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The pioneering African-American historian Rayford Logan called the early years of the Progressive era the "nadir" of race relations in the United States.[1] Historians and political scientists who study the Supreme Court generally agree that Supreme Court decisions are rarely substantially out of line with the kind of sustained national consensus regarding race relations that Logan described. Professors Bernstein and Klarman point to popular culture, including the roaring success of D.W. Griffith's epic *Birth of a Nation* attacking Reconstruction and defending the Ku Klux Klan, and elite opinion such as the flourishing of scientific racism to demonstrate that there was indeed a broad national consensus favoring policies of racial subordination.[2] What then are we to make of Progressive era decisions like *Buchanan v. Warley*?[3]

Professors Bernstein and Klarman offer slightly different explanations for those decisions, and slightly different accounts of their significance. Both agree that the result in *Buchanan* is best explained as resulting from the Court's jurisprndential commitments. For Professor Bernstein, those commitments were to what he calls "traditional," as distinct from sociological, jurisprudence,[4] while for Professor Klarman, the commitments were to enforcing at least, but perhaps no more than, the minimal meanings of the Constitution's language.[5] Similarly, both authors agree that *Buchanan* had little

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. B.A., Harvard University, 1967; J.D., M.A., Yale University, 1971.

1. RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877-1901 (1954).

2. *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 799, 801-03 (1998); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 883, 896 (1998).

3. 245 U.S. 60 (1917). Having written about *Buchanan* before, I focus my comments on it, with occasional references to Professor Klarman's account of other Progressive era cases. For my discussion of *Buchanan*, see Mark V. Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245, 249-50 (1997).

4. *See* Bernstein, *supra* note 2, at 806-22.

5. *See* Klarman, *supra* note 2, at 939-40.

impact on residential segregation, and that the NAACP's success in that case might have had some organization-building effects that contributed to the development of the NAACP's vigorous litigation campaign in succeeding decades.[6] Professor Bernstein emphasizes the impact a ban on publicly mandated segregation would in theory have on housing prices, and is a bit more sanguine than Professor Klarman about the possibility that a Court with a sustained commitment to "traditional" jurisprudence would have stood in the way of public policies that contributed to African-American subordination.

I agree with the main thrust of both Articles, and so these comments raise questions around the edges of their arguments. Professor Bernstein accurately describes sociological jurisprudence and explains how its method of balancing competing social interests systematically aligned the Court with views that prevailed in other domains of public life. The Court's refusal to follow the precepts of sociological jurisprudence in *Buchanan*, however, allowed it to perform what Professor Bernstein calls its "traditional role" as an elitist counterweight to popular control of public policy.[7] But Professor Bernstein's description of the Court's "traditional" jurisprudence needs sharpening.[8]

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6. *See* Bernstein, *supra* note 2, at 873-74; Klarman, *supra* note 2, at 949-50. Professor Klarman also describes, more tentatively, how the *Buchanan* litigation campaign might have had organization-building effects that contributed to the more vigorous civil rights movement of the 1950s and 1960s. *See id.*

7. *See* Bernstein, *supra* note 2, at 875-77.

8. Professor Bernstein's discussion of some collateral points could be more careful as well. For example, contrary to Professor Bernstein's account, the common law did not broadly require either integration or the provision of separate but equal facilities. *See id.* at 823. There was a common law obligation of non-discrimination imposed on common carriers, but the class of common carriers was not as broad as we might think. For example, the class included inns serving travelers but not places of public accommodations generally. Further, it was a matter of legal controversy whether the non-discrimination requirement entailed a ban on *race-based* discrimination; cases litigating the issue in the Reconstruction era produced divided results. And, finally, the common law common carrier obligations were not given the same interpretation in every state. *See* Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*, 13 LAW & HIST. REV. 261, 273-77 (1995) (describing common law rules). These deficiencies led Congress to enact a general civil rights statute in 1875, held unconstitutional in 1883. *See* The Civil Rights Cases, 109 U.S. 3, 24 (1883).

