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Contract Rights and Civil Rights

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ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL. By *David E. Bernstein*. Durham: Duke University Press. 2001. Pp. xiii, 191. $39.95.

Have African Americans fared better under a scheme of freedom of contract or of government regulation of private employment relationships? Have court decisions striking down regulation of employment contracts on liberty of contract grounds aided black interests? Many contemporary observers, although with some notable dissenters, would respond that government regulation of freedom of contract, particularly the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, has benefited African Americans because it has restrained discriminatory conduct by private employers.[1]

Professor David E. Bernstein[2] challenges the view that abrogation of freedom of contract has consistently benefited African Americans by examining government regulation of the workplace during the period from Reconstruction to the New Deal. Bernstein argues that "for most of the period after Reconstruction and before the modern civil rights era African Americans were better off with free labor markets than with federal regulation" (p. 105). Bernstein further argues that African Americans benefited from court decisions striking down some of these labor regulations. With this latter argument, Bernstein

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1. *See, e.g.*, James Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 173-74 (1989) (finding positive correlation between enactment of Title VII and expansion of black employment in textile industry); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 279 (1990) (suggesting, with qualifications, that the "available evidence broadly supports the hypothesis that federal [antidiscrimination] law improved black relative wages and occupational status"). *But see* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 246-51 (1992) (finding improvement in black employment due to end of state laws mandating segregation).

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seeks to bolster the much maligned "Lochnerian jurisprudence,"[3] pursuant to which many courts during the early twentieth century declared a variety of regulatory statutes unconstitutional on liberty of contract grounds. Noting that some scholars have argued that *Lochner*-era decisions benefited the powerful at the expense of the powerless (p. 4), Bernstein claims that those decisions striking down government regulation in defense of freedom of contract frequently aided black interests.

Bernstein has provided us with an important narrative that is underappreciated in African-American history. Historians of the declining status of African Americans during the late nineteenth and early twentieth centuries have tended to focus on the racial animus of private actors and government actions such as segregation laws, disfranchisement, and grossly underfunded black schools. Although some historians have previously noted the efforts of southern state legislatures to control black labor through vagrancy laws, convict leasing laws, emigrant agent laws, contract enforcement laws, and enticement laws,[4] and the anti-black sentiment of many labor unions,[5] Bernstein's book is a useful compilation of the ways in which certain governmental actions adversely affected black employment opportunities during the Reconstruction to New Deal period.

The more provocative parts of Bernstein's book, however, are those in which he uses his historical narrative of the Reconstruction to New Deal era to address the larger implications of government regulation of private market relationships on the lives of racial minorities, and judicial decisions holding such regulation unconstitutional on freedom of contract grounds. Here, Bernstein displays a certain ambivalence. On the one hand, he is careful to note that he is not arguing that "over the longer run African Americans would have benefited disproportionately from economic laissez-faire" (p. 113). Indeed, Bernstein suggests, once African Americans gained political influence, particularly after the enfranchisement of many southern blacks fol-

3. Bernstein defines "Lochnerian jurisprudence" as the liberty of contract jurisprudence associated most prominently with the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905). P. 2.

4. *See, e.g.*, WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915 (1991); PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969 (1972).

5. In recent years, labor historians have placed considerable emphasis on the exclusion of black workers from the union movement and the labor market during the Reconstruction to New Deal time period. *See, e.g.*, ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY (2001); JAMES GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION (1989); BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY (2001); Nell Irvin Painter, *Black Workers from Reconstruction to the Great Depression*, *in* WORKING FOR DEMOCRACY: AMERICAN WORKERS FROM THE REVOLUTION TO THE PRESENT 63-71 (Paul Buhle & Alan Dawley eds., 1985).

lowing passage of the Voting Rights Act of 1965, they may have benefited "disproportionately from state action" since they are a "discrete, identifiable, and relatively well-organized group, the type of group that public choice theory suggests often gains disproportionately from collective political action" (p. 114).

On the other hand, Bernstein seems to favor the protection of civil rights of racial minorities through freedom of contract rather than government regulation:

> [G]iven the post-World War II historical trends favoring equal rights for African Americans . . . one can imagine that but for the interruption of the Great Depression and the New Deal, and the concomitant demise of classical liberalism as a vital American ideology, entirely different forms of civil rights protections could have arisen. Civil rights protections could have been of the sort envisioned by Reconstruction-era Radical Republicans, including Frederick Douglass: a classical liberal combination of equal protection of the law/prohibitions on class legislation, liberty of contract and free labor markets, and freedom of association. (p. 109)

Although Bernstein concedes that his freedom of contract model of civil rights protection would not necessarily "obligate the state to eradicate discrimination, or to guarantee 'equal opportunity' " (p. 110), he nevertheless argues that "unlike the modern [regulatory] regime [for protecting civil rights], the classical liberal vision does not depend on granting the government massive regulatory powers, and hoping, despite a wealth of contrary historical experience from the United States and abroad, that those powers will never be grossly abused" (p. 110).

Bernstein has written an engaging book that expands our understanding of the ways in which anti-black sentiment contributed to certain types of state regulation that affected African-American employment opportunities in the late nineteenth and early twentieth centuries. Part I of this Review considers various forms of government regulation of the workplace during the Reconstruction to New Deal era that Bernstein believes harmed black workers. Bernstein is convincing in arguing that some of this regulation did harm black economic opportunities. But in a few particulars, he both overstates the effect of this labor market regulation on black economic opportunities and understates the effect of other factors such as grossly unequal funding for education, widespread poverty resulting from generations of enslavement, and the pervasiveness — North and South — of anti-black sentiment among both workers and bosses.

Part II of this Review considers Bernstein's larger thesis that Lochnerian jurisprudence protected black interests during the period from Reconstruction to the New Deal and that the demise of *Lochner* harmed African Americans. A few Lochnerian decisions did benefit

blacks,[6] but many others caused harm and perpetuated racial segregation and discrimination.[7] Although Bernstein argues that Lochnerian jurisprudence "lasted far too short a time" (p. 7) to adequately protect black interests, in fact, freedom of contract ideology faded in time to allow government regulations forbidding racial discrimination in employment, first in the 1940s and then in the 1960s, to withstand judicial scrutiny.

I. GOVERNMENT REGULATION OF LABOR RELATIONS FROM RECONSTRUCTION TO THE NEW DEAL

Bernstein describes his book as a consideration of various "facially neutral occupational regulations passed between the 1870s and 1930s [that] harmed African American workers" (p. 5). These regulations included emigrant agent laws, licensing laws, and various statutes that provided a variety of benefits to labor unions. Bernstein argues that each of these regulations operated in a manner that harmed black interests. But the effect of these laws on black workers is less clear than Bernstein suggests.

A. *Emigrant Agent Laws*

One of the issues confronting southern planters in the wake of emancipation was how to retain low-cost labor, particularly in the face of black mobility. Southern states employed a variety of devices during the late nineteenth and early twentieth centuries to control this mobility: vagrancy laws that essentially criminalized unemployment; a convict lease system that forced those convicted of even minor offenses to agree to lengthy and arduous employment contracts; enticement laws that made it a crime, not a tort, to hire someone under contract with another employer; and emigrant agent laws that restricted the activities of labor agents through hefty licensing fees.[8] Bernstein opens his book with a consideration of emigrant agent laws.

