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RACE AND THE POLICE POWER: 1890 TO 1937

RICHARD A. EPSTEIN*

I. A MORALITY PLAY

The history of race relations between the end of the Civil War and the passage of the Civil Rights Act of 1964 has been the subject of intense analysis. The narrative on the topic reads much like a modern morality play. Its message is both powerful and compelling because one easily can distinguish good from evil. The evil of Jim Crow and segregation in the South was a national disgrace.[1] The critical decisions of the Supreme Court that allowed the southern states (and to a lesser extent the northern ones) to impose this regime were equally disgraceful. In 1896, *Plessy v. Ferguson*[2] gave full sway to the notorious separate but equal doctrine in race relations. In *Plessy* Justice Harlan wrote in impassioned dissent, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[3] He stood alone at the time, but history has proved him right. To be sure, *Plessy* did not institute the regime of Jim Crow—that set of explicit racial restrictions

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1. The classic study is still C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

> The origin of the term "Jim Crow" applied to Negroes is lost in obscurity. Thomas D. Rice wrote a song and dance called "Jim Crow" in 1832, and the term had become an adjective by 1838. The first example of "Jim Crow law" listed by the *Dictionary of American English* is dated 1904.

Id. at 7.

2. 163 U.S. 537 (1896).
3. Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

that governed voting, marriage, economics and schooling, and permeated every important aspect of collective Southern life under segregation. But *Plessy* did legitimate the basic structure against constitutional attack, and thereby set the agenda that governed civil rights activity at both the national and state level for the next 70 years. Good came only with the passage of the Civil Rights Act of 1964, which marked the final, crushing blow to the old order. The bankruptcy of Jim Crow, and the system of racial segregation it spawned, legitimated the Civil Rights Act with far greater vividness than any argument of moral philosophy. The statute was passed as much for what it repudiated as for what it introduced.

The speed with which events moved in the United States in the 1960s, however, has taken its toll on the understanding of what was wrong with Jim Crow. Too often the dominant explanations are based on the racial hatred which translated itself into explicit racial classifications that permeated every aspect of Southern life. The response to Jim Crow was equally clear and authoritative: Any practice, public or private, which drew distinctions between whites and blacks in social, economic or political life fell outside the pale. Under the Civil Rights Act, the distinction between private and government discrimination was rendered largely, if not wholly, irrelevant. No effort was made to relate the impact of private discrimination to the structure of the market, to the importance of barriers to entry, to the viability of competition or to the threat of monopoly. The antidiscrimination principle was no longer conceived as a well-tailored antidote to the monopoly position of the innkeeper or the common carrier, or as a check on the power of the state to take from some and give to others. The experience of Jim Crow was so powerful that it pushed to one side any conceptual analysis of discrimination and its consequences in private markets. Economic analysis, game theory and the like formed no part of the discourse. The question of civil rights was perceived first and foremost as a moral issue, as a question of simple justice,[4] which admitted only one categorical answer: Any form of illicit discrimination on grounds of race was made illegal under the statute. It was the practice of discrimination that mattered. The source of discrimination, public or private, was wholly irrelevant.

I believe that today's common view does not understand what was wrong with Jim Crow and segregation. The dominant evil was not self-interest or markets, or even bigotry. The evil was excessive state power and the pattern of private violence, intimidation and lynching, of which there is painful record,[5] but against which there was no federal remedy.[6] The

4. See R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976), for a history of the most important desegregation decision, Brown v. Board of Education, 347 U.S. 483 (1954).

5. *See, e.g.*, Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive*, 51 U. CHI. L. REV. 1161 (1984), reprinted in LABOR LAW AND THE EMPLOYMENT MARKET 217 (eds. Richard Epstein & Jeffrey Paul) 1985.

6. *See, e.g.*, Hodges v. United States, 203 U.S. 1 (1906), *overruled*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) with its extensive account of the private acts of violence,

explicit discrimination in the South and elsewhere was preserved by coercion, both by the state and by private individuals (the Ku Klux Klan) whose activities were left unchecked by state agents. The history of failure in the South is not a history of the failure of individual character or individual will. It is not a history of the failure of markets. It does not demonstrate the need for federal intervention to eradicate the "harm" that private markets caused. Quite the opposite, the enduring lessons from our history of Civil Rights all stem from two sources. One source is the abnegation of the principles of limited government, that is, government action in only those areas where government is required, such as taxation and law enforcement. The second source, unrelated to the first, is the massive state legislative regulation of private markets that was left unchecked by passive judicial action. With Jim Crow, big government fell into the hands of the wrong people, who were able to perpetuate their stranglehold over the local communities and businesses by a pervasive combination of public and private force. Jim Crow is best attacked from the limited government, libertarian perspective. It is another illustration of how in Lord Acton's words, "Power corrupts, and absolute power corrupts, absolutely."

The central point here can be raised by a single question. Which people in society are the ones on whom your wealth and livelihood depends? With the use of private force, you are forced to trade with the person whom you fear the most. Even when peace is purchased on one front, danger lurks on another, so that new entrants represent new perils, and not new opportunities. With markets, all individuals can gravitate towards the persons who are most favorable to their personal goals and ambitions. You trade with your best prospects, but not with your worst. With monopoly, trading depends upon the preferences of the monopolist that provides the services, constrained only by his desire to maximize profits by making sales. Within the political context, this same question is more difficult to answer, because legislative decisions are always a function not only of individual preferences, but also of the way in which they are aggregated into some collective decision. In a world devoid of constitutional restraint, the (bare) majority rules. The issue thus becomes: Who will be able to assemble a dominant coalition on matters of race. Here enormous leverage rests with the median voter.[7] If it were possible (as it often is not) to array all the voters within the jurisdiction along a single axis, the individual whose preferences are at the median will tend to dominate the tastes of persons at either extreme. The conclusion follows from the premise that self-interested voters will choose the social alternative which is closest to their own private preferences. If the only available position (or candidate), A, is not at the median, then

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which fell outside the thirteenth amendment because individual acts of violence were not tantamount to slavery as they did not involve the total "subjection" of one person to the will of another. *Id.* at 17-18.