Also, Professor Bernstein misunderstands the role that reasonableness plays in the Court's opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Bernstein, *supra* noto 2, at 826-27. He objects to the Court's reliance on public opinion in its analysis of reasonableness, treating this as inconsistent with its "traditional" jurisprudence. But as I understand traditional jurisprudence, its function was to hive off areas from public control. Having decided that the statute at issue in *Plessy* did not intrude on a protected area, the Court *then* considered the statute's reasonableness. *See Plessy*, 163 U.S. at 548-49 (rejecting the plaintiff's constitutional arguments and beginning consideration of whether assigning passengers to coaches by race "is a valid exercise of legislative power"). In traditional jurisprudence, public opinion was always

According to Professor Bernstein, the Court's "traditional" jurisprudence centered on a substantive commitment against "class" legislation.[9] This commitment had its origins in the Jacksonian attack on class legislation, which Jacksonians and their heirs understood to be the result of elite control of the organs of public policy.[10] The classic example of class legislation for Jacksonian jurisprudence was the establishment of the Bank of the United States, which, as Jacksonians saw it, resulted from the impact of the concentrated power of wealth on the legislative process. The idea of class legislation became generalized as the century progressed. The specific emphasis on the concentrated power of wealth was transformed into a concern about the impact of all forms of concentrated power. After the adoption of the Fourteenth Amendment, the Court could fairly interpret the Amendment as making Jacksonian jurisprudence the law of the land.[11] Those who followed and transformed Jacksonian jurisprudence believed that class legislation disadvantaged ordinary, and unorganized, people.[12] That is how the maximum work-hour law invalidated in *Lochner v. New York*[13] could be seen as exemplifying class legislation: The concentrated power of organized bakery workers overbore the interests of unorganized consumers and unorganized individual bakers. And it is how, as Professor Bernstein properly notes, the statute upheld in *Plessy v. Ferguson*[14] could have been seen as class legislation as well: The concentrated power of organized white racists overbore the interests of less-organized African-Americans and whites uninterested in segregation. The racial zoning ordinance that the Court struck down in *Buchanan* also is an example of the kind of class legislation that Jacksonian jurisprudence disapproved.

Professor Bernstein unfortunately blurs the concept of class legislation in "traditional" jurisprudence as it was understood by its adherents when attempting to connect the anti-class-legislation analysis to Justice Harlan's dissent in *Plessy*, with its famous state-

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relevant to the determination of a statute's reasonableness; it was just that reasonableness itself was not always a relevant legal criterion.

9. *See* Bernstoin, *supra* note 2, at 806-12.

10. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED 33-45 (1993) (discussing Jacksonian democracy's incipient role in the *Lochner* era).

11. I do not mean by this to suggest that such an interpretation of the Fourteenth Amendment was the only one available to the Court, merely that it *was* available.

12. *See* GILLMAN, *supra* note 10, at 76-99 (discussing the class warfare spawned by "impos[ing] brutalizing burdens on masses of people at the same time it showered unprecedented splendors on a select few").

13. 198 U.S. 45 (1905).

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

ment that "[t]here is no caste here."[15] In traditional jurisprudence there is a difference between "class" legislation and "caste" legislation that deserves emphasizing. From the anti-class-legislation perspective, *Buchanan* is an example of a broad class of special interest legislation, part of the same class as the statute in *Lochner*. In contrast, an anti-caste perspective would link *Buchanan* with *Plessy* but not with *Lochner*: Except in a metaphoric sense, legislation that disadvantages consumers and ordinary workers does not create a subordinate caste in the way that racial segregation does. The critical commentators on *Buchanan* whom Professor Bernstein cites understood this when they stressed the role that property rights played in the Court's analysis.[16]

