard for property rights is not an end in itself, but is also important for securing individual autonomy and other personal liberties. Consider the case in the context of black economic aspirations. Since emancipation, blacks had manifested a strong desire to acquire land. As blacks increasingly migrated to cities in the upper South during the late nineteenth century, however, this dream was frustrated. Black newcomers were compelled to live in congested and rundown neighborhoods. Yet as blacks began to accumulate wealth, they renewed their drive for better housing. Land ownership was both an economic goal and a potent symbol of freedom.[49]

Against this background, *Buchanan* assumes a special significance. It affirms that economic liberty is directed as much to obtaining property as to securing the interests of existing owners.[50] In

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46. *Id.* at 30.

47. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 228 (1990).

48. *See* Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 64 (1985) (stating that the "larger spread of state court decisions" reveals approval of a "wide range of reform legislation"); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 296-307 (1913) (summarizing state laws upheld by Supreme Court from 1888-1913).

49. *See* LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH, 1790-1915, at 143-84 (1990).

50. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 393 (1868) ("The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary

Buchanan, the Supreme Court defined property broadly: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."[51]

Building upon this insight, the Justices ruled that the Fourteenth Amendment operated "to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."[52] *Buchanan*, then, exemplifies the historic tendency of constitutional law to encourage the dynamic and creative aspects of property ownership rather than to just uphold the status quo. By placing a high value on the acquisition and use of property, the Justices tried to keep open the channels of change even for racial minorities.

Judicial protection of individual economic rights was abandoned in 1937 as a consequence of New Deal jurisprudence. New Dealers envisioned an active role for government in managing the economy and promoting the general social welfare. Judicial deference to legislative control over economic life became the new orthodoxy.[53] In a sharp break with the past, courts sought to fashion an untenable distinction between economic liberty and other personal rights.[54] The libertarian legacy of cases like *Buchanan* was ignored for decades. Changes in the intellectual and political climate, however, have opened the door for a revival of interest in property rights. Questioning the efficacy of government regulations, a number of prominent scholars have urged a return to judicial review of economic legislation.[55] The full implications of this movement are beyond the

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importance to his or their 'pursuit of happiness.' "); *see also* Beebe v. State, 6 Ind. 501, 511-12 (1855), *overruled in part by* Schmitt v. F.W. Cook Brewing Co., 120 N.E. 19 (Ind. 1918); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *1-*3 (O. Halsted, 1827-28).

51. Buchanan v. Warley, 245 U.S. 60, 74 (1917).

52. *Id.* at 79.

53. *See* James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 87, 90 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) (criticizing the dichotomous treatment of economic interests and individual rights).

54. *See* Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 31-37 (James A. Dorn & Henry G. Manne eds., 1987) (declaring that "in the real world a stark dichotomy between economic freedoms and civil rights does not exist"); *see also* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.").

55. *See, e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 324-31 (1980) (discussing legal and policy reasons supporting enhanced standard of review for economic legislation); Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 13-20 (1988) (discussing wage regulation statutes and arguing for a re-examination of *West Coast Hotel*);

scope of my comment, but the fresh interest in the property rights of individuals should help us to reclaim the traditional belief that the focus on property in decisions like *Buchanan* safeguards liberty by limiting government power.

B. Substantive Due Process

A study of *Buchanan* also highlights the need for a reassessment of substantive due process. The picture drawn of this doctrine too often veers into caricature. The standard account holds that judges developed a substantive reading of the due process clauses during the post-Civil War era in order to safeguard the interests of business enterprise from legislative regulation.[56] Under substantive due process, courts required lawmakers to justify economic regulations, and struck down laws deemed unreasonable or arbitrary as a violation of due process. Critics paint a dark picture of how this doctrine operated. They accuse the justices of substituting their own economic judgments for those of elected lawmakers under the guise of enforcing constitutional values.[57] Moreover, they view substantive due process as a major barrier to economic reform. Justice David Souter, for example, has exclaimed that the Supreme Court "routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process."[58] According to the conventional wisdom, the Court abandoned the mistaken notion that due process encompassed substantive legal principles as part of the constitutional revolution of 1937. Today, we are

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Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 457-63 (1993-1994) (urging due process review of market entry restrictions); Michael J. Phillips, *Entry Restrictions in the* Lochner *Court*, 4 GEO. MASON L. REV. 405, 457-55 (1996) (urging due process review of market entry restrictions); *see also* Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1377-83 (1990) (calling for heightened judicial activism in the areas of economic and social legislation).