Labor agents performed two roles for workers: they provided information about distant jobs, and they sometimes paid travel costs to facilitate a worker's move to a new job. Labor agents could also provide guarantees of employment that allowed a worker to avoid a vagrancy charge while moving to a new locale. This facilitation of relocation proved crucial to black interests because migration functioned as an important method for southern black workers to secure more advantageous employment opportunities.

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6. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917) (striking down local ordinance mandating residential segregation).

7. *See infra* notes 39-64 and accompanying text.

8. P. 10. *See generally* COHEN, *supra* note 4.

Beginning in the 1870s, several southern states attempted to limit black mobility by enacting laws imposing substantial license fees on labor agents engaged in the recruitment of workers for out-of-state jobs. State supreme courts divided on the question of whether these laws offended the Constitution.[9] Following the United States Supreme Court's 1900 decision in *Williams v. Fears*[10] upholding Georgia's emigrant agent law against a claim that it violated freedom of contract, several additional southern states enacted similar emigrant agent laws. Moreover, the "Great Migration" of southern blacks northward during World War I provoked additional southern states to enact emigrant agent legislation (p. 25).

What effect did these emigrant agent laws and the Court's decision in the *Williams* case holding Georgia's law constitutional have on African-American mobility? In an earlier article from which this chapter of his book is drawn, Bernstein asserts that the *Williams* case "negatively affected the lives of millions of African-Americans,"[11] but he does not repeat this claim in the book. Bernstein argues that economic theory suggests that emigrant agent laws harmed blacks, but he concedes, as he must, that the effects of these laws are "nearly impossible" to quantify (pp. 25-26).

In fact, hundreds of thousands of southern blacks migrated both northward and to other parts of the South despite the 1900 *Williams* decision and the subsequent enactment of new emigrant agent laws (pp. 25-26), suggesting that these laws did not have a dramatic effect on black mobility. Indeed, more southern blacks moved northward during the decade after *Williams* than did so during the decade prior to the decision, and those migration numbers exploded during the 1910s.[12] Bernstein concludes this chapter with the claim that "the history of emigrant agent laws . . . provides an excellent example of how Lochnerian jurisprudence, when applied, aided African Americans" (p. 27). But he is unable to demonstrate that the two nineteenth century state supreme court decisions that struck down these laws[13] had any effect on patterns of black migration.

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9. Joseph v. Randolph, 71 Ala. 499 (1882) (striking down emigrant agent law); Shepperd v. County Comm'rs of Sumter, 59 Ga. 535 (1877) (upholding emigrant agent law); State v. Moore, 18 S.E. 342 (N.C. 1893) (striking down emigrant agent law).

10. 179 U.S. 270 (1900).

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

12. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 28-29 (1993) (during the 1890s, 174,000 blacks left the South; during the 1900s, 197,000; during the 1910s, 525,000).

13. *See supra* note 9.

B. *Licensing Laws*

Many jobs in the late nineteenth and early twentieth centuries were subjected to licensing requirements. Bernstein argues that these requirements, sometimes enacted at the urging of the regulated profession so as to reduce competition, operated to the disadvantage of black workers. Bernstein explores licensing laws in three primary fields: plumbers, barbers, and physicians. With respect to plumbers and barbers, Bernstein argues that in some parts of the nation, licensing laws were used either to exclude African Americans or to force them to work without a license, which restricted their employment options (pp. 34-41). As Bernstein notes, *Lochner*-era courts generally upheld these various licensing restrictions against freedom of contract challenges, finding that the public nature of this type of work justified the licensing requirements as a proper exercise of the state's police power (pp. 30-31).

These licensing requirements probably did have an adverse impact on black workers, but the actual effect cannot be precisely delineated, especially given the fact that many blacks, as Bernstein notes (pp. 35-36), continued to work without a license. Bernstein argues, for example, that after the Ohio Supreme Court upheld that state's licensing requirement for plumbers in 1898, the plumbers' union used the licensing process to exclude black plumbers (p. 34). But according to the relevant census data, the total number of black plumbers and the percentage of plumbers who were black steadily increased in Ohio between 1900 and 1920, suggesting that the effect of the licensing requirements may have been less dramatic than Bernstein suggests. Similar increases in the number and percentage of black plumbers took place in both Illinois and New York following court decisions in those states in the late nineteenth and early twentieth centuries legitimating licensing requirements.[14]

14. BUREAU OF THE CENSUS, SPECIAL REPORTS: OCCUPATIONS AT THE TWELFTH CENSUS 264, 348, 362 (1904); BUREAU OF THE CENSUS, 4 THIRTEENTH CENSUS OF THE UNITED STATES: POPULATION 1910, at 453, 495, 503 (1914); BUREAU OF THE CENSUS, 4 FOURTEENTH CENSUS OF THE UNITED STATES: POPULATION 1920, at 911, 981, 993 (1923). Admittedly, census data captures only those who self-identify as plumbers and does not report employment levels; hence this census data likely understates the actual effect of the licensing requirements on black workers.

But a 1980 econometric analysis of the effect of licensure laws on black employment in various trades, including plumbers, between 1890 and 1960 found that the licensing laws in four nonsouthern states (Illinois, New York, Ohio, and Pennsylvania) "had little or no impact on the relative penetration of blacks into the crafts." Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, *in* OCCUPATIONAL LICENSURE AND REGULATION 169 (Simon Rottenberg ed., 1980).

Ironically, in some northern communities, blacks tried to use licensing restrictions to prohibit racial discrimination in public accommodations. For example, Chicago Alderman Oscar De Priest sought passage of a local ordinance granting the mayor the right to revoke the license of any business that engaged in racial discrimination. ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920, at 207 (1967). But De Priest's

Bernstein also notes that in the medical field, state licensing officials after 1910 deemed many medical schools that trained black students unsuitable and hastened their closure. Bernstein argues that these measures restricted black access to the medical profession, which they may have done, although the percentage of doctors who were black continued to increase during the decade following these closures.[15]

C. *Pro-Union Legislation*

During the 1920s and 1930s, Congress and some state legislatures enacted a variety of laws that favored labor unions. Bernstein devotes one chapter to legislation favoring railway unions, another chapter to prevailing wage laws favoring construction unions, and a final chapter to a variety of New Deal labor laws that benefited unionized workers. Bernstein argues that because many unions — particularly those in the railway and construction industries — either excluded blacks from membership or engaged in other forms of racially discriminatory behavior, this pro-union legislation, though facially neutral, had the effect of harming black employment opportunities.

In fact, racial animus was widespread in many labor unions during the first half of the twentieth century[16] and thus laws that improved the status of unions did have an adverse effect on black workers. As will be discussed below, however, it is exceedingly difficult to quantify the effect of pro-union legislation on black workers given the array of other factors that hampered black employment efforts. Black workers confronted a variety of barriers to work in addition to union animus, most prominently employer racial animus and inferior educational opportunities. Moreover, pro-union labor laws did not always harm black workers. Such laws benefited both blacks who were permitted to join unions (such as the United Mine Workers) on a nondiscriminatory basis as well as blacks who used picketing and boycotts to challenge racial discrimination by private employers outside the union context.