The difference between caste legislation and class legislation raises another question. We know from Professor Bernstein's account of sociological jurisprudence that the Court was not broadly committed to "traditional" jurisprudence. Why, then, was it deployed in *Buchanan* but not in other cases? I suspect that the answer would begin by noting that issues of race have always been special in constitutional law. Ordinarily, as Andrew Kull has argued, that specialness has operated to the disadvantage of African-Americans.[17] In *Buchanan*, it may have operated to their advantage. But the very specialness of race in constitutional law then raises a question about the extent to which *Buchanan* actually can be accounted for by reference to the Court's commitment to "traditional" jurisprudence, since the Court does not actually seem to have been committed to it generally. *Buchanan* and the other Progressive era race cases suggest that the Court was reaching, however hesitantly, toward a new transformation of Jacksonian jurisprudence. Having expanded from an attack on the power of concentrated wealth to an attack on concentrated power generally, that jurisprudence might have been in the process of contracting into an attack on caste legislation, a particular form of class legislation.

Professor Klarman also offers an explanation for the outcome in *Buchanan*. While he stresses that it would be absurd to contend that the Progressive era Court was leading a charge against caste legislation, his alternative account seems to discount the shift in the Court's constitutional perspective too much. Consider first Professor

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15. *Id.* at 559 (Harlan, J., dissenting). This is not to deny that Harlan felt the pull of the Jacksonian legacy, but only that his formulation in *Plessy* is not precisely the one a pure Jacksonian constitutionalist would use.

16. *See* Bernstein, *supra* note 2, at 858-60.

17. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

Klarman's discussion of *Guinn v. United States*.[18] In describing the state's grandfather clause exempting certain persons from the state's literacy test, he notes that "it seems hard to imagine a more blatant subversion of the Fifteenth Amendment, short of a facially race-based suffrage restriction."[19] The Court treated the statute as "a surrogate racial classification on its face and thus avoided any inquiry into legislative motive."[20] And yet, because the statute did not in fact use the language of race, the Court did indeed go beyond what a minimal reading of the Fifteenth Amendment would require. There *is* a difference between holding statutes unconstitutional when they use race-based classifications on their face, and doing so when they use some non-race criterion "as a surrogate" for race, even when the surrogate is nearly perfect. The former enforces a pure requirement of formal equality alone, while the latter is a slight move in the direction of invalidating on the basis of improper purposes. It would have taken no more ingenuity than the Court displayed in the *Guinn* decision for the Court seventeen years earlier to have invalidated the Mississippi plan of disfranchisement.[21] No more ingenuity, perhaps, but more inclination, and that is what makes the Progressive era cases a puzzle: The Court was willing to push ouly a little beyond where it had previously gone even though the minimal requirements of constitutionalism might have allowed it to rest in place.[22]

The same can be said of *Buchanan*. By 1917 the Court had over forty years of precedents delineating the Reconstruction Amendments' meaning. Two prominent decisions in particular were available to the Court. The Court could have taken *Pace v. Alabama*[23] and *Plessy v. Ferguson*[24] to stand for the proposition that disabilities imposed equally on whites and African-Americans did not violate

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18. 238 U.S. 347 (1915); *see* Klarman, *supra* note 2, at 919-23 (discussing *Guinn*).

19. Klarman, *supra* note 2, at 921.

20. *Id.* at 922.

21. *See* Williams v. Mississippi, 170 U.S. 213, 225 (1898) (rejecting the black defendant's challenge to an all-white jury drawn from voter registration rolls that were almost entirely white because of election commission laws allowing discrimination).

22. Professor Klarman invokes minimal constitutionalism as well in his account of *Bailey v. Alabama*, 219 U.S. 219 (1911). I am puzzled by his argument about *Bailey*. As he presents the case, the Court relied on the fact that *state* constitutions barred states from criminalizing a breach of contract to support its conclusion that statutes that "in substance" do the same thing are violations of the *federal* Thirteenth Amendment. Klarman, *supra* note 2, at 927. That argument, whatever its merits, does not seem to me to represent something demanded by the minimal requirements of the Constitution.

23. 106 U.S. 583, 585 (1882) (upholding a law against co-habitation between whites and blacks that penalized both races equally).

