

**Plessy v. Ferguson in a Libertarian Perspective**

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Decided within a decade of each other, *Plessy v. Ferguson*<sup>1</sup> and *Lochner v. New York*<sup>2</sup> are conventionally understood as intellectual twins. They are taken to illustrate some common failings that today's political liberals believe constitutional adjudication should avoid.<sup>3</sup> And their repudiation is sometimes taken to illustrate beneficial forms of constitutional adjudication. In these comments I hope to question both of these common positions. I argue that *Plessy* and *Lochner* are more different than alike, and that a libertarian perspective often rejected by contemporary liberals helps us understand both why the cases are different and why recent efforts to rehabilitate so-called expressive defenses of liberal legislation may be misguided or at least incomplete in light of *Plessy*.

By *libertarian*, I mean a view of the proper role of government that is limited to provision of the basic conditions of personal security, narrowly defined, and enforcement of contracts voluntarily entered, subject only to narrow exceptions for fraud and coercion, again narrowly defined.<sup>4</sup> *Lochner* indeed can be best understood as a libertarian decision in this sense. It held unconstitutional a state law making certain contracts illegal, in circumstances where, on the Court's analysis, there was neither fraud nor coercion. *Plessy*, in contrast, does not seem at all libertarian, for there the Court upheld a state law making certain contracts illegal even though, once again, there was no reason to think that either fraud or coercion were involved. Although the membership of the Court did not change dramatically between *Plessy* and *Lochner*,<sup>5</sup> its

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<sup>1</sup> 163 U.S. 537 (1896).

<sup>2</sup> 198 U.S. 45 (1905).

<sup>3</sup> I use the term *today's political liberals* to refer to a category familiar in ordinary political conversation, not to one rooted in deep philosophical commitments or analysis.

<sup>4</sup> Government may act, on this version of libertarianism, where otherwise valid contracts have external effects on those not parties to the contract, although a strict libertarian would allow such action only where contractual solutions – between the third parties and the initial parties – were very nearly impossible rather than, for example, merely quite costly to create.

<sup>5</sup> Justice Joseph McKenna replaced Stephen Field in 1898, Oliver Wendell Holmes replaced Horace Gray in 1902, and William Day replaced George Shiras in 1903.

intellectual orientation apparently did. From the perspective of today's liberalism, both *Plessy* and *Lochner* are anti-liberal decisions, but the latter is libertarian and the former is not.

A libertarian perspective on *Plessy* is illuminating for several reasons. *Plessy*'s repudiation in *Brown v. Board of Education* has come to be taken, on our political and legal culture, to illustrate the essential role of the state in securing racial justice. But *Brown* is in some ways an inapt example for that. It involved one level of government, the national government acting through the Supreme Court, overturning a racial injustice committed by another level of government, the various states with segregated public education system. *Brown* therefore does not really illustrate the value of statism as such, but only the value of one form of statism (centralized, with judicial review) compared to another (decentralized). Seeing *Plessy* through a libertarian lens more clearly shows how the choice between statism and libertarianism might matter than does examining *Brown*.

In addition, libertarianism is not a widely held view in the contemporary legal academy. Invoking it to analyze *Plessy* may show that it has more value than many think. To put it somewhat crudely, we generally want an approach to constitutional interpretation that gets as many right answers as we can get. Libertarianism does better than statism in explaining why *Plessy* was wrong, and neither statism nor libertarianism has much to say about *Brown* directly.<sup>6</sup> This analysis might then open up some space for further consideration of libertarianism as an approach to constitutional interpretation.

Cass Sunstein argues that *Plessy* and *Lochner* rest on the view that the government must be neutral in the face of social and economic relations that exist in some sense outside of or prior

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<sup>6</sup> Indirectly, libertarianism might suggest that the government ought not be involved in providing education. It would thereby dissolve the problem in *Brown* by condemning all public education, not merely segregated public education.

to the government.<sup>7</sup> *Lochner* barred legislatures from altering the distribution of economic power between workers and employers. The Court excluded from the legitimate scope of the police power what it called “labor law[s] pure and simple.”<sup>8</sup> Labor contracts were freely negotiated, and the purported disparity of power did not mean that employees were coerced into signing any particular contract: If a baker in *Lochner* preferred to work shorter hours than the employer demanded, the baker could move west, become a hod-carrier, or whatever. In light of these real options, the baker was not coerced into signing a contract for long hours. The *Lochner* Court agreed that legislatures could act in response to real problems of public health or safety, which a libertarian would understand as effects of private contracts on third parties, but they could not reject the categories the common law used to determine who had capacity to enter voluntary contracts. The Constitution protected the contracting liberty of those who had the capacity to contract.