As Bernstein notes, in the late nineteenth and early twentieth centuries, most railroad unions, which were notoriously racist, discrimi-

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efforts to use government regulation to abrogate freedom of contract in a manner that benefited blacks failed. *Id.*

15. Bernstein, citing the effect of the medical school closures, claims that "after 1910, the percentage of African American doctors . . . leveled off." P. 44. But according to the 1910 census, there were 3,077 black doctors in the country, 2.0% of the total; by 1920, there were 3,495 black doctors, 2.4% of the total. BUREAU OF THE CENSUS, 4 THIRTEENTH CENSUS OF THE UNITED STATES: POPULATION 1910, at 428-29 (1914); BUREAU OF THE CENSUS, 4 FOURTEENTH CENSUS OF THE UNITED STATES: POPULATION 1920, at 356-57 (1923). These numbers probably would have been higher absent the medical school closures.

16. *See* sources cited *supra* note 5.

nated against or excluded black workers from the better paying skilled jobs in the railroad industry.[17] Labor unions sought a variety of forms of government regulation to facilitate their exclusion of black workers and to expand work opportunities for their white members. State "full crew" laws, which required railroads to operate with an engineer, fireman, conductor, brakeman, and flagman, harmed blacks, since many black porters had unofficially performed the brakeman's job in addition to their own work. With the passage of these laws, many black porters lost their jobs (pp. 52-53). In 1926 Congress enacted the Railway Labor Act, which extended both collective bargaining and exclusive representation rights to racially exclusionary railway unions, thereby further harming the interests of some black rail workers.

Discrimination against black workers was also extensive in the construction trades, as blacks were excluded from many construction unions. As Bernstein notes, in 1931, Congress strengthened the hand of these discriminatory unions by enacting the Davis-Bacon Act, which required federal contractors to pay workers on public works projects the "prevailing wage," which was subsequently deemed to connote a union wage (pp. 73-79). This statute, which significantly raised wages on federal construction projects, caused many federal contractors to stop hiring low-cost (and lesser skilled) black workers in favor of unionized white workers (p. 80). Prior to the Davis-Bacon Act, the willingness of non-union black workers to work for less than a union wage led to substantial work opportunities. "Prevailing wage" legislation undermined that advantage (p. 79). Although the dearth of black workers in the construction industry cannot be attributed solely to the Davis-Bacon Act, which was limited in application to federal public works projects, it undoubtedly harmed low-wage, non-union, black construction workers who might otherwise have secured work on such projects (pp. 79-81).

During the 1930s, Congress extended the collective bargaining and exclusive representation rights of labor unions. The National Recovery Act ("NRA") granted exclusive representation rights to labor unions in many industries. Although the NRA was short-lived, in 1935 Congress enacted the National Labor Relations Act ("NLRA"), which further guaranteed the right of workers to engage in collective bargaining and concerted action and granted labor unions exclusive representation rights. Both the NRA and the NLRA aided black workers in industries where unions accepted black members on a nondiscriminatory basis,[18] but because most labor unions discriminated against

17. ARNESEN, *supra* note 5, at 5-83.

18. The United Mine Workers, for example, did not, for the most part, discriminate against black workers. RONALD L. LEWIS, BLACK COAL MINERS IN AMERICA: RACE, CLASS, AND COMMUNITY CONFLICT 1780-1980, at 101 (1987).

black workers, both Acts weakened the position of most black workers who sought work in unionized industries.

Other aspects of New Deal labor legislation also had a negative effect on black workers. The short-lived NRA provided for an increase in wage rates. This adversely affected black workers as many employers chose to discharge their least skilled employees, who were frequently black, in lieu of paying the mandated minimum wage (pp. 87-89). The same principle applied when Congress established a national minimum wage through the 1938 enactment of the Fair Labor Standards Act ("FLSA"). In the South, the new FLSA-mandated minimum wage caused a sharp increase in prevailing wages, resulting in significant unemployment for unskilled workers, many of whom were black (pp. 99-102). Labor unions enthusiastically supported this minimum wage legislation because it tended to narrow the gap between union and non-union wages, thereby undermining the competitive wage advantage enjoyed by non-union workers (pp. 100-02).

D. *The Effect of Pro-Union Legislation*

What impact did this pro-union labor legislation have on black workers? Bernstein, in an earlier article, suggests that had courts struck down legislation favoring unions during the 1930s, such action could have kept "hundreds of thousands, perhaps millions of blacks from being permanently deprived of their livelihoods."[19]

That assessment seems overstated and difficult to support.[20] Certainly the anti-black sentiment of many labor unions, such as the railroad and construction unions, coupled with federal legislation strengthening the power of those unions, harmed black workers in those industries. But disentangling the effects of this labor regulation from other factors such as poor education,[21] widespread black poverty,

19. David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 87 (1993).

20. Bernstein appears to have modified that earlier claim in his book:

> One should not leap . . . to the conclusion that labor market regulations were primarily responsible for African Americans' economic plight. The social and economic disadvantages resulting from slavery undoubtedly lingered for generations. State violence and state refusal to protect African Americans from private violence inhibited African Americans' economic success, as did other forms of state action and inaction that affected the labor market, such as gross inequality in the provision of state publicly funded education.

P. 113.

By the same token, Bernstein blames current high black unemployment on New Deal policies, pp. 103-05, and characterizes his book as a corrective to the view that "the economic subjugation of African Americans between Reconstruction and the modern civil rights era primarily resulted from irrational private discrimination and social custom in a free market environment." P. 111.

21. *See, e.g.*, JOE W. TROTTER, JR., COAL, CLASS, AND COLOR: BLACKS IN SOUTHERN WEST VIRGINIA 1915-32, at 103 (1990) (noting that the lack of blacks in managerial jobs in

racial violence,[22] and widespread anti-black sentiment among employers and other whites[23] is extraordinarily difficult.

For example, many employers, particularly in the South, home to the overwhelming majority of black workers during the Reconstruction to New Deal era, were notoriously anti-black and engaged in open discrimination against black workers even in the absence of labor unions urging such action. The best example is the southern textile industry, the region's most important industry during the first half of the twentieth century.[24] Anti-black animus was widespread among southern white mill workers and mill owners; as a result, black workers were almost completely excluded from the industry until after enactment of the Civil Rights Act of 1964, which forbade racial discrimination in employment.[25]

Prior to the Civil War, slaves had been widely used in the South's fledgling textile industry, but after Reconstruction, when the industry blossomed, white mill owners almost completely excluded black workers, a pattern that would continue during the southern textile boom of the early twentieth century.[26] Those blacks who secured employment in this industry did so primarily in unskilled jobs, but even these opportunities were limited. Throughout the period from 1900 to 1960,

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the coal industry was due in part to exclusion of blacks from state university educational programs).

