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Why Judicial Reversal of Apartheid Made a Difference

*William A. Fischel**

Did *Buchanan v. Warley*¹ have any practical effect on the economic well-being of black Americans? Michael Klarman argues that it did not, since the enforcement of racial segregation proceeded along other lines, such as regular zoning, racial covenants, informal discrimination, and unofficial violence.² David Bernstein disagrees in part with Klarman's conclusion. He argues that *Buchanan v. Warley* effectively made more housing available to blacks in urban areas, even if it did not promote racial integration.³

I second Bernstein's conclusion by putting *Buchanan* in the context of the urban-economics theory of housing segregation. Because *Buchanan* helped blacks gain a foothold, albeit a segregated one, in central cities, it was instrumental in facilitating the Great Migration of blacks from the rural South to urban areas in the North. Had *Buchanan v. Warley* been decided the other way, the American civil rights movement might have played out differently. Without housing in central city areas of the North, blacks would have been less able to generate political support for the federal civil rights legislation of the 1960s. As Klarman has argued elsewhere, the creation of a northern black urban community greatly facilitated this legislation.⁴ Without the urban concentration of blacks facilitated by *Buchanan v. Warley*, the civil rights movement could have been delayed or have found other channels.

I use the term "apartheid" to describe the system at issue in *Buchanan* instead of "segregation" because apartheid carries specific

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

2. Michael Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 883, 943-45 (1998).

3. David Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799, 861-63 (1998).

4. See Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 456 (1994).

connotations of legally enforced residential segregation.⁵ Racial segregation exists in American cities, but it is not officially compelled by the law of the land. The law of the land for a long time tolerated and enforced private covenants that had racial exclusion as their objective. And law enforcement officers often looked the other way when private violence excluded blacks from white areas. However, one needs to make a hostile stretch of the English language to characterize the American pattern of segregation since *Buchanan v. Warley* as apartheid.⁶

1. Racial segregation can come from white aversion.

Here is the urban-economics take on racial segregation.⁷ Imagine a fully-developed (i.e., no vacant land) city neighborhood inhabited by black people that is adjacent to a fully developed neighborhood inhabited by white people. Assume for the sake of argument that the quality of housing is the same in both neighborhoods. However, the price of housing is not exactly the same in the two neighborhoods. The model assumes that whites have an aversion to living near blacks. As a result of this aversion, whites are willing to pay less for housing adjacent to blacks.

It is assumed, moreover, that blacks have no similar aversion to living near the white neighborhood border. As a result, the situation just described—whites living in the same quality of housing next to blacks—cannot be an equilibrium condition. Owners of hous-

5. Apartheid, of course, refers to the official policy of segregation that prevailed for many years in South Africa, and its most distinguishing (and hated) element was legally enforced residential segregation. Contemporary advocates of residential segregation made the connection with South Africa's territorial segregation. See Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 501 (1982) (describing suggestions made by segregation advocates to segregate rural land by popular referendum, based on South African practice).

6. Two sociologists are willing to make that stretch by titling their otherwise useful book on residential segregation "American Apartheid." See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). Judge Higginbotham, however, argued that South African apartheid and American residential segregation were different, and that apartheid was far more damaging to blacks than American residential segregation. Referring specifically to *Buchanan*, he and his coauthors declared, "The focus of this article is to demonstrate how much worse it would have been if the United States did not have . . . those opinions of the Supreme Court which struck down some of the racist state legislation and judicial decrees." A. Leon Higginbotham et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 769.

7. The model was first developed by Martin Bailey, *A Note on the Economics of Residential Zoning and Urban Renewal*, 35 LAND ECON. 288 (1959). My description here is based on the variation presented in EDWIN S. MILLS & BRUCE W. HAMILTON, *URBAN ECONOMICS* 261-64 (4th ed. 1989).

ing in the white neighborhoods will find that blacks are willing to pay more for it than whites near the black/white border. As owner-occupied housing comes on the market or as tenants' leases come due, blacks will be the dominant buyers. Thus the border of the neighborhoods will change, with whites moving away and blacks moving in.

This process applies to an entire urban core, in which blacks locate initially, and then expand outward. Low income migrants will choose central city locations because the housing there is often older and more run-down and hence cheaper to rent or buy. Central city location also enables them to economize on commuting expenditures. From this core, the border between blacks and whites will expand, as blacks outbid whites for housing in a competitive market. This process ends only when the price of housing inside the all-black district equals the price of housing on the border with whites. At that point, blacks no longer have any incentive to move into white neighborhoods, since the housing is the same price for blacks everywhere.