56. *See generally* BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE CONSTITUTION (1942) (tracing interplay of laissez-faire economics and police power regulation).

57. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 43-49 (1990) (discussing cases and arguing that Due Process Clause, as originally understood, was void of substantive content); MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 496-502 (1988) (positing similar argument).

58. United States v. Lopez, 514 U.S. 549, 605 (1995) (Souter, J., dissenting); *see also* UROFSKY, *supra* note 57, at 501. For a contrary view, see Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1080-89 (1997) (analyzing the number of cases in which the Supreme Court invalidated laws on due process grounds, and concluding that the number of such decisions is less than commonly asserted).

told, both liberal and conservative scholars agree that substantive due process is dead, at least with respect to economic matters.[59]

I suggest that every aspect of this tale is suspect. The dire legend of substantive due process was invented by scholars associated with the Progressive movement in order to further their regulatory agenda.[60] One should start a fresh analysis by examining terminology. It bears emphasis that the very phrase "substantive due process" is anachronistic when used to describe decisions rendered during the supposed heyday of the doctrine. Indeed, courts did not differentiate between procedural and substantive due process until the New Deal era.[61] Even though the unitary understanding of due process shattered in the late 1930s, no Supreme Court justice employed the term "substantive due process" until 1948.[62]

The concept of due process can be traced to the principle expressed in Magna Carta that persons could not be deprived of life, liberty, or property except by "the law of the land."[63] The initial state constitutions used the phrase "law of the land," not due process of law.[64] Indeed, this older wording can be found in a number of current state constitutions.[65] The "law of the land" concept encompassed various unenumerated rights, including economic liberty. As scholars have chronicled, state courts began to fashion substantive interpretations of due process before the Civil War.[66] Much of this emerging

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59. *See, e.g.*, BORK, *supra* note 57, at 57-58 (discussing abandonment of economic due process); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14-20 (1980).

60. The works of the Progressive historians were informed by a critical perspective toward the Constitution as an anti-democratic document as well as a desire to encourage social and economic change by lowering constitutional barriers to legislative reform. *See* RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS (1968). According to Hofstadter, Progressives began to argue that "the courts must no longer be regarded as sacrosanct, and to try to find ways of curbing their power." *Id.* at 202.

61. *See* McCormack, *supra* note 55, at 404 ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.").

62. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

63. *See* Rebert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948-63 (tracing development of clause in England from Magna Carta period through seventeenth century). *See generally* A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1965).

64. *See* Riggs, *supra* note 63, at 973-77 (summarizing state constitutional documents); *see, e.g.*, MARYLAND DECLARATION OF RIGHTS, art. XXI (1776); MASSACHUSETTS DECLARATION OF RIGHTS, art. XII (1780); NORTH CAROLINA DECLARATION OF RIGHTS, art. XII (1776).

65. *See, e.g.*, MARYLAND DECLARATION OF RIGHTS, art. XXIV (1978); TENNESSEE DECLARATION OF RIGHTS, art. I, § 8 (1870).

66. *See* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 370-85 (1911) (using examples to show due process limits on legislative

substantive due process limited legislative power by voiding class legislation which conferred special benefits or imposed unique burdens.[67] Thomas M. Cooley, the most influential constitutional theorist of the late nineteenth century, embraced a substantive understanding of due process in his landmark work, *A Treatise on the Constitutional Limitations*.[68] Cooley explained that due process was intended to safeguard individuals from the arbitrary exercise of governmental power, and was not confined to "rules that pertain to forms of procedure merely."[69]

Following the Civil War, the Supreme Court gradually accepted the premise that the due process clause imposed substantive as well as procedural restraints on government. In essence, the Justices reasoned that the concept of due process guaranteed those fundamental rights of individuals which were essential to a free society.[70] The Court initially employed substantive due process in the area of state railroad rate regulations, holding that regulated industries were constitutionally entitled to receive a reasonable return on investment.[71] The rise of substantive due process was linked with the eco-

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power despite failure to contemplate judicial review in state constitutions); Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583, 590-610 (1930); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 317 (1988) (discussing role of substantive due process in "class legislation" cases and discussing "pure vested rights" theory); Riggs, *supra* note 63, at 977-84 (linking "law of the land" arguments in early cases to development of state constitutional law).