*Plessy* too invoked the rhetoric of pre-existing social relations, but unlike *Lochner* it cannot be translated into libertarian terms. Those challenging the statute requiring segregation on Louisiana’s trains assumed, the Court said, that “social prejudices can be overcome by legislation.” But, the Court continued, “if the two races are ever to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.” The challengers’ “fallacy,” according to the Court, was “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”<sup>9</sup>

Both cases use the language of voluntary consent, but in significantly different ways. One

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<sup>7</sup> Cass Sunstein, ‘*Lochner*’s Legacy’, *Columbia Law Review* 87 (1987): 873– 919.

<sup>8</sup> 198 U.S. at 57.

<sup>9</sup> 163 U.S. at 551.

might put it this way: *Lochner* involved a two-party relationship, between bakers who were willing to work long hours and employers who were willing to pay them for their work.<sup>10</sup> *Plessy*, in contrast, involved a three-party relationship.<sup>11</sup> African-American riders and the railroads contracted for unsegregated service. White riders who desired segregated services could have contracted for them, again in an ordinary two-party contract. Instead they inserted themselves into the railroads' contracts with African-Americans. Nor can the contract for unsegregated services be properly described as having a regulable external effect on whites who were not parties to that contract, for the only such effect is a moral one, the distaste whites feel for allowing others to secure unsegregated services. *Lochner*'s libertarianism defined even third-party health and safety effects narrowly, and certainly could not accommodate third-party moral effects.

As the *Plessy* Court saw things, the challenge to segregation rested on a fallacy about the meaning of segregation. Rather than asserting anything about racial hierarchy, segregation simply was doing what a majority wanted, when not everyone's desires could be satisfied. But *Lochner* suggests another way of satisfying everyone's desires: through a regime of voluntary contract.

The railroads were indifferent as between operating segregated cars and operating unsegregated ones; all they cared about was choosing the system that maximized their profits. If white riders were willing to pay a high enough rate for the benefit of riding on segregated cars, one that exceeded the difference between the cost of operating segregated cars and the cost of

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<sup>10</sup> Because the Court found no health or safety problems, there were no third-party effects in *Lochner*.

<sup>11</sup> The following discussion is strongly influenced by Louis Michael Seidman, 'Brown and Miranda', *California Law Review* 80 (1992): 673-753.

operating unsegregated ones,<sup>12</sup> the railroads would operate segregated cars. But if white riders were unwilling to pay the extra costs, the railroads would operate unsegregated cars. The very fact that Louisiana's white railroad riders found it necessary to get the legislature to enact a segregation statute suggests that white riders were unwilling to pay enough, or were unable to aggregate their payments as effectively as they could aggregate their votes.<sup>13</sup> And, of course, African-American riders were perfectly happy to ride on unsegregated cars at the rates the railroads were charging. *Lochner* might suggest that the state law barring such a contract violated the liberty of contract of both the railroads and the African-Americans.

Because *Plessy* also involved relations between African-American and white riders, however, the story must be a bit more complicated. The contract the railroads were willing to enter with African-Americans intruded on the interests the white riders sought to advance. Again, however, *Lochner* might suggest the solution: White riders must offer railroads enough to induce the railroads to operate segregated cars. If they do not, we know that however much they care about segregation, they prefer to spend their money on other things. Just as bakery workers could have bargained with their employers, exchanging shorter hours for lower pay, so white riders could have bargained with railroads. If *Lochner* involved a labor law pure and simple because neither side to the transaction lacked common law capacity to contract, so we might say that *Plessy* involved a race law pure and simple, for exactly the same reason.