This model predicts that white aversion causes blacks to have lower housing costs, a controversial implication. It does not say that the segregation that results from this process is beneficial to blacks. However, it does suggest that in a competitive housing market (one in which neither buyers nor sellers collude), white prejudice is costly to whites and provides a partly offsetting compensation to blacks. The short-run cost to whites of this process is the capital loss they sustain on their property as the border sweeps over their neighborhood. Blacks do not cause this reduced housing value; they do not care (in this model's characterization of behavior) whether they live next to blacks or whites. The loss is caused by white buyers' aversion to living next to blacks.⁸ Even if a few white homeowners have no racial aversion, they suffer a capital loss as the white part of the housing market declines to bid for their homes once their homes are on the border between black and white neighborhoods.

Economic tests of this model have been controversial, and its housing price implications have not been borne out in most cities.⁹ An obvious implication of the model is that in the long run, whites should end up paying more for housing on average than blacks. Evidence prior to 1970 suggests, however, that whites do not pay more for "comparable quality" housing in urban areas.

8. In more sophisticated versions of this model, whites are only averse to living in neighborhoods with a critical proportion of blacks, but this does not change the long-run result.

9. For a review of the econometric tests, see MILLS & HAMILTON, *supra* note 7, at 261, and JOHN F. McDONALD, *FUNDAMENTALS OF URBAN ECONOMICS* 213-14 (1997).

The basic model does not predict price differences very well because whites are hardly the passive participants that the model posits. The model's operation means that many whites suffer capital losses as homeowners and suffer higher housing prices or commuting costs as they flee from neighborhoods near blacks to less conveniently located areas of the city. So whites develop a host of institutions to hold back the tide of their own prejudice.¹⁰ They boycott real estate dealers and ostracize former neighbors who sell to blacks. To avoid this reaction, real estate salespeople are encouraged to "steer" blacks to other neighborhoods. White homeowners resort to intimidation and violence against black pioneers in white neighborhoods. They are willing to pay a premium in neighborhoods in which owners have agreed to restrictive covenants that exclude blacks.

2. Covenants and other forms of discrimination are costly.

The trouble, from the white homeowners' point of view, with the foregoing mechanisms to prevent black-neighborhood expansion is that they often do not work very well. This is because of the well known "free rider" problem in economics.¹¹ Among prejudiced whites, an all-white neighborhood is a "public good." Such a "good" is non-rival and non-excludable in consumption. Thus if a black family moves into a neighborhood, the well-being of all prejudiced whites is reduced, even though they may have no direct interaction with the newcomer. Indeed, the only person who has an immediate economic interaction with the newcomer is the seller who has most likely departed herself from the neighborhood or, as a landlady, may not live there herself. While a neighboring white homeowner might be willing to pay something to blacks to move out of his neighborhood, his ability to combine his monetary offering with his neighbors' is complicated by the free rider problem of such goods. His white neighbor will think, "If he is willing to pay let him. We will both benefit, and I won't have to pay." Such reasoning would, in situations in which no coercive enforcement of collective action is possible, often defeat attempts to exclude blacks.

It is often in the interest of at least a few whites to sell to blacks. Some blacks may have a preference for integrated

10. See generally MASSEY & DENTON, *supra* note 6; CHARLES ABRAMS, FORBIDDEN NEIGHBORS (1955) (discussing the link between housing problems and American prejudice).

11. See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 44 (5th ed. 1989); Jennifer Roback, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661, 665 (1989) (connecting public good theory with racial prejudice and discrimination).

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

Hence there will be strong incentives to breach agreements not to sell to blacks. Some real estate salespeople will agree to endure the "fly-by-night" reputation that comes from failing to steer blacks away. Some property owners will decline to burden their land with restrictions on who may occupy it. Approached by others eager to provide the "public good" of racial purity, these uncooperative folks will take advantage of the situation and sell to blacks.

Thus it was, in the absence of apartheid laws like those at issue in *Buchanan*, very difficult to keep the black/white border from moving in ways adverse to whites. In fact, it must have been nearly impossible in most situations. We know this not from econometric studies about who paid what for housing, but from the simple demographic fact that the black ghetto took root and expanded in virtually every large city.¹² One prediction of the model that is borne out by experience is that the black neighborhood tends to expand along the borders, leaving more housing available to blacks than they otherwise would have had. In other words, although there was discrimination and segregation in northern cities, things could have been worse for blacks.