7. On matters of voting theory generally, see J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT, LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

a new political entrant, B, who takes that position will be able to get 50 percent of the vote (those who are further from A than B, plus some fraction of the people whose preferences lie between the two).

Consequently, as most individuals are closely bunched toward the middle of the distribution, the median voter theorem still holds, but the problem of collective choice becomes tractable because very few people will perceive great differences between their first and second choices. Indeed in a world of perfectly homogeneous preferences, politics and markets yield the same result.[8] But there are other arrays of tastes and preferences where political markets do far worse. Thus, suppose that the voters in a community are divided into two hostile camps, one with 51 percent of the votes, and the other with 49 percent of the votes. The median voter theorem suggests that the well advised politician will cater to the tastes of the majority, inflicting very large losses on the minority if unconstrained by constitutional principles. In addition, the situation can become very unstable if the populations shift because of differential birth rates, immigration and migration, or (in extreme cases) by intimidation and assassination.[9] Now the minority suddenly can become the majority, at least if the census is retaken. It follows, therefore, that instability may compound oppression. Markets are largely immune to these problems. Since choices are not aggregated on an all-or-nothing basis, two wholly separate and hostile groups are not faced with sharply discontinuous outcomes at the median. A shift in population of 2 percent is not the difference between control and no control, between office and exile, or between domination and oppression. It is a small difference of two percent in wealth or market share.

This political market was not kind to the blacks, either in the south, or nationwide. The systematic exclusion of blacks from the electorate that shifted the voting population in favor of whites has been well documented.[10] Within that white population, racists and bigots could, and did, outvote more moderate whites who were willing to do business with blacks. Within a market, however, that same majority could not bind a minority. Yet in the political setting, the majority can bind the minority by passing laws that *require* segregation, discrimination, unequal taxes and biased enforcement of the laws. The South of Jim Crow must be understood as a comprehensive network of interlocking institutions. The Supreme Court's routine willingness, prior to 1937, to defer to political judgments of state legislatures allowed a virulent majority to choke off the improvements that

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8. Note that here are powerful comparisons between state and private organizations. Condominiums and partnerships also work best when composed of like-minded persons. *See generally* Epstein, *Covenants and Constitutions*, 73 CORN. L. REV. 906 (1988).

9. *See* Levy, *The Statistical Basis of Athenian-American Constitutional Theory*, 18 J. LEGAL STUD. 79 (1989).

10. As reflected in the Supreme Court decisions that struck down poll taxes, Harper Virginia Board of Elections, 383 U.S. 663 (1966); and literacy tests, South Carolina v. Katzenbacn, 383 U.S. 301 (1966) (sustaining Voting Rights Act of 1965, 79 Stat. 437 (1965), 42 U.S.C. § 1973 (1982)).

blacks and others could achieve among themselves and prevented business transactions between blacks and whites who were sympathetic to black interests and aspirations. The local situation was further aggravated because the existence of hostile laws made the South a less attractive place for new entrants from outside the region who otherwise might have made substantial profits from doing business with local blacks. Similarly, exiting the old system (by migration to the north) was a costly option and was blocked further by the use of public and private force.[11] The political process, unconstrained by constitutional safeguards, brought on the intolerable situation of monopoly control with the wrong monopolist in control.

II. The Police Power: *Plessy* or *Lochner*

The emergent pattern of local politics took place in a system that was, on its face, sensitive to the risks of untrammelled popular democracy. In large measure, the Civil War had been fought on the issues of the institution of slavery and white dominance. The Civil War amendments—on slavery, citizenship, voting, equal protection, due process and privileges and immunities—were designed to decrease the scope of state power to confer ordinary common-law liberties selectively on some persons while denying them to others. The basic structure was simple and ingenious. Specific limitations on state power that were lacking in the original constitution now were imposed by the Civil War amendments.[12] The enforcement of a system of small state governments was entrusted to the federal government.[13] Government activity, in total, should have been less at all levels after the Civil War than before, since no new and separate grants of power were accorded the federal government beyond its power to limit state misbehavior. Congress did pass in 1866 a civil rights statute that purported to fulfill the mission of the Civil War amendments, but it was given narrow construction during the Jim Crow period.[14] The history of regulation before the 1964 Civil Rights Act shows very little direct federal intervention. History does show a pattern of extensive state regulation in the teeth of the Civil Rights Amendments. There is necessarily some ace in the hole. That ace in the hole is the "police power" that came to be construed, both generally and

11. As discussed in Roback, *supra* note 5.

12. The key limitation on the power of the state was the contract clause, "no State shall . . . pass . . . any Law impairing the Obligation of Contracts" had been interpreted in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), not to reach contracts not yet formed when a statute was passed. The effect of the decision meant that only retroactive invalidation was reached by the clause, so that there was no effective federal constitutional constraint on state behavior. It was this pattern that was sharply reversed by the Civil War Amendments.

13. *See* U.S. Const. amend. XIV, cl. 5 ("[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"). Analogous language appears in the thirteenth amendment on slavery and the fifteenth amendment on voting.

14. *See infra* notes 25-33.

in race relations, as the ability to regulate in order to achieve "safety, health, morals and general welfare."