24. 163 U.S. 537, 548 (1896) (rejecting a challenge te a statute requiring separate, but equal, accommodations for blacks and whites on passenger trains).

those Amendments. Professor Klarman argues that *Pace* and *Plessy* were distinguishable from *Buchanan* in the terms established during Reconstruction because the former cases involved social rights of association, untouched by the Reconstruction Amendments, whereas *Buchanan* involved property rights, which were at the core of the civil rights that the Reconstruction Amendments' framers sought to protect. Thus, he argues, anyone minimally committed to the Reconstruction Amendments would have to find the ordinance in *Buchanan* unconstitutional.[25]

I do not think Professor Klarman establishes that the result in *Buchanan* was compelled by a minimal understanding of the Reconstruction Amendments. In retrospect, we can understand *Pace* as involving social rights, but the Court did not have to understand it in that way. One could equally characterize *Pace* as involving the civil right to enter into a contract of marriage.[26] One committed to a minimal reading of the Constitution might therefore have reasonably concluded that after *Pace* and *Plessy* laws imposing disabilities equally on whites and African-Americans did not violate the Constitution, whether they dealt with civil or social rights.

That conclusion could be supported by the obvious proposition that many clearly valid state laws imposed equal disabilities in the area of civil rights—laws barring both whites and African-Americans from selling liquor, for example.[27] And, finally, the animating purpose of the Reconstruction Amendments, at its bare minimum, was to eliminate disabilities imposed solely on African-Americans. Once again, then, the ordinance in *Buchanan* was not "so obviously unconstitutional" that anyone with the most minimal commitment to the Constitution would have to find it unconstitutional.

Professor Klarman's interest in "contextualizing" the Court's decisions may have led him slightly astray.[28] No sensible observer

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25. *See* Klarman, *supra* note 2, at 938-43.

26. Laws banning interracial marriages therefore interfered with the civil right to enter inte contracts. Strikingly, during the Reconstruction era debates, opponents of the Fourteenth Amendment made this argument, and proponents of the Fourteenth Amendment had no adequate response. *See* Mark V. Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 888 & n.15 (1987) (discussing the debates).

27. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661-62 (1887) (upholding a state law prohibiting sales of alcoholic beverages).

28. Contextualizing Supreme Court decisions is the standard work of historians and political scientists, who sometimes have to be cautioned against the danger of *over*contextualizing in a way that eliminates the possibility that purely professional concerns—such as developing a coherent doctrine that lawyers and judges can easily use—for developing defensible interpretations of the Constitution might actually occasionally matter. Professor Klarman avoids this mistake, but perhaps at the cost of asserting too strenuously the novelty of his approach.

could plausibly contend that the Supreme Court can set itself against a sustained national consensus on important public policies for any substantial period.[29] All the terms of this formulation are important. There must be a consensus rather than a close division in the polity; the consensus must be national rather than local or regional; the consensus must be sustained over an extended period (a decade or so); the consensus must involve important rather than marginal policies; and the Court must maintain its views over an extended period.[30] The Progressive era race cases fail on the last two counts. The policies were not that important in light of available close substitutes,[31] and the Court's actions were not part of a general effort it sustained over a decade.[32]

One must be careful in identifying the relevant units of analysis when contextualizing a line of cases. The cases will almost certainly be roughly consistent with similar policies being adopted elsewhere in the polity. But we need not be surprised to discover that any individual case, or even a handful of related ones, might be inconsistent with its political context. Professor Klarman's analysis gives some, albeit limited, force to the minimal demands of professional responsibility in interpreting the law, which may provide some opportunities for divergence between court decisions and policies developed

29. Considering the organization of government in the most general terms, we should be astonished to discover a regime so organized that one of its institutions (the courts) could be at odds with its other institutions on important matters for a sustained period.

30. The classic exposition is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

31. Substitutes included restrictive covenants and private rules segregating transportation. *See* Joseph R. Palmore, Note, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878-1946*, 83 VA. L. REV. 1773, 1792-1804 (1997) (discussing the widespread use of segregated rail laws in the late 1800s). As a general matter, since substitutes are ordinarily available, the Court can speak broadly about apparently important social policies and yet have rather little impact on the way society operates.