22. To offer one example, racial violence kept virtually all black workers out of Washington County, Indiana, from about 1880 until at least World War I. EMMA LOU THORNBROUGH, THE NEGRO IN INDIANA: A STUDY OF A MINORITY 225 (1957). Several other Indiana counties used private intimidation to exclude virtually all black residents during the late nineteenth and early twentieth centuries. *Id.* at 225-28.

23. For example, in Gary, Indiana, the community's white leaders sponsored a "clean out the Negro" campaign in 1909 aimed at removing those black workers that U.S. Steel had brought to the city to build new factories. Neil Betten & Raymond A. Mohl, *The Evolution of Racism in an Industrial City, 1906-1940: A Case Study of Gary, Indiana*, 59 J. OF NEGRO HIST. 51, 53 (1974). As late as 1954, a survey of Pennsylvania employers found that ninety percent engaged in some type of racial discrimination. Louis H. Mackey, The Pennsylvania Human Relations Commission and Desegregation in the Public Schools of Pennsylvania 1961-1978, at 28 (1978) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with the College of William & Mary Law Library). In 1944, only forty-five percent of American whites believed that "Negroes should have as good a chance as white people to get any kind of job." MILDRED A. SCHWARTZ, TRENDS IN WHITE ATTITUDES TOWARDS NEGROES 74 (1967).

24. TIMOTHY J. MINCHIN, HIRING THE BLACK WORKER: THE RACIAL INTEGRATION OF THE SOUTHERN TEXTILE INDUSTRY, 1960-1980, at 8 (1999) [hereinafter MINCHIN, HIRING THE BLACK WORKER]; TIMOTHY J. MINCHIN, WHAT DO WE NEED A UNION FOR: THE TWUA IN THE SOUTH, 1945-1955, at 7 (1997) (by 1945, eighty percent of the nation's cotton spindles were located in the South).

25. One scholar has described the change in the racial employment structure of the southern textile industry in the wake of enactment of the Civil Rights Act of 1964 as being of a "magnitude . . . [that] has probably never occurred before in southern industry." Richard L. Rowan, *The Negro in the Textile Industry*, *in* NEGRO EMPLOYMENT IN SOUTHERN INDUSTRY 115 (Herbert R. Northrup ed., 1970).

26. Rowan, *supra* note 25, at 39, 47-49, 53-54.

blacks consistently comprised less than five percent of textile industry employees.[27]

No state action or labor union discrimination was required to accomplish this exclusion of black mill workers.[28] Instead, this discriminatory treatment was due in significant measure to the racial animus of mill owners and white mill workers who refused to work with blacks.[29] The large number of female workers in the textile mills contributed to white insistence on black exclusion. South Carolina did enact legislation in 1915 mandating racial segregation in that state's textile mills. That statute, however, had virtually no effect on black employment rates as blacks were already almost completely excluded from that state's textile industry.[30] Moreover, Virginia, North Carolina, and Georgia never enacted such segregation legislation, but black employment in the textile industry in those states remained minimal as well until after 1964.[31] After 1964, black employment levels in the textile industry increased in response both to Title VII of the Civil Rights Act of 1964 and Executive Order 11246, which forbade discrimination by federal contractors.[32]

In support of his view that labor regulations had a particularly pernicious effect on blacks, Bernstein asserts that "diffuse interest groups have trouble enforcing mutually desired norms in the absence of coer-

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27. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 8; Rowan, *supra* note 25, at 54.

28. According to a 1944 study, less than ten percent of the membership of the Textile Workers Union of America, the leading textile union, was in the South, where over seventy percent of the industry (as measured by the number of cotton spindles) was located. Most southern textile mills were non-union. *See* HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO 119-20 (1944); Rowan, *supra* note 25, at 21. A major effort to unionize the southern textile industry beginning in 1929 failed. *Id.* at 58-60. The southern press attacked textile unions for being pro-black. One North Carolina newspaper wrote: " 'Do you want your sisters or daughters to marry a Negro? That is what this Communist controlled Northern Union is trying to make you do.' " STERLING D. SPERO & A.L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT 350 (1931) (quoting *Labor Unity*, June 22, 1929, which in turn, is quoting the *Gastonia Gazette*). Unions would remain relatively insignificant in the southern textile industry. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 6.

29. Rowan, *supra* note 25, at 64 ("[M]ill owners took the safe course of excluding Negroes from their operations except for outside or laboring jobs."). Many mill owners announced that they refused to use blacks other than in limited positions because of the racial hostility of white workers. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 17-19.

30. Rowan, *supra* note 25, at 60-61. Moreover, after enactment of the segregation law, black employment levels in South Carolina's textile industry slightly increased. Heckman & Payner, *supra* note 1, at 143 ("Initial racial exclusion [was] ratified by [the] 1915 Jim Crow law.").

31. James J. Heckman & J. Hoult Verkerke, *Responses to Epstein*, 8 YALE L. & POL'Y REV. 320, 328 (1990).

32. Richard J. Butler et al., *The Impact of the Economy and the State on the Economic Status of Blacks*, *in* MARKETS IN HISTORY: ECONOMIC STUDIES OF THE PAST 239 (David Galenson ed., 1989).

cion . . . . [I]t is very difficult for a cartel, including a cartel of racist whites, to operate effectively unless the government intervenes on its behalf" (p. 111). But Bernstein's claim that "a cartel of racist whites" cannot "operate effectively unless the government intervenes on its behalf" is contradicted by the experience of the southern textile industry.

Moreover, in some instances, pro-union labor regulations benefited black workers. Not all unions discriminated against black workers;[33] those African Americans who belonged to unions on a nondiscriminatory basis enjoyed the benefits of legislation designed to protect unionization.

Furthermore, some labor regulations aided black protest efforts outside of the union context. Bernstein labels the labor injunction "an anathema to unions, a blessing for African Americans" (p. 53). Accordingly, he derides the 1932 Norris La Guardia Act, which deprived federal courts of jurisdiction to issue labor injunctions, as harmful to black interests. But the Norris La Guardia Act would play a crucial role supporting black efforts to challenge racial discrimination in the workplace. During the 1930s, blacks throughout the nation launched "Don't Buy Where You Can't Work" picketing and boycott efforts aimed at businesses that refused to hire black workers.[34] The Norris La Guardia Act helped shield these protest efforts from judicial intervention. For example, in 1936, the New Negro Alliance organized a boycott of a grocery store chain in Washington, D.C., using picketing to protest the chain's refusal to hire black workers in some of its stores. The grocery store sought a federal injunction to terminate the picketing, but the United States Supreme Court interpreted the Norris La Guardia Act to deprive the lower court of jurisdiction to issue an injunction.[35] The Court's landmark decision had a profound effect on black picketing and boycott efforts. Shortly thereafter, additional protests were launched against discriminatory employers throughout the

33. *See, e.g.*, PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1973, at 195 (1974) (discussing the interracial character of the National Miners' Union); BRIAN KELLY, RACE, CLASS, AND POWER IN THE ALABAMA COALFIELDS 130 (2001) (discussing progressive nature of the United Mine Workers in the context of southern racism). By the same token, anti-union activity often harmed black as well as white workers. For example, in 1908, the United Mine Workers, with substantial black membership, conducted a strike in Alabama. Irritated in part because of the biracial character of the union, the Governor of Alabama forbade all public meetings, ordered the state militia to break up the union camp, and threatened to jail picketers. These actions crushed the strike and dealt a devastating blow to Alabama's miners, both black and white. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 363 (1951).