67. Under the influence of the Jacksonian movement, antebellum state courts were often hostile to legislation granting special privileges to any class. As state courts began to review exercises of legislative authority, they distinguished between legitimate police power measures and arbitrary laws which did not advance the public welfare. The latter category of statutes were deemed invalid because they did not satisfy the "law of the land" clause or the emerging concept of due process. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWER JURISPRUDENCE 45-60 (1993) (discussing formative years of police power jurisprudence); DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM 137-41 (1990) (noting rise of laissez-faire constitutionalism and discussing John Appleton's commitment to equal rights).

68. *See* COOLEY, *supra* note 50.

69. *Id.* at 356.

70. The complex issue of due process as a substantive restraint on government cannot be examined here in detail. For thoughtful studies, see Glen O. Robinson, *Evolving Conceptions of 'Property' and 'Liberty' in Due Process Jurisprudence*, *in* LIBERTY, PROPERTY AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 72-79 (Ellen Frankel Paul & Howard Dickman eds., 1989) (analyzing reach of procedural and substantive due process); G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 107-23 (1997) (discussing substantive due process and police power analysis).

71. During the 1890s the Supreme Court emphasized that the Due Process Clause placed substantive limits on legislative regulation of railroad property. *See* RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 10-12 (1993) (noting that Supreme Court begins to recognize substantive due process claims in this context after *Granger Cases*); James W. Ely, Jr., *The Railroad Question Revisited:* Chicago, Milwaukee & St. Paul Railway v. Minnesota *and*

nomic individualism of the nineteenth century, but due process protection also extended to other liberties, such as free expression.[72]

Under substantive due process review, courts would not simply accept at face value legislative declarations about protecting the public.[73] Rather, courts would examine both the goals to be served by governmental action as well as the means employed to achieve the objective. They independently weighed the evidence to determine whether a regulatory measure was a valid exercise of the police power or an arbitrary restriction of individual rights. Although it was admittedly difficult for judges to draw consistent lines between permissible and unconstitutional legislation, they were engaged in a legitimate inquiry into the nature and extent of due process protection. Given the long association of property ownership with individual liberty and the high value placed on contractual freedom by nineteenth century Americans, it is hardly a surprise that both state and federal courts often relied on substantive due process to vindicate economic freedom.[74]

Ignoring the libertarian foundation of substantive due process, liberal critics in the twentieth century asserted that the courts were just acting to safeguard the business community against regulation. They insisted that a substantive reading of the Due Process Clause subverted its original meaning as a guarantee of procedural regularity.[75] In time, this view hardened into a widely-accepted orthodoxy.

Constitutional Limits on State Regulations, *in* LAW AND THE GREAT PLAINS: ESSAYS ON THE LEGAL HISTORY OF THE HEARTLAND 73-91 (John R. Wunder ed., 1996) (noting Court's tendency to link substantive due process with deprivation of property interest).

72. Contrary to standard historical accounts, conservative jurists and commentators during the early twentieth century maintained that due process protected both liberty of expression and economic rights. Indeed, because conservatives were committed to the notion of limited government, they experienced less difficulty in fashioning a defense of free speech than did the Progressives. *See* GRABER, *supra* note 38, at 1-74. In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932), for instance, Justice George Sutherland, writing for the majority, equated free speech with entrepreneurial liberty. For Sutherland's record in championing expressive rights, see HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 250-56 (1994).

73. *See* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 61-65, 85-103 (1995) (chronicling Supreme Court's acceptance of substantive due process in late nineteenth century).

74. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 171-204 (1991) (arguing that doctrine of substantive due process was shaped by prevailing economic ideology).

75. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 249-82 (1977) (characterizing development of substantive due process as a phenomenon where "courts substitute their own views of policy for those of legislative bodies"); JOHN MORTON BLUM, THE PROGRESSIVE PRESIDENTS 31-32 (1980) (discussing perception among Progressives that substantive due process posed a barrier to economic reform); 2 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 374-96 (1932) (noting that a key

This interpretation, however, has been sharply challenged in recent years,[76] and some scholars have urged a revival of substantive due process review of economic legislation.