The legislation upheld in *Plessy* allowed white riders to short-circuit the bargaining process, just as the law invalidated in *Lochner* allowed bakery employees to short-circuit the

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<sup>12</sup> These costs would include both the direct cost of running a dual set of cars, and the revenue lost from those African-American riders who would have taken an unsegregated train but would not take a segregated one.

<sup>13</sup> Apparently, some railroads in Louisiana were offering segregated services to some riders, although most railroads apparently opposed the segregation statute, in part on the ground that it would deprive them of the flexibility to respond to consumer demand. Compare Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), p. 17, with Jennifer Roback, 'The Political Economy of Segregation: The Case of Segregated Streetcars', *Journal of Economic History* 46 (1986): 893-917.

same process. The Court let white riders use state power to make a contract between two willing parties illegal, instead of requiring them to demonstrate the depth of their concern by voting with their pocketbooks.

A libertarian who applauds *Lochner*, – at least with respect to its refusal to allow legislatures to displace freely bargained agreements – should find it easy to condemn *Plessy*.<sup>14</sup> Indeed, the libertarian aspects of *Lochner* bore fruit a decade later, in *Buchanan v. Warley*.<sup>15</sup> Louisville adopted an ordinance barring home-sellers of one race to sell to homebuyers of another if the house was located on a block with a majority of people of the seller’s race. As in *Lochner*, the city invoked the police power, here its power “to promote the public peace by preventing racial conflicts.”<sup>16</sup> The Court unanimously struck down the ordinance as a violation of the seller’s property rights. The goal of promoting public peace was an important one, the Court wrote, but it could not be “accomplished” by a law denying constitutional rights.<sup>17</sup> The right was, again, the right to sell property on whatever terms the seller and buyer could rely on.

In support of its result, the Court cited *Holden v. Hardy*,<sup>18</sup> a case decided a year after *Plessy* and written by Justice Brown, the author of *Plessy*. In *Holden* the Court upheld a maximum hours law for miners, finding that long hours posed a serious threat to the workers’ health. A libertarian might reply that as long as workers were aware of the risks, they could bargain for a wage premium to compensate them for the incremental risks of working long hours. In the years after *Lochner*, it became possible to re-interpret *Holden v. Hardy* as a case involving people working in such isolated conditions that they might fairly be treated as lacking common

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<sup>14</sup> See, e.g., Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992).

<sup>15</sup> 245 U.S. 60 (1917).

<sup>16</sup> *Id.* at 73.

<sup>17</sup> *Id.* at 81.

<sup>18</sup> 169 U.S. 366 (1897).

law capacity to contract.

Notably, the Court in *Buchanan* did not take that way out. It did not say, that is, that legislatures could intervene in contracts involving African-Americans because African-Americans lacked common law capacity to contract. That contrasts with the Court's willingness a few years after *Lochner* to uphold a maximum hours law for women only, in part on the ground that women's frailties made the contracts they entered unreliable indicators of the women's true preferences.<sup>19</sup> A decade after *Lochner*, then, its libertarianism seems to have become rather full-fledged with respect to African-Americans. A decade before *Lochner*, libertarianism did not have as much bite. Had it been deployed in *Plessy*, the result would have been different.

The libertarian argument against *Plessy* rests in large part on the proposition that white riders' revealed preferences in the marketplace, their unwillingness to offer railroads enough to obtain segregated cars and their reliance on state coercion, demonstrate that they wished to interfere with the preferences of railroads and African-American riders without paying the full cost of that interference. More sophisticated modern analyses of legislation, which are compatible with the fundamental libertarian propositions, show why this might not be so.

White railroad riders, the argument goes, faced a coordination problem. Segregation is something like a "public good" offered by a private railroad: If some white rider rich as Croesus could actually offer a railroad enough to buy a segregated railroad car, he would provide the benefits of segregation to all other white riders who preferred segregated cars to unsegregated ones. This rich rider *must* provide the benefit to other white riders: Segregation consists in riding in cars *with others of the same race*, not in riding in a railroad car by yourself. Of course, no individual white rider who preferred segregated cars could actually offer enough. Railroads

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<sup>19</sup> Muller v. Oregon, 208 U.S. 412 (1908).



might prefer to price-discriminate, offering segregated cars to riders willing to pay a premium.