In order to see how the pattern unfolded, a review of some of the most notorious Jim Crow constitutional decisions concerning the police power from the perspective, not of a defender of the modern civil rights legislation, but of a believer of the traditional Lockean virtues of private property, individual liberty and limited government is instructive. What approach should be taken to race relations if the principles of substantive due process, as embodied in *Lochner v. New York*,[15] had been carried over to race relations? Ironically, next only to *Plessy*, *Lochner* is widely regarded as the most indefensible decision in constitutional law during years between 1870 and 1937, which are often dubbed, misleadingly in my view, the "Lochner Era."[16] Today *Lochner* is praised for its Holmes dissent with its famous epigram, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[17] Yet, whatever the soundness of Holmes's general legal position, *Lochner* had, and has, far greater appeal on the matters of race than on the questions of health and safety regulation that it directly addressed. Mr. Herbert Spencer's Social Statics is the right antidote to Jim Crow. The nation would have been spared great anguish if Herbert Spencer's prescriptions had been followed.

Plessy v. Ferguson, decided some eight years before *Lochner*, illustrates the tension between the two approaches, one of which champions legislative power while the other emphasizes judicial control. In 1890 Louisiana passed a mandatory statute that provided, "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations."[18] The statute was challenged under the equal protection clause of the constitution on the ground that the separate treatment it demanded of railroads necessarily infringed the rights of individual black citizens to the equal protection of the law. To stress the obvious, *Plessy* does not deal with the private voluntary discrimination that railways might practice in their own self-interest. Government coercion required the separation of the races.

The passage of the Louisiana statute suggests that the railway did not practice racial discrimination in its business, and had to be coerced into doing so by a political majority. In fact, detailed studies of the history of

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15. 198 U.S. 45 (1905).

16. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 567 2d ed. (1988) (noting that description should be used "with great caution," because term "*Lochnerizing*" has become an "epithet"). For criticism of *Lochner*, see P. MURPHY, THE CONSTITUTION IN CRISIS TIMES (1972). Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545 (1987). I have defended *Lochner* in Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL ED. 153 (1987); Epstein, *The Mistakes of 1937*, 11 GEORGE MASON L. REV. 5 (1988).

17. Lochner v. New York, 198 U.S. 45, 75 (1905).

18. Louisiana Act of 1890, No. 111, p. 152.

Jim Crow legislation in the South confirm what is evident from the statutes themselves.[19] The railroads opposed the requirements of the statutes, resisted their passage and may have funded the suit that Plessy (a man who claimed to be 7/8ths white) brought to challenge the statute. To pretend that the managers and shareholders of the railway were necessarily, or even likely, persons of perfect virtue would be idle. Quite likely, they were ordinary businessmen, more concerned with their financial profits than with correcting any larger social injustices. Yet, modest characterization of their motives explains why there is so little to fear from private discrimination. Self-interested businessmen will be loath to practice discrimination where it hurts the bottom line.

One word says it all: cost. Racial segregation is expensive for the firm. The basic problem is how the railroad utilizes its capacity. Before the statute every space was available for any passenger. Hence the railroad could be confident that at peak hours it could fill its cars with passengers on a first come, first serve basis. Once the statute was passed, however, the railway necessarily lost revenue because of redundant and unused seating. Thus, if the railway decided to operate two cars, each with a capacity of 100 persons, it could not accommodate rush hour traffic of 120 whites and 40 blacks. In contrast, an integrated system would allow still another 40 people to come on board. Nor is it possible to counter the problem by using cars of unequal size given the problem of variable proportions: on the next run the traffic might be 40 whites and 120 blacks. To maintain different kinds of rolling stock and to train personnel in their operation would be more expensive.

The second alternative open to the railroad is little more appealing than the first. Partitions do allow the separation of passengers within a car. But partitions do not respond ideally to the problem of variable proportions, unless the partitions can be made movable. Even then, the railroad incurs the heavy expense of shifting the partition every time the proportion of whites and blacks on the train changes, in order to utilize capacity that would otherwise remain idle. With any kind of commuter railroad, this partition shifting becomes an infeasible and unattractive alternative. The separate but equal requirement, therefore, substantially increases those costs of serving the market. While the rule might satisfy the demands in some political markets, it is unlikely to satisfy them in an economic market when the locus of power moves from the legislature to the railway owner. Even passengers who are prejudiced against blacks easily could prefer cheap transportation to segregated transportation if the price break is steep enough. It is unlikely that railways could charge higher rates to blacks under a price discrimination policy, given their lower reservation prices. So why worry? Self-interest protects the position of a racial minority far better than a heavy dose of republican virtue.

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19. Roback, *supra* n.5.

Where then does the state obtain the power to regulate the railway in how it allocates its space? In *Plessy*, the challenge to the statute was premised on the equal protection clause of the fourteenth amendment. Freedom of contract becomes the central issue when examining this clause within a libertarian framework. Here we have a private party that wants to sell its services to whites and blacks on identical terms. Why should the state be able to curtail its power? Ironically, freedom of contract under the fourteenth amendment had been constitutionalized in an earlier Louisiana case, *Allgeyer v. Louisiana*,[20] that dealt with the arcane mysteries of the insurance industry. If freedom of contract works for insurance companies, railroads should be covered as well. Presumptively, the separate but equal statute is constitutionally infirm.

That same conclusion could be reached by the equal protection clause, given the coercive regulation that subordinates blacks to whites. Whenever there is state coercion, the state must justify its conduct. The police power issue is introduced into constitutional discourse to justify state coercion. Does the regulation fall within the "police power" of the state? It is useful to recall the definition in *Lochner*:

> There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.[21]

This police power, it should be stressed, is entirely a creature of judicial implication. The two words appear nowhere in the constitution. This is not to say that judicial implication is necessarily illegitimate. The great questions of constitutional interpretation arise precisely because everyone concedes that some limitation must be engrafted onto the text, although they strongly disagree as to what that limitation should be.

The word "police" in the phrase "police power" offers one useful clue about the scope of this power. The police can restrain the use of force by private individuals. Their power is at the highest when they disarm a criminal who has perfect common-law title to his gun. More generally, by the 1890s the police power clearly extended to cover wrongful actions of all kinds and descriptions, most notably those forms of conduct that were regarded as nuisances, both at common law and as a matter of ordinary English.[22] The owner of a factory did not have the right to pollute his neighbor's well or a navigable river. Where private suits to enjoin the action or to sue for

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20. 165 U.S. 578 (1897).