34. AUGUST MEIER & ELLIOTT RUDWICK, ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 314-32 (1976).

35. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

nation, including Washington, D.C., New York, Chicago, Philadelphia, Cleveland, and St. Louis.[36]

In sum, Bernstein correctly observes that some facially neutral labor regulation during the Reconstruction to New Deal era did have an adverse impact on black workers that was more significant than some historians have previously recognized. But disentangling the effect of this labor regulation on black workers from the array of nonregulatory factors that impeded black employment efforts such as employer racial animus and limited educational opportunities remains extraordinarily difficult.

II. CONTRACT RIGHTS, CIVIL RIGHTS, AND *LOCHNER*

Bernstein places his book in the larger debate over Lochnerian jurisprudence and its effect on certain groups within American society. He claims that "legal scholars and historians have traditionally seen Lochnerism as at best irrelevant to the welfare of African Americans, and at worst a menace" (p. 7). Bernstein contests that view. He argues that "Lochnerian jurisprudence, when applied, protected African Americans from facially neutral legislation that restricted their access to, and mobility in, the labor market" (p. 7). He further claims that the Supreme Court's rejection of *Lochner* during the 1930s harmed blacks because "Lochnerian jurisprudence, had it survived the New Deal, could have been a potent weapon against segregation" (p. 108). Bernstein's claims, however, are at odds with the historical record.

First, as noted above, many of those Lochnerian decisions that did strike down facially neutral legislation that restricted black access to, and mobility in, the labor market did not have a demonstrable effect on patterns of black employment.[37]

Second, although state laws mandating racial segregation among private parties did violate Lochnerian principles, very few courts during the *Lochner* era extended freedom of contract principles to the segregation context. Indeed, with the exception of the Supreme Court's decisions striking down local ordinances mandating residential segregation,[38] *Lochner*-era courts almost never sustained legal chal-

36. MEIER & RUDWICK, *supra* note 34, at 326.

37. For example, the impact on black migration of the two state supreme court decisions striking down emigrant agent laws is virtually impossible to discern. *See supra* note 9. Moreover, as Bernstein notes, most Lochnerian courts sustained, rather than struck down, state licensing laws that arguably harmed black workers. Pp. 30-31. As for those few decisions in which a court struck down such licensing laws, Bernstein does not argue or demonstrate that they positively affected black employment levels. Pp. 34-35.

38. The Court's most significant decision in this area was *Buchanan v. Warley*, 245 U.S. 60 (1917); *see also* City of Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam).

lenges to segregation laws.[39] Thus, to suggest that Lochnerian jurisprudence, had it survived, might have eventually been used to challenge segregation laws is nothing more than speculation.[40]

Finally, not only did *Lochner*-era courts leave state segregation laws largely untouched, they also issued decisions animated by freedom of contract concerns in two other areas that affirmatively undermined black interests. First, in response to one of the most important legislative efforts to curb racial discrimination during the Reconstruction to New Deal era — the enactment of state legislation prohibiting the segregation and exclusion of blacks in public accommodations — courts, frequently motivated by proto-Lochnerian concerns, interpreted these statutes very narrowly and in a manner preservative of the rights of business operators to continue to exclude or segregate black patrons. Second, Lochnerian courts made a substantial contribution to the explosion of northern residential segregation during the first half of the twentieth century through their enforcement of racially

39. During the late nineteenth and early twentieth century, many states enacted legislation mandating legislation in a broad range of private engagements: on railroad cars, buses, and ferries; in hospitals and private colleges; in athletic contests; in bathing facilities at mines; and in marriage. MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 133-36 (1946). Yet no *Lochner*-era court struck down such a law as violative of freedom of contract. Even the United States Supreme Court refused to strike down laws mandating segregation in private contracts, upholding, for example, a state law that forbade racial integration in *private* colleges. Berea College v. Kentucky, 211 U.S. 45 (1908). For a discussion of various court decisions considering the legitimacy of state segregation laws, see CHARLES S. MANGUM, THE LEGAL STATUS OF THE NEGRO 181-222 (1940).

40. Moreover, just one year after the *Lochner* decision, the Supreme Court narrowly construed Congress's authority under the Thirteenth and Fourteenth amendments to protect the "right to contract" of black workers, leaving such workers vulnerable to private violence that deprived them of employment.

Pursuant to its power under the Thirteenth and Fourteenth Amendments, Congress in 1870 had imposed criminal liability "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Hodges v. United States, 203 U.S. 1, 21 (1906) (Harlan, J., dissenting). Four years earlier, in 1866, Congress had enacted legislation guaranteeing black people "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *Id.* at 22 (Harlan, J., dissenting).

In the early twentieth century, a group of white men in Arkansas used extreme force and intimidation to induce a group of black workers to breach their employment contracts with a local sawmill. The whites were tried and convicted of violating the above-mentioned criminal statute; the indictment specifically charged the defendants with using force and threats to interfere with the black workers' right to contract. In *Hodges v. United States*, however, the Court offered a narrow construction of Congress's authority to protect the "right to contract" under the Thirteenth amendment. *Id.* at 16-19. In response to the argument that "one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts," and that the defendants, "by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract," *id.* at 17, the Court nevertheless concluded that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery," *id.* at 18, and that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth amendment. The decision left black workers vulnerable to intimidation and violence at the hands of whites. The Court later reversed this decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

restrictive covenants and rejection of arguments that such covenants violated either the Fourteenth Amendment or public policy. Each of these two areas of *Lochner*-era decisionmaking deserves closer consideration.

A. *Enforcement of State Antidiscrimination Law*

In 1875, Congress enacted civil rights legislation that, among other things, banned racial discrimination in public accommodations.[41] In 1883, however, the United States Supreme Court held the 1875 statute unconstitutional, arguing that Congress lacked power under both the Thirteenth and Fourteenth amendments to enact legislation abrogating freedom of contract.[42] The *Civil Rights Cases* likely had an adverse impact on black access to public accommodations, even though the 1875 statute had been disregarded in parts of the nation.[43]

In response to the Court's decision in the *Civil Rights Cases*, blacks organized throughout the North to seek state legislation banning racial discrimination in public accommodations.[44] In many northern states, elections during the 1880s were closely contested between Democrats and Republicans, affording black voters, though small in number, significant political influence. In part due to the desire to secure support of black voters, state legislatures throughout the North and West enacted legislation during the 1880s banning racial discrimination in public accommodations.[45] But many northern courts, influenced by a

41. Bernstein suggests that Radical Republicans favored civil rights protection through freedom of contract and freedom of association. P. 109. In this instance, however, Radical Republicans favored *abridging* freedom of contract and freedom of association in order to prevent racial discrimination by private proprietors of public accommodations and amusements.