But price discrimination is ordinarily quite difficult, because sellers, such as the railroads, find it hard accurately to identify those, and only those, willing to pay the right premium.

Legislation is a way to solve this problem, essentially by substituting a prescriptive regulation for individual contracts when the cost of negotiating such contracts, such as contracts that price-discriminate, is high.<sup>20</sup> To simplify the exposition, suppose (a) that railroads will find it profitable to offer segregated services only if nearly all white riders pay a small premium, and (b) that only whites vote for legislators, who are their faithful representatives.<sup>21</sup> Whites can solve their coordination problem if a majority of them – less than the number needed to compensate the railroads – get together to elect legislators who enact a segregation statute. The statute serves as a signal to railroads that they can profitably offer segregated services: If they do so at a small premium, they will find enough riders.

This understanding of *Plessy* and *Lochner* can be deepened by focusing on the fact that the Court in *Plessy* asserted that legislatures attempting to interfere with the natural social relations of African- Americans and whites were engaging in an exercise in futility. The question is whether law can change the distribution of economic or social power. The *Lochner* Court could imagine that a maximum hours law could indeed change the distribution of economic power, but believed that doing so was outside the proper scope of government authority. It believed that protecting health and safety was within the government's legitimate authority, but held that the law at issue in *Lochner* failed to do so and was therefore unconstitutional.

Analogously, the *Plessy* Court may have believed that altering the distribution of social power

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<sup>20</sup> This is probably the place to note that this is a “problem” only from within a particular libertarian position. From a different perspective, the coordination difficulty is a moral advantage.

<sup>21</sup> This simplification does not change the underlying analysis, within what seems to me a relatively large range of realistic possibilities.

was within the government's legitimate authority in the abstract, but that all laws attempting to change the distribution of racial power would fail to do so and were therefore unconstitutional.

But, one might think, that was not the issue in *Plessy*. Rather, the issue was whether legislatures should be allowed to displace ordinary rules of contract law, which would allow the railroads to maintain unsegregated cars as long as doing so made business sense (and no longer, if whites were able to offer enough to purchase segregated facilities). What do the ordinary rules of contract law do? They authorize railroads to sell their services to the highest bidder(s): If African-Americans can offer enough for unsegregated services, railroads provide such services, while if whites offer more for segregated services, railroads offer segregation. Now assume that requiring unsegregated services would not change the distribution of social power between whites and African-Americans. That means that whites would offer more for segregated services than African-Americans would for unsegregated ones. Under the ordinary rules of contract law, the railroads capture the surplus the whites have to offer. Under the statute in *Plessy* the whites do not have to make that offer. In this view, then, the issue in *Plessy* was simply whether railroads or white riders would capture the surplus created by white riders' preferences for segregated services.

Here is another version of this argument: The *Plessy* Court must have understood the ordinary rules of contract law to require unsegregated facilities, at least presumptively.<sup>22</sup> But the presumptive goal of unsegregated services could not be reached. Given existing social relations, whites would inevitably purchase segregated facilities, at least if the setting in which they were purchasing tickets allowed them to do so without incurring substantial costs of coordinating their efforts. All that was at stake, therefore, was who would end up with the money: whites or

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<sup>22</sup> In this view, *Plessy* is linked to the Civil Rights Cases, 109 U.S. 3 (1883), which held unconstitutional a federal public accommodations civil rights law on the ground that the common law required public accommodations to provide nondiscriminatory service.

railroads.<sup>23</sup> Like *Lochner*, *Plessy* was about the distribution of wealth. But if the Constitution barred legislatures from dictating the distribution of wealth between workers and employers in *Lochner*, it did not bar them from dictating the distribution of wealth between whites and railroads in *Plessy*.

Perhaps the Court believed that the constitutional liberty of contract spoke with particular force to the employer-employee relationship, but had little to say about the relationship between whites and railroads. This might be restated: Perhaps the *Lochner* Court took common law property entitlements to be constitutionally fixed with respect to employer-employee relations, but the *Plessy* Court took the same entitlements to be subject to legislative change with respect to the impact of race relations on transactions between whites and corporations.