21. 198 U.S. 45, 53 (1905). *See generally* E. FREUND, THE POLICE POWER (1904), for the most exhaustive contemporary account of the subject. I have given my views on the subject in R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, chs. 8 & 9 (1985).

22. *See* Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

damages were clumsy and unwieldy, a system of state regulation was an appropriate and desired substitute. By this account, the police power is closely tied to the ideas of tort to person and property as these ideas have long been understood at common law.

The police power also had a second dimension, which justified antifraud legislation. The argument is parallel to that made with respect to nuisances. Fraud is often difficult to detect and prevent. Leaving victims of fraud to the vagaries of private lawsuits often was tantamount to saying that there could be no relief at all. A statute that enjoined the publication of fraudulent information, or subjected the perpetrators of fraud to fine or punishment, may well play a legitimate role under a libertarian model of the police power. Prophylactic rules often are justified when case by case prosecution is both costly and unreliable, subject always to the major dangers of overbreadth.

These two heads of the police power leave some considerable scope to government action on issues as diverse as environmental pollution and securities fraud. Force and fraud are the two types of behavior against which government should guard. The police power, therefore, is read to conform with a coherent theory of government power, one which prevents the *police power* from transforming itself by degrees into the embodiment of the *police state*. Any additional head of the police power is not needed because there are no other risks to the soundness of social life that require the use of government coercion, at least without compensation to the parties against whom it is used.[23]

So constituted, the police power does not come within a country mile of overriding *Plessy*'s prima facie case, whether advanced on freedom of contract or equal protection grounds. Sitting next to another passenger on a train is not the commission of robbery nor the creation of a common-law nuisance. Nor does it involve deceit or fraud. The white passenger who does not like his black neighbor (or reverse) can change his seat; he may not force the railroad to provide separate or partitioned carriages. The principle of freedom of contract allows the unhappy passenger not to ride the train for good reason, bad reason or no reason at all. Even today, businesses cannot sue prospective customers or employees that do not deal with them on grounds of race or sex. But those tastes, however intense, do not allow those unhappy passengers (or their favorite legislators) to remake the railroad in their own image. Indeed, if this railroad had any monopoly position that justified regulation, the regulation would move in exactly the opposite direction. The railway, consistent with the common-law view, would be under an obligation *not* to discriminate among its passengers unless it

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23. There is a case for government intervention to control the coordination problems that are associated with certain common pool assets, such as water and oil and gas. But here typically there are common-law rules to ownership, through acquisition, that have to be displaced. A well designed system that produces an extensive social surplus allows these interests to be taken (or regulated) with compensation. See for a discussion, R. EPSTEIN, *supra* note 21, ch. 15 (1985).

could show a viable cost justification. Within this libertarian framework, *Plessy* is an easy case, even after the elusive police power limitation on property and contract is taken into account.

Historically, however, the doctrinal development was far more muddled. Even in areas having little to do with race, the police power already had been extended far beyond the contours of the common law nuisance and fraud. During the 1880s, for example, the Supreme Court, speaking through the first Justice Harlan, sustained grotesque restrictions on the sale of margarine that were not designed to prevent fraud, but to suppress competition.[24] In earlier decisions the Court had expanded the police power far beyond the point of libertarian analysis. The technique that the Court used, in large measure, rested upon the posture of judicial deference to legislative determinations of permissible forms of health and safety regulation. Statutes were construed broadly where there was the tiniest risk to health and safety, so long as the statutory language nodded weakly to some ostensible health purpose. Anticompetitive purposes were cloaked in the transparent disguise of police power regulations.

In order to sustain the statute, *Plessy* required the Supreme Court to go one step beyond the earlier misguided precedents. While earlier cases tolerated extravagant means directed toward the end of "safety and health," those cases did not expand the class of permissible ends that fell within the police power. *Plessy*, however, did not refer to or discuss the earlier police power cases, which, despite their weaknesses, were moored in their analysis to an inflated conception of nuisance and fraud. Instead *Plessy* assumed that the separation of the races by government force was an appropriate end of the state, wholly without reference to tort, nuisance or fraud. Thus, the Court wrote:

> The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative

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24. *See* Powell v. Pennsylvania, 127 U.S. 678 (1888) (upholding punitive regulations against sale of margarine as "health" measure); McCray v. United States, 195 U.S. 27 (1904) (sustaining 10 cent tax on yellow oleomargarine when comparable tax on butter was .25 cents). *See generally* MILLER, THE MARGARINE WAR (unpublished to date) (discussion whole range of special interest regulation designed to protect dairy industry).

power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.[25]

The passage offers no account of the scope and limits of the police power. It is written as though the statute was designed to protect the principle of freedom of association (to prevent the enforced "commingling" of the races), when its actual purpose and effect is the opposite: the statute prevents contractual freedom between the railroad and its black and/or white customers. As will become clear, under the standards for economic liberties developed shortly thereafter in *Lochner*, the statute in *Plessy* would have been doomed.