3. Ordinary zoning is not an effective substitute for racial zoning.

The development of ordinary zoning—classifying districts according to permitted uses—paralleled the racial zoning that was overturned in *Buchanan*. The closeness of their development seems to have led Bernstein to suggest that ordinary zoning accomplished much the same goals.¹³ In conjunction with racial covenants and covert discrimination by zoning boards in issuing discretionary permits, ordinary zoning is argued to have been a close substitute for racial zoning.

12. See MASSEY & DENTON, *supra* note 6, at 75-77 (discussing hypersegregation in U.S. metropolitan areas).

13. See Bernstein, *supra* note 3, at 864-66; see also MASSEY & DENTON, *supra* note 6, at 37.

This argument likely does not apply to the already-developed areas of cities to which black immigrants were most likely to come. Most developed areas were already zoned for the predominating land uses. Although zoning committees in the 1910s contemplated expelling nonconforming uses, the ensuing controversy led most cities to permit nonconformers to continue if they were not too noxious.¹⁴ Only important changes in pre-existing uses required zoning actions. As a result, the existing, older housing stock in central cities that was most important for black migrants was largely untouched by zoning.

Conversions from single-family to multi-family use in older sections may have required zoning actions, and these changes could have provided opportunities to discriminate by race. But even here discrimination could be avoided by straw-buyers. After the conversion was allowed for whites, the owners could not be stopped by zoning from selling or renting to blacks. Of course, they could still be stopped by private covenants, but zoning did not by itself facilitate the adoption of covenants.

Zoning would have some bite as applied to undeveloped land. First, it could discourage the construction of low-cost units that would be demanded by most poor black immigrants. Many observers believe that this is an important, if not the primary, purpose of suburban zoning restrictions on apartments and other low-cost housing.¹⁵ But this type of zoning affects poor whites as well as blacks. No doubt variances and exceptions could be made for whites, but the resale problem again arises. Moreover, general restrictions on development of high-density housing are resisted by many influential whites, including developers, real estate agencies, and landowners. These interests are especially influential in larger jurisdictions such as older cities.¹⁶

Zoning in smaller suburbs tends to be less responsive to outsider, prodevelopment interests, which would likely make it more difficult to develop low income housing in suburbs.¹⁷ But this process jumps far ahead of the *Buchanan* story. My contention is that

14. See MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS* 81-86 (1987).

15. See Edwin S. Mills, *Economic Analysis of Urban Land-Use Controls*, in *CURRENT ISSUES IN URBAN ECONOMICS* 511, 518-19 (Peter Mieszkowski & Mahlon Straszheim eds., 1979).

16. See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 212-13 (1985) (discussing interests present in larger cities) [hereinafter FISCHER, *ZONING*].

17. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 405-07 (1977) (detailing the ability of homeowners in small communities to repress and/or exclude proponents of development, especially those who favor low-income housing).

Buchanan allowed a large stock of existing housing in central cities to be occupied by those blacks who managed to deal with the extra-legal restraints.

That ordinary zoning was not primarily a means of racial discrimination is suggested by its rapid spread to nearly all areas of the country. Had it been largely a substitute for racial zoning, it would have been adopted most rapidly in cities experiencing racial change. No evidence suggests that pattern, though I cannot categorically deny its existence.¹⁸ A real estate manual of the period endorsed both racial covenants and zoning for protecting property values, but it does not connect the two other than to note that racial zoning had recently been declared unconstitutional.¹⁹

4. Housing near jobs was especially important to blacks.

The American pattern of urban demography is taken so much for granted that we overlook that it could have developed otherwise. In the American pattern, low-income immigrants, particularly blacks, purchase older housing in the central residential areas of most large cities. The ghetto then expands, seldom without controversy, but usually successfully, as more blacks arrive to make expanding it profitable.

In most cities prior to World War I, job opportunities were concentrated in the center of cities. Until low-cost commuter transportation came along, most people needed to live close to their jobs.²⁰ Thus the concentration of blacks near the center of cities also helped them by making jobs more accessible. White flight from the center of the city made white workers' commutes longer. In other words, departing whites were initially subject to "spatial mismatch"²¹ between jobs and housing. In the longer run, jobs may have moved to the suburbs so that blacks in central cities lost their location advantages, but that issue did not play out until after World War II.