Too often critics have generalized about the doctrine of substantive due process on the basis of a few cases. The most visible decisions invoking substantive due process, such as *Lochner v. New York*[77] and *Adkins v. Children's Hospital*,[78] are those invalidating laws which sought to ameliorate industrial working conditions. But one cannot fairly judge the doctrine by focusing on a handful of high profile cases. In fact, the employment cases were not typical of substantive due process jurisprudence. Rather, the Supreme Court most commonly relied on due process review to strike down utility rate controls, price regulations, and entry barriers that impeded competing enterprise.[79] In addition, the Court rendered several decisions vindicating personal liberty grounded on substantive due process grounds.[80] Since the vast majority of legislation passed constitutional

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development in articulation of the meaning of due process was the shift in emphasis from executive branch to judiciary); EDWARD S. CORWIN, COURT OVER CONSTITUTION 107-09 (1938) (noting that expansive reading of Due Process Clause, as opposed to original interpretation of ensuring a fair trial for accused persons, permits Supreme Court to rule on substantive content of legislation).

76. Scholars have demonstrated growing interest in the jurisprudence and jurists of the period 1890 to 1937. Although they differ in many respects, revisionist historians offer a more balanced account of substantive due process and judicial protection of economic rights. *See, e.g.*, ARKES, *supra* note 72, at 282-86 (analyzing substantive due process jurisprudence of Justice Sutherland); ELY, *supra* note 73, at 61-65, 94-95 (summarizing work of federal courts and theorists of this time); GILLMAN, *supra* note 67, at 101-46 (discussing tradition of neutral polity and foreshadowing of *Lochner*); HOVENKAMP, *supra* note 74, at 171-204 (summarizing various hypotheses historians have employed to explain substantive due process); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 157-66 (1997) (anayzing jurisprudence of Justice Field); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 327-31 (1985) (noting symbiotic relationship between laissez-faire rights and legal-political hostility toward "class legislation").

77. 198 U.S. 45 (1905). One of the most famous judicial decisions in American history, *Lochner* has been the subject of a vast literature. For helpful and comprehensive treatments, see GILLMAN, *supra* note 67, at 126-36; PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990); Mary Cornelia Porter, Lochner *and Company: Revisionism Revisited, in* LIBERTY, PROPERTY AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 11-38 (Ellen Frankel Paul & Howard Dickman eds., 1989).

78. 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For a spirited defense of *Adkins*, see ARKES, *supra* note 72, at 71-81.

79. *See* HOVENKAMP, *supra* note 74, at 179 (noting that under substantive due process analysis "many statutes creating entry or licensing restrictions for various occupations or professions were overturned"); Phillips, *supra* note 58, at 1073-75 (discussing use of due process to eliminate entry barriers).

80. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that compulsory public school education unduly interferes with upbringing and education of children by parents or guardians); Meyer v. Nebraska, 262 U.S. 390, 401-03 (holding that state law banning

muster, substantive due process viewed in historical perspective does not appear such a fearsome bogey.

Buchanan illustrates the advantages of substantive due process review, as well as the artificiality of classifying cases in terms of economic or other personal liberties. Under substantive due process, lawmakers were required to provide a convincing justification for legislation which infringed individual liberties, such as the right to acquire and use property. Consider how effectively this doctrine operated in *Buchanan*. Proponents of the racial segregation ordinance introduced a wealth of information to sustain their argument that physical separation was the key to racial harmony.[81] Justice William R. Day, writing for the Court, conceded that "there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control," but he was unwilling to accept the rationale for the segregation ordinance.[82] Day highlighted a blatant inconsistency between the terms of the ordinance and its purported goal. Although justified as "essential to the maintenance of the purity of the races," the ordinance permitted "the employment of colored servants in white families."[83] As Day perceived, this servant exception contradicted the alleged purpose of the statute. Day was equally unimpressed with the contention that racial segregation would halt depreciation in property values. He pointed out that "property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."[84] Since the state failed to offer a compelling rationale for interference with the economic liberty to acquire and use property, Day concluded that the black purchaser was deprived of property without due process of law.

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teaching of foreign language violates due process). William G. Ross has written a fine account of the Supreme Court's reliance on substantive due process in *Pierce* to invalidate a law requiring all children te attend public schools. *See* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 148-73 (1994).