However, *Plessy* possibly could have relied on a different tradition that would have allowed the Court to appeal to decisions of northern state courts to justify itself. The critical decision in this regard was *Roberts v. City of Boston*,[26] which sustained the operation of a system of racially segregated schools in Boston. The headnote to the opinion makes clear its scope: "The general school committee of the city of Boston have power, under the constitution and law of this commonwealth, to make provision for the instruction of colored children, in separate schools established exclusively for them, and to prohibit their attendance upon other schools."[27] *Roberts* predated the Civil War amendments, and Chief Justice Lemuel Shaw's opinion did not use the words "police power" or invoke the doctrine of separate but equal that grew up in their interpretation.[28] Shaw did discuss the great principle "that by the constitutions and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law."[29] But he nonetheless concluded with words that were seized on in *Plessy*, that given "the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment."[30] In light of these evident difficulties, Shaw then took the line that as long as the school committee had deliberated honestly, anxiously and in good faith, its decision could not be challenged in court.[31] This early set of intuitions easily can be transformed into the later pattern of constitutional adjudication. Shaw essentially adopted a view that judicial deference was required in the oversight of difficult administrative decisions. That approach fit perfectly with *Plessy*'s view that state officials were accorded broad deference under the police power.

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

26. 59 Mass. (5 Cush.) 198 (1850). It is relied upon in *Plessy*, 163 U.S. 537, 544 (1896).

27. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 198 (1850).

28. For an exhaustive account of *Roberts*, its origins and consequences, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION ch. 2 & 3 (unpublished to date). The Boston schools were desegregated by administrative action in 1855.

29. *Id.* at 206.

30. *Id.*

31. *Id.* at 209-10.

Lochner, however, pointed in quite a different direction. *Lochner*'s doctrinal significance lay in its holding that the state's police power did not allow the state to impose a maximum ten hour work day on certain classes of bakers for the purported end of protecting their health. The court held that a 10 hour limitation on employment was a "labor statute" that fell outside the permissible ends of government regulation. While the court did not stress the point, the beneficiaries of the statute were not the workers, but the rival bread firms (and their unions) whose employees worked eight hour shifts, and thus were not crimped in their operation by the statute's passage.[32]

Lochner has been condemned for its uncritical vindication of the common law. Professor Cass Sunstein has written: "In the *Lochner* period, for example, the Supreme Court treated the system of market ordering, within the constraints of the common law, as if it were prepolitical and inviolate."[33] *Lochner*, however, does not contain any such sweeping jurisprudential justification of either natural or common law. Unfortunately, as valuable as *Lochner* was as a limitation on government power, its protection of private markets did not go nearly as far as Sunstein's remark suggests.

The basic point is well shown by noting that consent and assumption of risk had a far broader role at common law than it did under *Lochner*'s formulation of the police power. As between consenting parties, assumption of risk at common law had been a valid defense to any legal action for personal injury. In that context it had received an expansive interpretation by, among others, Oliver Wendell Holmes,[34] whose dissent in *Lochner* set the stage for today's dominant deferential attitude on economic regulation. *Lochner*'s broad rendering of the police power that allowed it to reach all matters of health and safety thus explicitly and consciously overrode the common law on this critical issue. This broadening of the police power facilitated the first wave of protective health and safety regulations of the Progressive era. At the very time that the Supreme Court struck down the maximum hours statute in *Lochner*, the Court upheld provisions of the Federal Employer's Liability Act that explicitly prevented railroads and their workers from contracting out of the statutory rules governing compensation for injury.[35] Thereafter, a line of cases upheld regulation of safety in mines[36]

32. *See* Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 156 & n.6 (1987).

33. Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129, 1155 (1986).

34. *See* Lamson v. American Axe & Tool Co., 177 Mass. 144, 58 N.E. 585 (1900). The ironies run even deeper. The most influential early American case on the expansion of assumption of risk to cover cases of common employment (*i.e.*, that the worker assumes the risks of negligence by fellow employees) was written on libertarian grounds by Shaw, C.J. in Farwell v. Boston & Worcester R.R., 45 Mass. 49 (1842). I have commented on the decision at length in Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Laws*, 16 GA. L. REV. 775 (1982).

35. *See* Southern Railway Co. v. United States, 222 U.S. 20 (1911). Section 7 of the statute prohibits contracting out of the liability rules set by the statute.

36. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

and workers compensation statutes,[37] again on the same view of the police power. Still other cases took a deferential view with respect to legislative bans on the sale of milk substitutes.[38] Health and safety, thus, were treated as proper subjects of regulation.

Under *Lochner* only "labor" (*i.e.*, anticompetitive) statutes were beyond the scope of the police power. Therefore, decisions that required railroads, for example, to bargain in good faith with majority unions were held to be outside the police power,[39] over the dissent of Justice Holmes. *Plessy* did not fall along the health/labor continuum used to organize police power cases. Rather *Plessy* assumed that race relations, like health concerns, were proper subjects of government regulation, notwithstanding their manifest limitation on both common-law rights of contract and property. Nothing in *Plessy* assumed that segregation (like markets) was a natural form of "prepolitical" order. Quite the contrary, the whole area of racial relations was thought to be subject to unfettered political control. The state that imposed a requirement of equal but separate accommodations could repeal that statute tomorrow. *Plessy* championed big government because it worked for an assumption of government rectitude. *Lochner* stood for small (but not small enough) government.

III. Unconstitutional Conditions: *Plessy* and *Berea College*

Thus far I have assumed that the state's case for regulation in *Plessy* rested solely upon its police power. But there is a second possible way to make the argument, which also assumed importance in the early Supreme Court forays into race relations. In some instances, the state might assert control over the conduct of the railroads because of its ownership of the tracks and roads over which they travel. This line of argument was not pressed in *Plessy*. Indeed, the record did not make clear who owned the right of way over which the railroad travelled. But given the result in that case, the point was, for the moment, irrelevant. If the state could mandate separation of the races under its general police powers, why should it worry about invoking its greater powers as owner or proprietor of the rails?

Nonetheless, once the general police power arguments are rejected, the question of state ownership as a source of state power could become crucial in theory and vital in practice: local bus companies, for example, use public roads for their business. The state might then make this seductive argument. Its ownership of the public highways gives it the right of any other owner, to exclude entirely at will. If, therefore, it can keep any bus company or trolley line off the public highways, the state can use its "lesser power" to admit them on condition that they agree to segregate the races. The railway or bus company has to agree to surrender the right to run its passenger

37. New York Central RR. Co. v. White, 243 U.S. 188 (1917).

38. The Hebe Company v. Shaw, 248 U.S. 297 (1919).

39. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

business as it sees fit in order to obtain the necessary permits to use public property.