18. Of the 31 large cities listed in a national survey in the early 1920s, 16 had zoning. Of the six southern cities on the list, three had zoning. See STANLEY L. MCMICHAEL & ROBERT F. BINGHAM, *CITY GROWTH AND VALUES* 369 (1923).

19. See *id.* at 182, 326.

20. See generally SAM B. WARNER, *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900* (1962); see also Stephen F. LeRoy & Jon Sonstelie, *Paradise Lost and Regained: Transportation Innovation, Income and Residential Location*, 13 *J. URB. ECON.* 67, 67-69 (1983) (assessing the impact of falling costs of commuting on the poor's access to suburban residential locations).

21. Harry J. Holzer et al., *Work, Search, and Travel Among White and Black Youth*, 35 *J. URB. ECON.* 320, 320-21 (1994) (defining the concept of spatial mismatch).

Consider how cities might have evolved had the apartheid laws been successful. Blacks would have been confined to a few areas in which they had become a majority prior to the adoption of the law. Some neighborhoods nearby might have changed as a result of variances granted by authorities, but I will argue in the next section that these would be rare, given the overwhelming support for the ordinances by most whites and the racial attitudes of the period. In order to accommodate the Great Migration, existing neighborhoods with a majority of blacks would quickly have become all black, and conditions would have become even more crowded than they actually did without benefit of the apartheid laws. Expansion into contiguous residential neighborhoods, which was the halting but inevitable process of ghetto expansion, would have been foreclosed.

New subdivisions outside of the city might have been built to accommodate the black demand to move to metropolitan areas. Since most black immigrants were poor, they could only have afforded new housing of very low quality. Not being located near center-city services, such areas would usually lack public infrastructure such as water and sewers. In other words, the suburban black ghetto would look more like the shanty-towns that have sprung up at the periphery of many cities in the third-world.

Suburban ghettos would probably have been even worse for black migrants than the central city ghettos. Employment opportunities—then concentrated in the central business district—would have been more remote and even less likely to be served by public transit. And suburban ghettos would have been quite scattered, since restrictive covenants would have been much easier to impose on the undeveloped land in the suburbs.

Black political action would have been even more difficult to organize in exurban ghettos because of communication problems. A more dispersed black community would also have been more subject to the physical intimidation that kept civil rights activities at a minimum in small southern towns. In short, decentralized ghettos might have been worse than the central city ghettos that did develop. And the repelling effect of exurban ghettos on potential black workers would have slowed the Great Migration. The Civil Rights movement spawned by it would have had to find another channel.

5. Local economic pressure would not have reversed apartheid.

Of course, had *Buchanan* gone the other way, the disastrous scenario I have limned would not necessarily have occurred. Much of

my recent scholarship has focused on the divergence between what happens in the courtroom and what happens on the ground (or, in my best example, under the ground). I showed in my most recent book that the decision in *Pennsylvania Coal v. Mahon*²² had almost no effect on the problem it supposedly addressed.²³

Underground mining of anthracite coal was causing damage to surface homes in Scranton, Pennsylvania and its environs in the early 1900s. In response to surface owners' concerns, the state legislature passed the Kohler Act, which enjoined the mining of coal in urban areas if there was a danger of subsidence. The problem with the law was that most surface owners had deeds in which the right to mine coal and the right to surface support were explicitly retained by the coal companies. Indeed, the right of support had recently been held by the Pennsylvania Supreme Court to be an estate in land, separate from surface rights and mining rights.

The uncompensated transfer of the right of support from the coal companies to the surface owners was held by the U.S. Supreme Court to be in conflict with the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's Takings Clause. In an opinion by none other than Oliver Wendell Holmes, Jr., the Kohler Act was struck down as having "gone too far" with the police power.

Pennsylvania Coal is popularly regarded as the first regulatory takings case.²⁴ Commentators who are hostile to the concept of regulatory takings have pointed out the dire consequences of the Kohler Act, suggesting that mining subsidence was wrecking housing in Scranton.²⁵ My on-site research of the case revealed, however, that *Pennsylvania Coal* changed nothing. Coal companies fixed surface damage that they caused, without charge to the owner, regardless of who owned the right of support.²⁶ This practice had begun several years prior to the Kohler Act and continued after it was struck down.