32. As Professor Klarman points out, when the Court confronted race issues again in the 1920s, its leading decisions—*Gong Lum v. Rice*, 275 U.S. 78 (1925), and *Corrigan v. Buckley*, 271 U.S. 323 (1926)—endorsed the system of racial subordination. *See* Klarman, *supra* note 2, at 935, 944 n.336.

elsewhere.[33] Divergence from policies should also be unsurprising when the court decisions have relatively little social impact.[34]

What, then, accounts for *Buchanan*? As Professor Klarman notes, the Justices were committed to "rule of law" principles, which meant that they could not uphold legislation blatantly inconsistent with generally accepted constitutional principles.[35] But, I have argued, the statutes at issue in the Progressive era cases did not have to be seen as gross violations of those constitutional principles. Something more must have been going on. Several Justices probably had a residual commitment to anti-class legislation. They and some of their colleagues may have had a similarly residual commitment to anti-caste principles. The Justices could have seen the two commitments converging in *Buchanan* and the other Progressive era cases. The decisions do appear to have been modest moves in the direction of a more "liberal" position on race than was found elsewhere in the law. Professor Klarman rightly stresses how modest the moves were, but his rhetoric, with its emphasis on the minimal demands of legality, understates the fact that the Court's decisions were moves in a *new* direction.

In the end, I think the Progressive era decisions remain a puzzle. I believe, admittedly without much support, that some Justices were uncomfortable with what they saw as the excesses of segregationist policies, although not with the core of segregation itself. They used the Progressive era cases to express their discomfort.[36] Professor Klarman points out that changes in the political context were incipient during the Progressive era. Some Justices may have sniffed these changes in the wind. They might have been attempting to anticipate the changes, or to use Alexander Bickel's image, to remember the

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33. This proposition could be specified more precisely in two ways, with different implications for questions other than the ones addressed here. First, it could be that national opinion continued to require formal compliance with constitutional norms taken in a minimal sense, and was content to let the judges decide what constituted such compliance. Second, it could be that national opinion was indifferent or even opposed to minimal compliance, but that professional norms did require such compliance, and the courts were in a position to follow the professional norms.

34. As Professor Bernstein suggests, the Progressive era decisions may have had the conceptual potential to broaden into a more general attack either on caste legislation or on class legislation in its broader sense. Professor Klarman is surely right in suggesting that the more significant the Court's decisions become, the less likely it is that any divergence between those decisions and other public policies could be sustained.

35. *See* Klarman, *supra* note 2, at 939-43.

36. The Justices' willingness to overlook procedural impediments in the cases, which Professor Klarman details, provides some slight support for this thought. *See* Klarman, *supra* note 2, at 939.

future.[37] But because the changes were only incipient, their anticipations of the future were modest.

Admittedly, these decisions had little immediate material impact. Segregation in housing, transportation, and education continued, and African-Americans remained effectively disfranchised throughout the South. Professor Bernstein and Klarman both point out that the NAACP's victory in *Buchanan* helped strengthen the NAACP, and thereby assisted in laying the groundwork for the more important role that it and other civil rights organizations would play in the civil rights movement decades later.[38] As Professor Klarman notes, the conceptualization of constitutional rights as individual rights in the *McCabe* case was a key legal argument that the NAACP developed against segregation starting in the late 1920s.[39]

More interesting, perhaps, is Professor Bernstein's suggestion that *Buchanan* identifies a path not taken, which would have led to greater civic equality. He would treat *Buchanan* as exemplifying the "traditional" hostility to class legislation generally, and argues that such hostility would stand in the way of the development of a caste society. Following a generally libertarian and market-oriented line, Professor Bernstein argues that conditions of civic inequality can be sustained only with the assistance of state power: Sellers of products and providers of services care only about cash, not color, and their material interests eventually undermine efforts to sustain civic inequality in the absence of state sanction.[40]

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37. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 102 (1970) (discussing the future of the Warren Court's decisions).

38. *See* Bernstein, *supra* note 2, at 873-74.