Arguments of this sort had a certain credence at the turn of the century. Justice Holmes, for example, championed this analogy between private and public owners both on the Massachusetts[40] and the United States Supreme Court.[41] It has generally been rejected, usually decisively, as a matter of constitutional law, through the so-called doctrine of "unconstitutional conditions."[42] The state, with its enormous monopoly power, does not have an absolute freedom to contract with its citizens any more than the state has an absolute right to regulate its citizens as it sees fit. As developed, this doctrine provides that the state cannot demand that individuals waive their constitutional right in order to receive some benefit from the state. In this instance, individuals cannot be made to waive their rights of freedom of association in order to gain use of the highways, any more than they could be made to waive their right to vote, to speak out against the state, or to engage in any common occupation or trade.

The appeal of the doctrine of unconstitutional conditions seems almost universal, but the doctrinal justification for its use has been far more elusive. The case for the doctrine, however, becomes far clearer if the doctrine is regarded, less as a defense of individuals from state coercion, and more as a *structural* limitation on excessive government power. Ideally, the object of government is to maximize the value of resources under its command for the benefit of all its citizens. Government cannot achieve that goal if it uses its powers to distort the preferences that would otherwise exist in private transactions in order to satisfy the preferences of some *select* group against those of the public at large. Surely, both bus companies and blacks are better off by using the public highway subject to state regulation than they would be if the state prohibited the companies from using the roads at all. The proper baseline for analysis is not the status quo ante, which presupposes that all benefits of collective state action (*i.e.*, road construction) are still unrealized. Rather, the correct baseline is the optimal use of public resources in question, given the state's need to fund the construction and maintenance of the public roads. With the conditions imposed under the separate but equal doctrine, the total value of the roads necessarily is reduced below what it would be with the roads built, and *no* such condition attached. After all, the state imposes massive operating inefficiencies on bus and trolley lines for which there is no offsetting social benefit: that is the gist of the capacity problems discussed previously. This last *achievable gain* is the baseline against which the state provision of benefits should be measured, not the status quo ante. It is hardly likely

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40. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

41. Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

42. *See generally* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). For a more detailed statement of my views outlined here, see Epstein, *Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

that the state would close down the roads to everyone to satisfy the demands of outsiders. Also, both black and white passengers possibly would prefer integrated carriages but not get them because of the dominance of hostile political groups.

It is important to beware of easy analogies between individual and collective ownership, which the absolutist position on state power glosses over. As long as the state acts as a public trustee for all its citizens, it cannot use its power to license in a way that secures factional benefits for some at far lower cost than it imposes upon others. Surely, states can require trolleys to carry insurance to answer for their torts, to comply with certain safety requirements, or to pay their fair share of the costs of public highway maintenance and operation. But the conditions in the licenses have to be limited to the class of ends for which the exercise of state power is generally relevant. Racial segregation does not aid in maintaining any desirable form of competitive equilibrium in transportation.[43]

This discussion of unconstitutional conditions is not an idle academic diversion. If *Plessy* did not address the scope of the government's power as owner of the roads, the analogous question, nonetheless, arises with respect to state powers of incorporation. The basic rule is that all corporations can only obtain their charters, and hence the protection of limited liability, from the state. As with the roads, the question is whether the corporate charter can be conditioned upon the willingness of the corporation to practice racial segregation. In *Berea College v. Kentucky*,[44] the Court used the expansive view of government power to squash down the remaining opposition to Jim Crow and segregation in the south. Berea College operated an integrated campus that offered education to black and white students on equal terms. A 1904 Kentucky statute prohibited any individual or corporation from operating an integrated campus at the same location and its constitutionality was sustained by the Supreme Court. As with *Plessy*, the statute in *Berea College* was a direct assault on freedom of contract and association. The college cited the *Lochner* line of cases, so criticized today, to the Court in an effort to strike the statute down.[45] Yet, that argument floundered on two grounds. First, the ground that the police power of the state was broad enough to require separation of the races,[46] a point no more valid in this context than in *Plessy*, was stressed (especially in the Kentucky state proceedings). Second, the Court held that the college, as a corporate form, was dependent for its very existence upon a grant from the state.[47] At that point the argument followed the familiar greater/

43. *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926), discussed in Epstein, *Foreword*, supra note 42, at 47-54.

44. 211 U.S. 45 (1908). The case is discussed in great detail in Schmidt, *Principles and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 444 (1982).

45. Berea College v. Kentucky, 211 U.S. 45, 49 (1908).

46. *Id.* at 51.

47. *Id.* at 53.

lesser line. If the state could refuse to charter the corporation, then its grant could be subject to whatever terms and conditions the state saw fit.

In practice, matters were complicated somewhat by the fact that Berea College had received its charter long before the 1904 statute required it to maintain separate campuses for blacks and whites. Yet here, the expansive "implied right" (under the police power) of the state to "alter, amend or repeal" its prior charter[48] was thought sufficient to allow this regulation to be imposed "over its own corporate creatures."[49] Doctrines championed and developed to attack large corporations also could be directed toward private integrated institutions. The Supreme Court thus sustained this exercise of government power against the college without reaching the question of whether the state could limit the instruction of ordinary individuals under its police power.