There were two reasons for *Pennsylvania Coal's* lack of impact. The less important one is that some surface owners bought their support rights back from the coal company. The company was willing to

22. 260 U.S. 393 (1922).

23. See WILLIAM A. FISCHER, REGULATORY TAKINGS LAW, ECONOMICS, AND POLITICS 13-47 (1995) [hereinafter FISCHER, TAKINGS].

24. For indications of this view and an extensive argument that *Pennsylvania Coal* was not originally thought of as a Takings Clause case, see Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

25. See, e.g., FRED BOSSELMAN ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 124-35 (1973).

26. See FISCHER, TAKINGS, *supra* note 23, at 29-30, 37-42.

sell coal in place, so that no subsidence would occur, at a fixed and relatively modest price. However, only a few such transactions took place, mostly purchases by large business owners. Most homeowners were simply given an informal liability rule by the coal companies. If they damaged the home, they would fix it at their expense. When I asked the last surviving management official of the Pennsylvania Coal Company why his company did it, he said it was "just good public relations."²⁷

I inferred from other sources, including an autobiography of the author of the Kohler Act and an interview with his son,²⁸ that coal companies made good on their promises because of indirect economic reasons and social pressures. To mine as they were entitled to before the Kohler Act was passed and after *Pennsylvania Coal* was decided would have driven their own workers out of the city. Moreover, mining company officials had extensive social ties with surface owners throughout the city, so they had a personal interest in "good public relations." Caving in the house of a lodge-brother was not considered good form.

The coal mine case has some parallels with *Buchanan v. Warley*. Holmes was initially inclined to dissent in *Buchanan*, and the dissenting opinion he wrote but did not publish reveals that he saw the apartheid issue in the same terms that he saw the anti-subsidence measure.²⁹ Of the apartheid act at issue in *Buchanan*, he said in 1917: "The value of property may be diminished in many ways by ordinary legislation as well as by the police power properly so called without any constitutional obligation to pay the owner unless the diminution reaches such a magnitude as to necessitate the exercise of eminent domain."³⁰ Of the coal-mine subsidence act, Holmes declared in 1922, for the majority:

One fact for consideration in determining such limits is the extent of the diminution [in value]. When it reaches a certain magnitude, in most if not in

27. Interview with E. Stewart Milner in Dunmore, Pa. (June 28, 1993 & Oct. 3, 1993) summarized in FISCHER, TAKINGS, *supra* note 23, at 38 (notes on file with the author).

28. See PHILIP V. MATTES, *TALES OF SCRANTON* (1974) (privately published by the author; date of publication is inferred from biographical information. A copy is in the Scranton Public Library, and a photocopy of relevant chapters is on file with William A. Fischer); see also Philip V. Mattes, *The Mine-Cave Struggle*, in *JUBILEE HISTORY OF LACKAWANNA COUNTY* (Thomas Murphy ed., 1928). Interview discussed in FISCHER, TAKINGS, *supra* note 23, at 39. Interview notes on file with the Author.

29. The unpublished opinion is reprinted in Schmidt, *supra* note 5, at 512-13. Holmes ultimately voted with the majority in *Buchanan*, which was unanimous. He was apparently not displeased with the *Buchanan* decision, as he quoted it at length in his opinion in *Nixon v. Herndon*, 273 U.S. 536 (1927), which struck down the Texas whites-only primary.

30. Schmidt, *supra* note 5, at 513 (citations omitted).

all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.³¹

Holmes did not think that the diminution of value of Buchanan's property by the apartheid law was so large as to warrant the exercise of eminent domain. Holmes said that the claim of complete diminution by *Buchanan* "obviously sounds too much in prophecy to be regarded as an allegation of fact."³² By implication, Holmes would have seen no problem with an apartheid ordinance that offered compensation for black and white property owners. Of course, had compensation been required, it is doubtful that much segregation could have been accomplished. The fact that whites were unwilling to outbid blacks for houses in changing neighborhoods is evidence that, collectively, whites could not have paid blacks to stay out of their neighborhoods.

Someone trained in the economics of law would invoke the Coase theorem to analyze this situation.³³ If blacks were willing to pay more for housing in a given area than whites, then it should not matter whether whites are entitled to exclude blacks or not. If whites cannot exclude them collectively (as was the case after *Buchanan*), then blacks will outbid them for housing. If whites are entitled to collective exclusion of blacks via the apartheid rule (before *Buchanan*), then blacks will compensate whites to change the laws to allow them to buy. Reasons of self-interested exchange might suggest that it did not matter which way *Buchanan* was decided.