42. The Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan dissented, urging that Congress had the right to abrogate freedom of contract rights: "[D]iscrimination practiced by corporations and individuals in the exercise of their public or *quasi*-public functions is a badge of servitude, the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the thirteenth amendment." *Id.* at 43. The Court's rejection of Harlan's views on the legality of this abrogation of freedom of contract helped facilitate the expansion of discrimination in public accommodations.

43. Contemporary newspaper accounts suggest that the statute had a positive impact on reducing discrimination. The *Boston Daily Advertiser* claimed in 1883 that the statute "had been in force long enough to accomplish its object substantially." Leslie H. Fishel, Jr., The North and the Negro, 1865-1900: A Study in Race Discrimination 372 (1953) (unpublished Ph.D. dissertation, Harvard University) (on file with the College of William & Mary Law Library) (quoting BOSTON DAILY ADVERTISER, Oct. 16, 1883). The *Cleveland Gazette*, a black newspaper that strongly supported the civil rights legislation, predicted that the Court's decision in the *Civil Rights Cases* "will close *hundreds* of hotels, places of amusement and other public places here in the North to our people." *Id.* (quoting CLEVELAND GAZETTE, Oct. 20, 1883).

44. Fishel, *supra* note 43, at 378.

45. Connecticut (1884), Iowa (1884), New Jersey (1884), Ohio (1884), Colorado (1885), Illinois (1885), Indiana (1885), Michigan (1885), Minnesota (1885), Nebraska (1885), Rhode Island (1885), and Pennsylvania (1887) enacted antidiscrimination legislation during the

nascent "Lochnerism," offered minimal enforcement, construing these statutes very narrowly and undermining their efficacy.

Some courts refused to extend coverage to any entity not specifically listed in the statute, citing liberty of contract concerns, even though virtually every statute, in addition to prohibiting discrimination by certain enumerated businesses, also barred discrimination by any "other place of public accommodation."[46] Illinois, for example, prohibited discrimination by a variety of entities, including "restaurants," "eating houses," and "all other places of public accommodation."[47] But when a black man brought suit, alleging that a drug store soda fountain had denied him service because of his race, the Illinois Supreme Court held in 1896 that because the state legislature had not *specifically* included a drug store soda fountain in its list of covered establishments, the proprietor of the drug store was free to deny service to the plaintiff. The court articulated a robust defense of freedom of contract:

> The personal liberty of an individual in his business transactions and his freedom from restrictions is a question of the utmost moment, and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment.[48]

1880s. MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 157 (1961). The Washington Territory (1890), California (1893), and Wisconsin (1895) followed suit during the 1890s. FRANK JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 74-75, 202, 207 (1919); QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE'S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 21 (1994). Of northern states east of the Mississippi, only Maine, New Hampshire, and Vermont, each with a very small black population, did not enact such legislation. Fishel, *supra* note 43, at 433 n.268. Prior to the Court's decision in the *Civil Rights Cases*, only Massachusetts (1865), New York (1874), and Kansas (1874) had enacted such legislation. KONVITZ & LESKES, *supra*, at 155-56.

46. *See, e.g.*, Faulkner v. Solazzi, 65 A. 947 (Conn. 1907) (barbershop); Cecil v. Green, 43 N.E. 1105 (Ill. 1895) (soda fountain); Brown v. J.H. Bell Co., 123 N.W. 231 (Iowa 1909) (merchant's booth at a food show); Humburd v. Crawford, 105 N.W. 330 (Iowa 1905) (boarding house); Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (saloon); Burks v. Basso, 73 N.E. 58 (N.Y. 1905) (boot black stand); Hargo Kellar v. Koerber, 55 N.E. 1002 (Ohio 1899) (saloon).

Some courts did allow suits to go forward despite the fact that the specific entity was not named in the statute. *See, e.g.*, People v. King, 42 Hun. 186 (N.Y. Sup. 1886) (skating rink); Kopper v. Willis, 9 Daly 460 (N.Y. Com. Pl. 1881) (restaurant); Youngstown Park & Falls St. Ry., 4 Ohio App. 276 (1915) (dancing hall); Valeria W. Weaver, *The Failure of Civil Rights 1875-1883 and its Repercussions*, 54 J. OF NEGRO HIST. 368, 379 (1969).

47. JOHNSON, *supra* note 45, at 97.

48. Cecil v. Green, 43 N.E. 1105, 1106 (Ill. 1896); *see also* Goff v. Savage, 210 P. 374, 375 (Wash. 1922) (holding that a drug store soda fountain is not a place of public accommodation and that "[i]t is the right of a trader whose business is purely of a private character to trade with whom he will, and . . . [to] discriminate as he pleases").

The Illinois state legislature rejected the court's narrow interpretation, quickly amending its antidiscrimination law to explicitly cover soda fountains.[49]

Similarly, the Minnesota Supreme Court held in 1898 that a saloon was not a "place of public refreshment" within the meaning of that state's antidiscrimination law and that therefore the proprietor of a saloon was free to deny service to a black man.[50] The court conceded "that the word 'refreshment' may include intoxicating liquors, and that the words 'places of refreshment' may . . . include a place where liquors are sold as a beverage," but nevertheless held that the statute did not apply to saloons because the legislature had failed to use the word "saloon" — though it had used the word "tavern" — in its list of covered entities.[51] Within months, the Minnesota state legislature amended its law to specifically include "saloons" in its antidiscrimination statute in response to the court's narrow construction.[52]

In 1910, the Iowa Supreme Court held, over two dissents, that a vendor at a food show (to which the public was invited and admission was charged) who served free coffee was not covered by that state's antidiscrimination law, notwithstanding statutory language including "all other places where refreshments are served."[53] In defending its construction of the statute, the Court noted that " 'the law does not undertake to govern or regulate the citizen in the conduct of his private business' "[54] and that "[i]t rested solely with the defendants to say who they would serve, and the courts should not undertake to control such matters."[55] Again, solicitude for the contract rights of private parties trumped the desire of the legislature to prohibit racial discrimination in public accommodations.

Some courts interpreted "public accommodation" as comprising only those businesses thought to be "affected with the public interest" such as common carriers and inns.[56] For example, in 1907, the Connecticut Supreme Court construed that state's antidiscrimination law, which it described as being "in derogation of a common private right" and "restrictive of personal liberty,"[57] as not encompassing a barber shop as a place of public accommodation:

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49. SPEAR, *supra* note 14, at 41.

50. Rhone v. Loomis, 77 N.W. 31 (Minn. 1898).

51. *Id.* at 33.

52. GILBERT STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 132 (1910).

53. Brown v. J.H. Bell Co., 123 N.W. 231, 233 (Iowa 1910).

54. *Id.* at 234 (quoting Bowlin v. Lyon, 25 N.W. 766 (Iowa 1884)).

55. *Id.* at 236.

56. Faulkner v. Solazzi, 65 A. 947, 947 (Conn. 1907).

57. *Id.* at 949.