The argument concerning the state power to charter corporations, however, is no more valid here than the analogous argument concerning public roads. The state power to incorporate is not absolute, any more than its control over the public highways is absolute. The doctrine of unconstitutional conditions, invoked to limit the state powers of the roads, also has been invoked to limit state power over the issuance of new charters. The state may decide not to incorporate anyone at all, but once the privilege of incorporation is allowed generally, it must be granted to anyone who does not abuse the corporate form.[50] The power to grant and deny incorporations must be used to maximize the total value of the resources under private and public hands. To give the state the power of selective incorporation necessarily provides enormous benefits to some class of individuals, at the expense of others, who are denied the like privilege. In order to condition the privilege, it becomes necessary to explain how the proposed state restriction prevents the abuse of the corporate form, much as restrictions on highway use prevent the abuse of the public highways. A statute, for example, that requires corporations to purchase insurance to protect tort creditors from the risk of limited liability imposes a proper condition, much like the condition that all users of the road agree to service of process for accidents caused by them. A provision that requires shareholders of a corporation to contribute funds to one political party is not a proper condition. The "natural law" tradition, which tends to regard corporations as voluntary associations that receive certain limited privileges from the state (*e.g.*, limited liability), speaks strongly against the massive assertion of government power that was invoked in *Berea College*. By virtue of that decision, state power to impose separation on the races rested not only on the police power, but independently on the control over incorporation as well.

The connection between *Berea College* and state power is revealed in the lone dissent of Justice Harlan, who previously had dissented in *Plessy*.

48. *Id.* at 57.
49. *Id.* at 58.
50. *See, e.g.*, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

In *Berea College* he saw the freedom of contract issues involved, and knew that this case could not fall within the class of health and safety statutes. His dissent therefore relied heavily upon the decision in *Allgeyer*,[51] which recognized freedom of contract in the first instance, and on *Adair*,[52] which struck down a federal statute that imposed collective bargaining on the railroads and gave constitutional protection against the so-called "yellow-dog" contract, an agreement by workers that they would not join a union so long as they worked for the employer. Once again, the constitutional protections for economic liberty were invoked to curtail the state regulation of race.

The power of the Harlan dissent should be contrasted with the bankrupt position of Justice Holmes. In 1881 in *The Common Law*, Holmes had written that the life of the law was not logic but experience, but his constitutional jurisprudence revealed quite the opposite tendency. His rejection of the doctrine of unconstitutional conditions rested on the dubious syllogism that since the state could grant or withhold corporate charters at will, it could grant the charter on whatever terms and conditions it saw fit. According to Holmes' view, it followed that there could be no obstacle against tying the use of the corporate form to maintaining racially separate instruction. As regards the power to alter or amend existing charters, he thought such power was routinely within the police power of the state. In effect, Holmes had committed himself to the side of government power on the critical issues in *Berea College*. His legal position left him no escape. Sandwiched between the Court's decision by Justice Brewer and the dissent of Justice Harlan was the single line: "Mr. Justice Holmes and Mr. Justice Moody concur in the result."[53]

IV. COUNTERATTACK AND RETREAT: *BUCHANAN* OR *EUCLID*

In the period before the 1937 revolution, not all decisions gave away to government power over race relations. Those decisions that prohibited the use of government power were of two varieties. On the one hand, courts invalidated state rules because they did not meet the minimum guarantees of separate but equal, as when no services were provided to blacks at all. Thus in *McCabe v. Athison, Topeka & Santa Fe Railway*,[54] the Oklahoma statute allowed the railroads to provide separate sleeping car accommodations to both blacks and whites if the railroad so desired. But the statute allowed the railroads to provide such accommodations to whites only if they did not think the demand for black cars was sufficient. The Supreme Court struck down this discriminatory act, and thereby placed a modest crimp in the capacity of the states to discriminate. Far from assaulting the principle of separate but equal, however, the decision only fortified the

51. Allgeyer v. Louisiana, 165 U.S. 578 (1897).
52. Adair v. United States, 208 U.S. 161 (1908).
53. *Berea College*, 211 U.S. at 58.
54. 235 U.S. 151 (1914).

principle's place within the then constitutional order, and gave defenders of the old order a convenient way to show that the courts did not ignore blacks who could prevail when they received no accommodations of any sort.

The more important attack on the old regime, however, came from the strong economic liberties and private property perspective. *Buchanan v. Warley*[55] involved another Kentucky ordinance, regulating the sale of land. Under the ordinance's terms, black persons were forbidden to purchase or occupy homes in those blocks where the majority of the homes were occupied by whites. A similar restriction against sale or occupancy by whites applied to blocks where the majority of the residents were black. The case arose when a black purchaser refused to take a conveyance of property given the ordinance, which the white seller then attacked on constitutional grounds.

Under the basic logic of the separate-but-equal standard, this statute should have been sustained, as there were no formal preferences accorded to whites that were not accorded to blacks as well. Nonetheless, the Court in this instance did not begin with the idea of parity but with the idea of property and liberty. In accordance with the general analysis outlined above, the case divides into two parts, the prima facie violation and the state's justification under the police power. In addressing the former, the Court found that there was a taking or deprivation of property, given the limitation on the owner's right to sell. The definition of property used in *Buchanan* was comprehensive and covered the right "to acquire, use and dispose" of property.[56] Those broad definitions have been compromised, if not rejected, under the modern case law in which the "mere regulation" of the right to dispose of property has not been regarded as a taking.

The broad definition of the property right thus forces the state to justify its restriction. In this instance, the police power arguments all centered upon the regulation as a means to prevent racial conflicts and to maintain racial purity, and to prevent the deterioration of property values in mixed neighborhoods. We are a long way from the control of force and fraud.