Susan Rose-Ackerman wrote an article that examined the theoretical economics of such transactions in an urban setting.³⁴ She characterized the apartheid privileges of whites as operating either as a profit-maximizing cartel or as a vote-maximizing local government. In either case, some level of black demand to be let into the neighborhood will prompt whites to collectively change their laws.

Rose-Ackerman demonstrated that an apartheid-collective possesses some monopoly power over locations in the city, and the bigger the area that adopts apartheid, the less likely a transaction

31. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

32. Schmidt, *supra* note 5, at 513.

33. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

34. See Susan Rose-Ackerman, *The Political Economy of a Racist Housing Market*, 4 J. URB. ECON. 150 (1977). Rose-Ackerman was not examining *Buchanan v. Warley* specifically or invoking the Coase theorem, but her analysis did provisionally assume an apartheid rule.

could take place. Whites would hold out for a higher price to vacate the neighborhood if a single cartel forestalled blacks from bidding for alternative neighborhoods. Since most apartheid laws were passed as city ordinances and most neighborhoods were occupied by whites, the monopoly power problem might have applied.

But the real problem with the Coasean analysis is the one that Coase himself wanted his readers to pay attention to.³⁵ The transaction costs of making the payments that Rose-Ackerman envisioned are enormous. How would blacks even organize to make such payments? Most of those who would benefit would not even be in the jurisdiction. Perhaps some entrepreneurial real-estate developers could arrange to deal with the white organization in order to profit from housing. But to internalize such profits, the entrepreneurs would have to be able to control the subsequent sales of housing. Otherwise, other entrepreneurs would reap all of the benefits of the subsequent sales by whites to blacks. The costs of maintaining complete control over a changing neighborhood's housing stock would seem prohibitive at any realistic estimate of profitability.

The transaction costs on the other side are at least as problematic. White homeowners would have to agree collectively to sell to blacks. This agreement would be similar to changing present-day zoning laws to nonresidential uses. Homeowners who are adversely affected have the power in most cases to block such change. The transaction costs of persuading those adversely affected are substantial, and they do inhibit land-use changes.³⁶ Considering the greater emotional charge of changing an apartheid law, few offers of compensation by blacks, if they could be organized, would be accepted by whites.

6. Informal and local political forces would not budge apartheid.

Might there have been more subtle ways to get apartheid to loosen its grip? In Scranton, I identified several factors that induced efficient transactions to be made by a form of implicit exchange. Mine owners did not want to destroy the houses of their workers, or to endure the social ostracism that being careless of surface owners' homes would have brought.

35. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988); R.H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 *J.L. & ECON.* 183 (1981).

36. See ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS* 84-111 (1977); FISCHEL, *ZONING*, *supra* note 16, at 69-78.

But the *Pennsylvania Coal* denouement resulted from conditions in which people had an incentive to make accommodation with one another. Surface owners and mine owners were locked into a relationship by the need of mine owners for workers and of surface owners for jobs in the mines. I will ask whether mutual interests between white homeowners and black workers might have diluted the apartheid laws at issue in *Buchanan v. Warley*.

Businesses that employed blacks in northern cities might have lobbied against apartheid. Businesses drew black workers to northern cities because they offered better wages than blacks could get in the rural South, even if they were below what white workers were paid.³⁷ The gain to employers was lower cost labor, which became increasingly important once World War I stopped the influx of poor European workers.³⁸ The employers would have realized that the apartheid laws would make it more difficult for them to attract black workers, because both housing and transportation costs would be too high. For the sake of naked self interest, industrial employers might have prevailed on cities not to adopt apartheid.

There was a parallel in the school segregation cases. Economic historian Robert Margo asked why whites in the deep south bothered to provide any schooling for blacks, given that the "equal" half of separate but equal was not enforced.³⁹ He found that local white employers often lobbied county school officials to provide black schools because blacks workers would otherwise not move there. In a similar vein, Gerald Rosenberg presents evidence that desegregation of Southern schools in the 1960s was promoted in part by local businesses.⁴⁰ Businesses were motivated not by principles of equality, but by the difficulty of attracting employees to the South if schools were unfunded and in continual turmoil.⁴¹ It seems possible, then, that urban employers in the 1910s might have formed an interest-group counterweight to local government apartheid that might have mitigated its worst excesses.