> there are certain occupations which the law has long clothed with a public character which not only invests the public with the power of regulation, but also, in the absence of regulation, involves duties to the individual members of the public of the most stringent character and highest consequence. Such occupations are those of the common carrier and innkeeper.[58]

The court concluded that "the common law has never recognized barber-shops as possessing that peculiar quality, as places of public accommodation, which is attached to hotels and common carriers;" hence, barber shops were free to discriminate against black patrons.[59] Yet the court ignored the fact that the Connecticut statute had modified the common law by expanding the concept of public accommodations beyond hotels and common carriers.[60]

Throughout the North, the reluctance of courts to vigorously enforce antidiscrimination legislation[61] contributed to the continuation of racial discrimination in public accommodations.[62] The *New York Age* commented in 1890 on the unwillingness of courts to enforce the legislation:

> People of Afro-American extraction who live here [in New York City] or who pass through this city, need not be told that there are keepers of restaurants, saloons, theatres, etc., who almost daily kick Afro-Americans out of their places, when the latter happen to go there for accommodation; and that these same persons, knowing the inadequacy of the law for any redress, laugh in your faces and tell you to sue and do your best.[63]

Racial discrimination in public accommodations would sharply increase in much of the North during the 1910s and 1920s in response to the dramatic increase in southern black migration into many northern cities,[64] but northern courts, influenced in part by Lochnerism, would

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58. *Id.* at 948.

59. *Id.*

60. Though Connecticut had not specifically listed barber shops in its statute, it did specify "other places of public accommodation." *Id.*

61. Some courts denied liability on the basis of a technicality. An Ohio circuit court, for example, reversed a verdict for a black plaintiff who had been refused a ticket in the parquet section of a Cincinnati theater, concluding that the plaintiff had not proven that the theater had authorized the ticket seller to refuse him a ticket. In so doing, the court sidestepped established principles of agency law. FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 118-19 (1913).

Nebraska's antidiscrimination statute expressly extended protection to "all persons," but because the statute was titled "an act to provide that all citizens shall be entitled to the same civil rights," the Nebraska Supreme Court held that a black plaintiff's failure to allege in his complaint that he was a citizen was fatal to his claim of racial discrimination by the proprietor of a barber shop. Messenger v. State, 41 N.W. 638, 638-39 (Neb. 1889).

62. Weaver, *supra* note 46, at 377-78.

63. Fishel, *supra* note 43, at 386 (quoting NEW YORK AGE, Apr. 12, 1890).

64. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 891 (1998).

continue to undermine enforcement of state antidiscrimination laws through narrow constructions of statutory language.[65]

B. *Judicial Enforcement of Racially Restrictive Covenants*

Bernstein argues that African Americans seeking housing in cities that had ordinances mandating residential segregation "benefited from Lochnerian jurisprudence" (p. 115). To be sure, in 1917, the United States Supreme Court in *Buchanan v. Warley*[66] did strike down a local Louisville ordinance that mandated racial segregation in housing because it constituted an undue restraint on the alienation of property. The *Buchanan* decision, however, had a limited impact on patterns of racial segregation. In the wake of *Buchanan*, private discrimination in the residential housing market sharply increased due in significant measure to the widespread use of racially restrictive covenants pursuant to which property owners agreed not to sell or lease real property to blacks or other racial minorities.[67] *Lochner*-era courts consistently enforced these covenants, contributing to the dramatic increase in residential segregation during the first half of the twentieth century.

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65. *See, e.g.*, Chochos v. Burden, 128 N.E. 696 (Ind. 1921) (finding that ice cream parlor is not an "eating-house"); Goff v. Savage, 210 P. 374 (Wash. 1922) (finding that a drug store soda fountain is not a place of public accommodation). Northern state legislatures would continue to modify their antidiscrimination statutes in order to respond to the narrow interpretations rendered by courts. KONVITZ, *supra* note 39, at 123.

66. 245 U.S. 60 (1917).

67. MASSEY & DENTON, *supra* note 12, at 24, 30-31. Massey and Denton note a number of factors contributing to the sharp increase in residential segregation during the late 1910s and the early 1920s, including racial violence, but emphasize the role of racially restrictive covenants: "After 1910, the use of restrictive covenants spread widely throughout the United States, and they were employed frequently and with considerable effectiveness to maintain the color line until 1948, when the U.S. Supreme Court declared them unenforceable." *Id.* at 36; *see also* GUNNAR MYRDAL, AN AMERICAN DILEMMA 622-27 (1944) (discussing importance of racially restrictive covenants as means of ensuring residential segregation after *Buchanan* decision). The *Buchanan* decision, which appeared to foreclose the use of local ordinances mandating residential segregation, contributed to the expanded use of these restrictive covenants to accomplish the same goal. *See* CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 52 (1959). By the 1940s, eighty-five percent of Detroit's real estate was encumbered by a racially restrictive covenant, as were 559 block areas in St. Louis, and more than eleven square miles of Chicago real estate. *Id.* at 9; ROBERT WEAVER, THE NEGRO GHETTO 116 (1948).

Moreover, the *Buchanan* decision did not end the use of residential ordinances mandating residential segregation. Such ordinances continued to be deployed in cities such as Richmond, New Orleans, Winston-Salem (North Carolina), Oklahoma City, and Dallas; in each of those cities subsequent litigation was required to enforce *Buchanan*. *See* City of Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam); Clinard v. Winston-Salem, 6 S.E.2d 867 (N.C. 1940); Allen v. Oklahoma City, 52 P.2d 1054 (Okla. 1936); Liberty Annex Corp. v. Dallas, 289 S.W. 1067 (Tex. Civ. App. 1927).

One state, Minnesota, did abrogate by statute the rights of property owners to agree to a restrictive covenant "directed toward any person of a specified faith or creed." PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 236 (1951).

In what appears to be the first reported decision assessing the constitutionality of an effort to secure judicial enforcement of a racially restrictive covenant, in 1892 a federal court in California denied enforcement on the grounds that to do otherwise would violate the Fourteenth amendment and would be contrary to public policy.[68] Courts of the *Lochner* era, however, rejected that view until the United States Supreme Court's 1948 landmark decisions in *Shelley v. Kraemer*,[69] which once again held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment, and *Hurd v. Hodge*,[70] which held that judicial enforcement of such covenants in the District of Columbia was contrary to public policy and violative of the Civil Rights Act of 1866.

Beginning in 1915 and continuing until the 1948 *Shelley* and *Hurd* decisions, state and federal courts, implicitly drawing on Lochnerian principles of freedom of contract, enforced racially restrictive covenants, rejecting arguments that judicial enforcement of these private contracts either constituted state action for purposes of a Fourteenth amendment violation or was contrary to public policy.[71] Moreover, in granting judicial enforcement of racially restrictive covenants, these courts declined to follow the principle enunciated in several *Lochner*-era railroad cases that courts should not enforce a covenant restricting a property owner's use of land if the covenant was contrary to public policy.[72]

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68. Gandolfo v. Hartman, 49 F. 181 (S.D. Cal. 1892). The court also found that judicial enforcement of the covenant barring conveyance of real estate to "a Chinaman" was in violation of a U.S. treaty with China. *Id.* at 182.

69. 334 U.S. 1 (1948).

70. 334 U.S. 24 (1948).