The more complex argument concerned the ostensible neutrality of the statute. While the statute had an explicit racial classification, it was "race neutral" in the sense that parallel restrictions were imposed upon both black and white owners and purchasers. The effect of the ordinance, if carried out, would have been to make blocks become either all black or all white. Its neutrality, however, cannot be evaluated in isolation. Clearly, the dominant political forces were all white, and the gradual separation of neighborhoods along racial lines would allow public authorities to direct money and services into white areas, to the systematic detriment of black ones. The race classifications involved were far from benevolent, and had systematic insidious effects. In striking down the ordinance, the court had to place limits on the police power and to distinguish both *Plessy* and *Berea College*,

55. 245 U.S. 60 (1917).
56. Buchanan v. Warley, 245 U.S. 60, 74 (1917).

which it did. *Plessy* allowed blacks to have equal accommodation, and *Berea College* depended upon the power of the state to alter or amend corporate charters. But the basic point here is far simpler. The asserted justifications of the police power are both lacking: either they address the wrong ends: *e.g.*, the maintenance of racial purity, which had been previously used to sustain antimiscegenation laws,[57] or they give relief far in advance of any conceivable abuse (*e.g.*, a nuisance) that might justify the police power. Arrest of dangerous offenders is a better way to control violence than to prohibit sales of homes to persons who have done no wrong at all. As before, the success in controlling the politics of racial domination did not require courts to override the behavior of private individuals in markets. It was quite sufficient for the courts to protect markets against legislative intervention.

Notwithstanding its useful contribution, *Buchanan* could not play a dominant role in constraining local political forces intent upon discriminating against blacks through public means. The decision only reached those statutes and ordinances that contained explicit racial classifications. *Buchanan* did not reach the whole range of zoning and land use ordinances that could limit the free disposition of land in ways that prevented the development of low cost and effective housing for persons of all races. In a sense, therefore, the far more important decision for race relations was *Euclid v. Ambler Realty Co.*,[58] which on its face had nothing to do with race at all. That decision sustained a local zoning ordinance that prevented the construction of multiple unit dwellings on large parcels of land. A consistent protection of economic liberties would have blunted the use of

57. *See Plessy*, 163 U.S. at 544. The antimiscegenation laws eventually were struck down in Loving v. Virginia, 388 U.S. 1 (1966), where the unanimous Supreme Court held that statute that prevented the intermarriage between white persons and persons of any other race (with an exception for the descendants of Pocahontas) violated the equal protection clause and the due process clause. Unlike many of the modern Supreme Court decisions on matters of race, this case shakes out easily on *Lochner*-like lines. Marriage is a contract, and the police power justifications advanced by the state are plainly worthless. *See* Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955). The analytical difficulty in the case was that a prohibition that is equal in form to whites and blacks does not appear to offend any equal protection argument. Professor Tribe says that *Loving* spoke of a "fraudulent equality." *See* TRIBE, AMERICAN CONSTITUTIONAL LAW 1480 (1988). But there was surely formal equality, and it is hard to see why there is any disparate impact on the white and black persons who seek to marry. Why then fraud? The fuller analysis should recognize that one can only understand the role of equality against a background of substantive rights, here those to contract. The limitation on the rights may have been equal for both parties to the marriage, but the critical point is that the benefits generated were solely for strangers to the marriage contract, *i.e.*, persons who disapprove of such marriages. There is accordingly no police power justification, rightly understood, nor just compensation for the persons so aggrieved. Hence the statute operates as an unjustified interference with contractual relations. The Supreme Court had some sense of this, for at the end of its opinion it noted that in addition to equal protection arguments, the Virginia statute could be struck down for its interference with the "basic civil rights of man"—a substantive and not an equality-based claim. *See Loving*, 388 U.S. at 12.

58. 272 U.S. 365 (1926).

the zoning power in dramatic fashion and, in other areas, confined zoning to the prevention of ordinary nuisances. Limited occasion zoning could be used to overcome certain collective action problems, as with the placement of signs over public streets and sidewalks. But once the broad discretion was conferred upon local governments, statutes that facially were neutral could be used with disparate impact upon vulnerable or unwelcome political groups. The modern response is to try to filter out the discriminatory uses from the legitimate ones, or to impose elaborate restrictions that require states to subsidize housing for racial groups that had been systematically excluded by zoning practices.[59] Yet two wrongs do not make a right; the unwise subsidy does not cancel the unwise exclusion. It is far easier to control government abuse by enforcing the constitutional limitations on legislative power in the first instance.

V. A Cautious Conclusion

The lesson of the early race cases should be clear. The police power exception to a wide range of constitutional protections was the vehicle that allowed local government to trample the ordinary rights of property and contract, which were as valuable to blacks as they were to whites. The pattern of abuse could not be stemmed overnight even after the early decisions were reversed. Instead, the mistakes of constitutional passivity created a situation of near-crisis proportions to which there were no clear answers, given the necessity to undo past wrongs while simultaneously fashioning policy to guide future interactions. There is also cause here for some sober reconsideration of the modern civil rights statutes, most notably the Civil Rights Act of 1964. In terms of their substance the modern civil rights statutes are light years away from the regime imposed by *Plessy*. If the choice were either/or, responsible persons could agree on only one answer. Nonetheless, the modern civil rights statutes rest upon the same broad conception of the police power and the same concept of legislative deference that undergirded the earlier jurisprudence of the Supreme Court, as the key decision in *Heart of Atlanta Motel v. United States*[60] expressly rejected all freedom of contract arguments and extended broad deference to the federal government in race relations. So long as Lord Acton's dictum applies, however, there is the enormous risk that high-minded legislation can be turned to improper and counterproductive ends. In large measure, I believe that Civil Rights Acts work best where they are consistent with the libertarian vision of strong private rights and limited government, and worst where they interfere with ordinary rights to hire and fire in the market place. Tracing down the ins and outs of the civil rights laws since 1964 is far too daunting a task to undertake here. But the results of that study I believe run strongly against the conventional wisdom. The dangers of abuse

59. *See* Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (setting in motion a chain of litigation that still boils over today).
60. 379 U.S. 241, 258-62 (1964).

in excessive government power remain great, even when the state seeks to correct the mistakes of past history—errors that could have been avoided originally if the police power had been confined to its proper scope, the prevention and control of force and fraud.