While some of this might have occurred, it likely would not have rolled back apartheid to any important degree. In the foregoing

37. See ABRAMS, *supra* note 10, at 24.

38. See Klarman, *supra* note 2, at 900.

39. See Robert A. Margo, *Segregated Schools and the Mobility Hypothesis: A Model of Local Government Discrimination*, 106 Q.J. ECON. 61 (1991) (arguing that competition for black labor created an incentive for southern whites to fund black schools).

40. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 100-02 (1991).

41. As Rosenberg notes, the carrot of federal aid for schools was withheld if desegregation was not forthcoming. See *id.* at 100.

examples, business interests wanted simply to enforce the law of the land. That is, they argued in the earlier period for better schools for blacks under the "separate but equal" doctrine of *Plessy v. Ferguson*,⁴² and they argued in favor of integration in the 1960s under the *Brown* decision and the Civil Rights Acts. Had *Buchanan v. Warley* gone the other way, businesses in the World War I era would have had to take a position against that of the courts and the state and local legislatures.

Businesses in northern cities that would have employed blacks faced some organizational problems themselves. Northern metropolitan areas were fragmented, with several independent jurisdictions making up the urban area. Although the fragmentation had not reached its present-day stage, in which the structure of local governments looks more competitive than most industries,⁴³ independent suburbs were rapidly developing in the early 1900s.⁴⁴ In such a situation, people associated with a particular industry were unlikely to live in the same place in which they were employed.

Moreover, local governments are somewhat less likely to respond to special interests in formulating legislation.⁴⁵ Apartheid laws were likely responding to a democratic majority at the local level, most of whom were whites concerned about their home values. They had the appeal of home and hearth on their side. There is no record of any of the apartheid laws having been rescinded or substantially modified prior to *Buchanan v. Warley* in 1917.⁴⁶

The final possibility is that homeowners and apartment owners themselves might have found that apartheid did not pay. By shutting out blacks as prospective tenants, the laws injured apartment owners. Some homeowners would have realized that if they held out against panic selling as neighborhoods began to change, they could sell their homes at a normal or perhaps even higher price to

42. 163 U.S. 537 (1896).

43. See generally William A. Fischel, *Is Local Government Structure in Large Urbanized Areas Monopolistic or Competitive?*, 34 NAT'L TAX J. 95 (1981) (arguing that local government structure is competitive in that varied fragmented municipalities may compete against one another for zoning or local ordinances).

44. See NATIONAL MUNICIPAL LEAGUE & COMMITTEE OF METROPOLITAN GOVERNMENT, *THE GOVERNMENT OF METROPOLITAN AREAS IN THE UNITED STATES* 7-22 (prepared by Paul Studenski, 1930).

45. See Ellickson, *supra* note 17, at 405 (noting that the lack of multiple issues reduces the need for small governments to address minority interests).

46. Garret Power notes some fine tuning of Baltimore's laws to make them more constitutionally defensible, but not to mitigate their effects on blacks. See Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983). Moreover, there were several unsuccessful attempts to re-establish the laws by subterfuge after the decision. See ABRAMS, *supra* note 10, at 210.

blacks later on. But these forces seem even weaker than the motives of employers. The impact of the apartheid laws would have been obvious to them from the very start (unlike the perhaps delayed impact on employers), but the influence of anti-apartheid real estate interests appears to have been weak.⁴⁷

7. State courts and state politics would not have helped.

The state legislatures could have upended a contrary holding in *Buchanan v. Warley*. Legislatures clearly had discretion over racial segregation, and cities were subject to their rules. State governments might have intervened if business interests had sought to override local decisions. Businesses that are outvoted at the local level often turn to state legislatures to override parochial decisions.⁴⁸ Business interests are typically better organized at the state level than homeowners, and they might have at least mitigated the force of local apartheid legislation.

Such a turn of events seems unlikely to have worked against apartheid in the *Buchanan* era. Only some businesses gained from having an additional stock of low-wage labor. Those not in a position to hire blacks would have resisted the cost advantage that they offered to businesses that could hire them. Moreover, white workers would have resisted. White unions were seldom open to blacks, and blacks were often used as strike breakers.⁴⁹ Although union activity was not strong during this period, what influence organized labor had was most likely felt at the state level. In South Africa, the influence of businesses was largely countered by white trade unionists, who were the major forces in favor of apartheid and related racial laws.⁵⁰

The durability of segregated education in the United States is also telling. Businesses that wanted a reasonably educated black labor force seem to have had only a small effect on the quality of black schools. That white business interests may have prevented black schools from being eliminated is not to say that black schools were satisfactory. The economic forces arrayed in favor of apartheid com-

47. That real estate interests sided with the NAACP in *Buchanan* is one indication of their political weakness. I say appears because we do not know how many cities had apartheid laws nipped in the bud by such influences.