71. The first court to uphold a racially restrictive covenant barring the sale of real estate to a black person was a 1915 decision by the Supreme Court of Louisiana. Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915). Other courts followed. The U.S. Supreme Court's decision in *Corrigan v. Buckley*, 271 U.S. 323 (1926), upheld a racially restrictive covenant but without reaching the issue of whether judicial enforcement of the covenant was constitutional, proved to be important as many other courts erroneously concluded that the Court had resolved the constitutionality of judicial enforcement of restrictive covenants. Brief for the United States as Amicus Curiae at 43, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72).

A few courts enforced racially restrictive covenants only to the extent that they barred the *use* of property by a black person, holding contractual restraints on the *sale* of real estate to a black person to be an unenforceable restraint on alienation. Los Angeles Invest. Co. v. Gary, 186 P. 596 (Cal. 1919); Porter v. Barrett, 206 N.W. 532 (Mich. 1925). Most courts, however, enforced racially restrictive covenants regardless of whether the covenant barred sale to blacks or occupancy by blacks. VOSE, *supra* note 67, at 21; D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5, 8-11 (1945) (listing and discussing court decisions upholding restrictive covenants); *see also* Brief for the United States as Amicus Curiae at 41-45, *Shelley*, 334 U.S. 1 (same).

72. *See, e.g.*, Beasley v. Texas & Pac. Ry. Co., 191 U.S. 492 (1903) (refusing to enforce a deed covenant restricting the building of a railroad depot on grounds that the covenant provision was contrary to public policy); Seaboard Airline Ry. Co. v. Atlanta, B & C R.R. Co.,

These court decisions did not specifically articulate freedom of contract concerns indicative of Lochnerian jurisprudence. Nevertheless, by construing narrowly state action under the Fourteenth amendment and declining to find racial exclusion to be a violation of public policy, these courts implicitly embraced a broad vision of contractual freedom — a vision considerably broader than that articulated by the pre-*Lochner* federal district court in California in 1892 and the post-*Lochner* United States Supreme Court in 1948. The willingness of *Lochner*-era courts to enforce racially restrictive covenants contributed to the sharp increase in residential segregation that began in earnest during World War I.[73]

Bernstein argues that Lochnerian jurisprudence "lasted far too short a time to provide much protection to African American workers" (p. 7), but in fact the demise of *Lochner* coincided with the beginnings of government regulation *prohibiting* racial discrimination by employers and labor unions. During the 1930s, a few northern states prohibited racial discrimination in public employment;[74] several other northern states extended this statutory ban to private employers and labor unions during the 1940s.[75] Moreover, in 1941, President Franklin Roosevelt issued an executive order establishing a Fair Employment Practice Committee ("FEPC") banning racial discrimination by private employers and labor unions engaged in federal contract work.[76]

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35 F.2d 609 (5th Cir. 1929) (refusing to enforce railroad's promise to provide an interlocking switch at a rail crossing as contrary to the public interest); Florida Cent. & P.R. v. State *ex rel.* Mayor, 13 So. 103 (Fla. 1893) (refusing to enforce promise of railroad to build depot in a certain location on grounds that contract is void as against public policy).

73. MASSEY & DENTON, *supra* note 12, at 24. To be sure, government action also contributed to the increase in residential segregation during the 1930s and 1940s. During the Depression, the federal government established several housing programs designed to encourage homeownership. For example, the Federal Housing Administration ("FHA") insured private mortgages on residential property that met the agency's standards. The FHA's mortgage standards, however, promoted residential segregation, as the agency generally would only insure homes in racially homogeneous neighborhoods or homes that were covered by racially restrictive covenants. This practice had an important impact on residential segregation patterns. DAVISON M. DOUGLAS, READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS 53-54 (1995). Despite this government action, racially restrictive covenants probably had a more significant impact on residential segregation.

74. MANGUM, *supra* note 39, at 174 (discussing state statutes in Illinois, New York, Ohio, and Pennsylvania banning racial discrimination in public employment); MURRAY, *supra* note 67, at 57 (discussing a similar statute in California).

75. By 1950, at least twelve states had enacted bans on racial discrimination by either private employers or labor unions. MURRAY, *supra* note 67, at 64, 147, 220, 261, 267, 270, 291, 312, 380, 396, 494, 514 (Connecticut, Indiana, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, and Wisconsin). Labor unions played an important role in securing passage of many of these statutes. RAY MARSHALL, THE NEGRO AND ORGANIZED LABOR 276 (1965).

76. MURRAY, *supra* note 67, at 565-68.

Although Bernstein is quite dismissive of the efficacy of the FEPC,[77] recent scholarship suggests that the FEPC had a significant impact on black employment in the defense industry in nonsouthern states.[78] Had courts retained Lochnerian principles into the 1940s, as Bernstein urges, these antidiscrimination efforts would have likely been declared unconstitutional (as would later congressional efforts to ban racial discrimination with the Civil Rights Act of 1964). Hence, the demise of *Lochner*, contrary to Bernstein's assertion, was well-timed to serve black interests. For example, in a decidedly post-Lochnerian decision, the United States Supreme Court in 1945 upheld a New York statute prohibiting racial discrimination by labor unions, rejecting the union's argument that the statute violated its "liberty of contract" rights.[79]

CONCLUSION

David Bernstein has provided us with an important narrative of the impact of government economic regulation on African Americans. The period between Reconstruction and the New Deal was an era of profound anti-black sentiment in America that manifested itself in a variety of public and private actions that undermined the political, economic, and social status of African Americans. At a time when blacks generally enjoyed minimal political influence, whites used the regulatory powers of the state to improve their own situation. This should come as no surprise. As Bernstein notes, "regulatory legislation tends to benefit those with political power, at the expense of those without such power" (p. ix). Minority groups who lack political power are likely to be harmed not just by private actors, but also by government actors when dominant interest groups use the coercive power of the state to solidify their position.

Lochnerian jurisprudence bore the potential to offset aspects of this political advantage, but this potential went largely unrealized. *Lochner*-era courts not only declined to apply liberty of contract principles to strike down laws mandating segregation among private actors, but many also affirmatively undermined black interests by narrowly construing state antidiscrimination laws so as to preserve the rights of business owners to discriminate and by enforcing private racially restrictive covenants despite claims that such enforcement violated the Fourteenth amendment or was contrary to public policy.

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77. "At its worst, the FEPC was completely ineffective. At its best, it froze an unfavorable status quo." P. 82.

78. William Collins, *Race, Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets*, 91 AM. ECON. REV. 272, 272 (2001) ("[The] Roosevelt administration's effort to enforce a nondiscrimination policy in war-related employment played a significant role in opening doors for black workers.").

79. Ry. Mail Assoc. v. Corsi, 326 U.S. 88, 93 (1945).

Beginning in the 1940s, African Americans began to enjoy greater political influence and were able to secure governmental action in some states banning racial discrimination in private employment contracts, efforts that would achieve success at the national level in the 1960s. Though Bernstein sees the demise of Lochnerism during the late 1930s as harmful to the interests of black workers, in fact, the death of *Lochner* allowed these prohibitions on racial discrimination in the workplace to proceed unfettered by liberty of contract ideology.