81. Although suspect to modern eyes, this argument cannot be dismissed out of hand. The notion that segregation was a beneficial instrument which mitigated racial tension was common during the early decades of the twentieth century. *See* Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WIS. MAG. HIST. 30 (1970) (discussing actions by President Woodrow Wilson introducing segregation into the federal government). For a discussion of the intellectual climate and political circumstances which confined the Supreme Court in handling race cases, see James W. Ely, Jr., *The South, the Supreme Court, and Race Relations, 1890-1965*, *in* THE SOUTH AS AN AMERICAN PROBLEM 126, 127-33 (Larry J. Griffin & Don H. Doyle eds., 1995).

82. Buchanan v. Warley, 245 U.S. 61, 80 (1917).

83. *Id.* at 81.

84. *Id.* at 82.

The *Buchanan* case is a reminder that a principled defense of individual property rights, under a substantive reading of the Due Process Clause, often safeguarded the interests of vulnerable and powerless segments of society. This conclusion is strengthened by a line of due process cases voiding anti-competitive entry barriers to various businesses.[85] In decisions such as *New State Ice* the Court upset the status quo in order to vindicate the rights of fledgling enterprise.[86] This record contradicts the prevalent but misleading image of substantive due process as a handmaiden of the economically powerful. Indeed, the record suggests that the best explanation for substantive due process was a judicial commitment to the values of limited government and economic rights that shaped the constitution-making process in 1787.

Lastly, *Buchanan* informs the contemporary debate over the role of the judiciary in American life. Despite repeated declarations that substantive due process is dead and that courts will not substitute their views for those of legislative bodies, in actuality substantive due process has been revamped to guarantee a variety of non-economic rights.[87] What sense does this make? As Learned Hand observed, "it would have seemed a strange anomaly [to the Framers of the Fifth Amendment] to learn that they constituted severer restrictions as to Liberty than Property."[88] It is clearly incompatible with the views of the Framers to afford greater judicial protection to some claims of right rather than others. The language of the Due Process Clause draws no distinction between the protection given property and other liberties. Ranking rights into categories not expressed in the Constitution constitutes inappropriate judicial activism. Justice Antonin Scalia has tellingly criticized the inconsistent use of substantive due process: "The picking and choosing among various rights to be accorded 'substantive due process' protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights' (even though the Due Process Clause explic-

85. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 278-80 (1932) (manufacture and sale of ice); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (ownership of pharmacy or drug stores by individuals who are not licensed pharmacists), *overruled by* North Dakota Stato Bd. of Pharmacy v. Snyder's Drug Store, 414 U.S. 156 (1973).

86. *See* ARKES, *supra* noto 72, at 53-61 (applauding the decision in *New State Ice* for upholding the economic freedom to enter lines of business); Phillips, *supra* note 55, at 440-47 (stressing that restrictions on market entry are anti-competitive, strengthen local monopolies, and disadvantage consumers).

87. *See* WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 177-81 (1988) (surveying ebbs and tides of due process review).

88. LEARNED HAND, THE BILL OF RIGHTS 50 (1958).

itly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis."[89]

Scalia is not the only observer troubled by continued reliance on substantive due process. Morton J. Horwitz has aptly written: "For about two decades after the end of World War II, the central ideological question before the Supreme Court was whether judicial activism was compatible with earlier Progressive commitments to judicial restraint in the name of democracy."[90] Accordingly, various liberal scholars have engaged in extraordinary intellectual contortions in an effort to distinguish "bad" judicial solicitude for economic rights from "good" defense of non-economic liberties.[91] A discussion of this dialogue is beyond the scope of this comment. But it is important to note that the intellectual quandary over substantive due process review would be eliminated by again extending meaningful judicial scrutiny to property rights. Such a step would reclaim the long-standing view of due process as a substantive restraint on government, a view that found classic expression in *Buchanan*.

89. United States v. Carlton, 512 U.S. 26, 41-42 (1994) (Scalia, J., concurring in judgment).

90. HORWITZ, *supra* note 42, at 252.

91. *See id.* at 247-72 (discussing distinct judicial roles played in *Brown* and *Lochner*). For a further elaboration of this point by Horwitz, see *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 602-04 (1979).