48. See FISCHER, TAKINGS, *supra* note 23, at 289-324.

49. See MASSEY & DENTON, *supra* note 6, at 28.

50. See MERLE LIPTON, CAPITALISM AND APARTHEID: SOUTH AFRICA, 1910-84, at 183-226 (1985) (discussing the resistance of white labor in general toward easing apartheid, even when doing so appeared to be in their economic best interest).

bined with the lack of representation of potential black immigrants makes it extremely unlikely that state legislatures would have overturned local apartheid laws.

State courts might have overturned racial zoning on state law grounds, as some had done prior to *Buchanan*. There is reason to believe, however, that the state courts would have been ineffective. Even those state judges inclined to protect blacks or the property rights of whites would have found it hard to resist the United States Supreme Court's authority and prestige. The Maryland Supreme Court, for example, struck down Baltimore's apartheid ordinance on two occasions, but when an amended version was litigated a third time, it declined to rule until *Buchanan* had been decided.⁵¹

Supreme Court decisions upholding local land use controls would have constrained state judges. Although *Euclid v. Ambler Realty Co.*,⁵² the major Supreme Court zoning case, was in the future, the Court had shown little hostility to local land use regulations. The Court had actually upheld the uncompensated expulsion of a pre-existing land use in *Hadacheck v. Sebastian*.⁵³ And most state court judges are subject to an electoral review unknown at the federal level.⁵⁴ Unless a contrary decision in *Buchanan v. Warley* had been followed by another Supreme Court decision that greatly narrowed the force of the holding, state court review of the apartheid laws would have favored the cities where it most mattered.

8. Conclusion: *Buchanan* satisfies process theory.

The world would have been a lot different, and certainly worse for blacks, if *Buchanan* had been decided the other way. This is an instance in which a big case had big effects. This case fits into the Constitutional jurisprudence of John Hart Ely⁵⁵ and (in part) of Michael Klarman,⁵⁶ who have emphasized the comparative advantage of the courts in encouraging the democratic process and, where the process is attenuated by laws beyond its reach, to attempt a result that would have been achieved under full enfranchisement.

51. See Schmidt, *supra* note 5, at 503.

52. 272 U.S. 365 (1926).

53. 239 U.S. 394 (1915).

54. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

55. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

56. See generally Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

I think that apartheid legislation would not have been passed by a democratic body that had a significant number of fully enfranchised blacks within its jurisdiction. As an example, a study of modern zoning in Atlanta showed that commercial rezonings that were opposed by homeowners in black areas of the city were much less common after the city was redistricted to give more representation to blacks on the city council.⁵⁷ If the *Buchanan*-era apartheid zoning laws would not have been defeated at the city level, then a state government with a fair representation of blacks would have reined in the cities.

One reason for courts to supervise local land use decisions is that in many cases, those who bear the brunt of the regulation live and vote outside of the jurisdiction.⁵⁸ Owners of developable land represent prospective residents who would be net additions to the community (rather than buying existing homes). This is because landowners' profitable development offers the newcomers housing at a mutually advantageous price, a price that is lower than it would be if only existing homes were for sale. However, owners of undeveloped land are systematically outvoted in majoritarian elections in most suburbs.⁵⁹ The importance of *Buchanan v. Warley* is another example of why courts should not make a distinction between protecting property and protecting people. In smaller jurisdictions, the owners of developable land are often the best—and sometimes the only—representatives of people who are not there. As *Buchanan* illustrated, sometimes the only remedy for democratic break-down is the principle of judicial review.

57. Dudley S. Hinds & Nicholas Ordway, *The Influence of Race on Rezoning Decisions: Equality of Treatment in Black and White Census Tracts, 1955-1980*, in 14 REV. BLACK POLITICAL ECON. 51, 51-63 (1986).

58. See FISCHER, TAKINGS, *supra* note 23, at 115-40.

59. See Ellickson, *supra* note 17, at 406.