39. *See* Klarman, *supra* note 2, at 934. *McCabe* made available an argument that, when pursued to the ends of its logic, would undermine segregation. This is different from saying that the Justices who articulated the argument intended that result. Professor Klarman does, however, express some skepticism about those legal arguments' importance to the civil rights movement's successes. It seems to me that Professor Klarman's rhetoric is unnecessarily grudging. At times it seems as if he argues against the contention that sometimes judicial decisions can have large-scale transformative effects. It is only a modest argument against that contention that the particular decisions he is discussing did not have such effects, and it is unnecessary for the purposes of that modest argument to demonstrate that the decisions had no effects whatsoever.

40. Professor Klarman addresses this argument in two footnotes, see Klarman, *supra* note 2, at 941 nn.322-23. He argues that historically, "a strong emphasis on economic rights failed te yield siguificant protection for other rights such as free speech or privacy." *Id.* at 941 n.322. That, however, does not address the more general libertarian argument Professor Bernstein offers: To a libertarian, government should interfere with neither property nor free speech rights. For an account of early libertarian defenses of free expression, see DAVID A. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 23-76 (1997). In addition, Professor Klarman offers an accurate description of the libertarian position as a criticism of *Buchanan*: "The same [libertarian] notions that invalidate residential segregation ordinances can be invoked to invalidato civil rights statutes on the ground that the state should not interfere with the contractual

As a speculation based on applying general economic theory to particular markets at a specific time and place, this argument goes well beyond the competence of lawyers-as-historians, and beyond our capacity as lawyers-as-lawyers. I conclude only with this modest observation. Contemporary liberals associated with the Democratic party find themselves caught in a bind.[41] They argue that the material condition of African-American life today is quite terrible. Their critics point to the same conditions as evidence that the liberal policies pursued in the 1960s were failures.[42] Liberals respond that the 1960s policies were not failures in themselves, but rather were not pursued with sufficient vigor, and indeed were abandoned in the "backlash" of the 1970s and thereafter. Their critics respond that liberals were in charge of policy for a long enough period to demonstrate what the policies could actually accomplish. I find myself siding with the critics of liberalism in this argument.[43] Such critics differ among themselves (or among ourselves) about the proper alternative to liberal policies for the elimination of civic inequality, but there is no doubt in my mind that the libertarian challenge to the poverty of liberalism's policies is a substantial one.

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freedom of employers or owners of places of public accommodation." Klarman, *supra* note 2, at 941 n.323. To which the libertarian response is: "And what exactly is the criticism here? We believe, and have arguments based on our understanding of how markets work, that market pressures undermine efforts to sustain a system of civic inequality. Civil rights statutes are ordinarily unnecessary, and frequently perverse in their effects."

Finally, Professor Klarman points out that libertarianism makes government redistribution of wealth impossible, which implies that racial minorities will "suffer" materially because they are poorer than average. *See id.* In general, libertarians have several responses to this sort of argument. One is a claim that libertarianism will unleash economic development that will raise the material well-being of those on the bottom of the distribution of wealth to a greater degree than government efforts at redistribution will, because of the effects such efforts have on the incentives of those at the top of the distribution. Second, libertarians, skeptical about the way in which the legislative process operates, argue that there is no reason to think that legislation will re-distribute wealth from the rich to the poor.

Finally, and probably most important, libertarians distinguish between civic inequality, which is normatively undesirable, and matorial inequality, which is a matter of normative indifference within libertarian political theory (although libertarians have no objection to private efforts to alleviate material inequality through private charity, and some may find the charitable impulse a normatively attractive one). For a modern version of the libertarian response, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992). Epstein is more an eclectic critic than a libertarian one, but his eclecticism encompasses libertarianism.

41. In describing contemporary liberals, I mean to make no large claims about liberalism as a political theory in the abstract.

42. Some critics, in contrast, say that liberal policies were successful and that the material conditions of African-American life are dramatically better than they were before the 1960s policies were put in place. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997).

43. I do not impute the views of these critics to Professor Bernstein or Professor Klarman, whose Articles do not address the issue taken up in this paragraph.