A libertarian perspective illuminates this view of *Plessy* and *Lochner* as well. Suppose that efficacy is a condition of legal validity: Legal rules that cannot accomplish their goals ought to be changed, if they are common law rules, and are unconstitutional, if they are statutory rules. *Plessy* deals with the first category: The common law rules cannot reach the goal of unsegregated facilities, so legislatures can, and perhaps should, change them. *Lochner* deals with the second category: The statute, considered as a health and safety measure, cannot promote health and safety, and so is unconstitutional. Having set aside the distributional justification for the maximum hours law, the Court considered its health and safety justifications. It found insufficient evidence that a maximum hours law protected the public's health, because there was no reason to think that bakers working long hours produced particularly unhealthy bread. And it rejected the argument that such a law protected bakers' health, because there was no reason to

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<sup>23</sup> The point can be sharpened if we assume that African-American demand for railroad services would not change if railroads instituted segregated cars. Then there is no change in the amount of railroad services provided, and the only question is who captures the surplus. Roughly the same analysis holds if instituting segregated services lowers African-American demand by only a small amount.

think that bakers working long hours were at any greater risk than anyone else, unprotected by legislation, working similarly long hours.

One could say much about these arguments on their own terms. For present purposes, however, suppose we accept the view that futile legislation is unconstitutional. That view provides another justification for *Lochner*. Consider the argument for the statute the Court found impermissible, that the law was a labor law pure and simple, aimed at altering the distribution of economic power between employers and employees. But the economic case favoring maximum hours laws as a way of altering the distribution of wealth between bakers and their employers is a difficult one to make out. There are circumstances under which such laws will indeed significantly alter the distribution of wealth, but it seems likely that those circumstances rarely occur.<sup>24</sup> The most important set of circumstances arises from the possibility that one incremental change, with few or no distributional effects in itself, will contribute to the development of a political movement that will take larger and more significant steps later: From the maximum hours law in *Lochner* to progressive taxation in the Sixteenth Amendment.

Without taking a definitive stance on that question, however, one can fairly say that a Court willing to find the public health justifications of the maximum hours law in *Lochner* inadequate would probably have found the distributional justification to be an exercise in futility as well.

But *Lochner* may be different from *Plessy* here, in a way that makes the results of the cases consistent. One might think that although a maximum hours law might not change the

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<sup>24</sup> The best enumeration of such circumstances of which I am aware is Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power,' *Maryland Law Review* 41 (1982): 563–658. I do not mean to assert that minimum wage laws, for example, never have the distributive effects their most ardent advocates hope for, or that such laws always have perverse effects from their advocates' point of view, but only that the direct distributive effects, when they occur, are typically small. The recent controversy over the distributive effects of minimum wage laws does not lead me to reconsider this relatively modest conclusion.

distribution of wealth as between employers and employees as a class, it might reduce the amount of employment (and incidentally benefit those employees who continue to hold their jobs). Libertarianism as such has nothing to say about the proper level of economic activity, but one can plausibly think that libertarians might believe that, once their fundamental principles are satisfied, policies ought to maximize aggregate social wealth.

Now suppose that a segregation law simply changes the distribution of wealth between railroads and white riders without affecting the overall level of railroad services provided. If the law in *Plessy* solved a coordination problem it is compatible with libertarian premises, and if it had no effect on aggregate social wealth, it would be consistent with the supplementary principle I have imputed to libertarians as well.

Consider next a different difficulty libertarians might have with the statute in *Plessy*. Suppose that the statute in *Plessy* did solve a market-coordination problem for whites. Recent works on the social meaning of law defend some laws precisely on the ground that they solve such problems, where merely reducing the cost of arriving at agreements would be insufficient.<sup>25</sup> The idea that laws can regulate social meaning can best be understood by contrasting such laws with laws, which we can call *instrumental*, that affect behavior by changing the costs or benefits associated with the behavior. Laws that regulate social meaning are designed to change behavior as well, but indirectly rather than directly. They communicate a view about correct behavior, and thereby induce people to reevaluate their prior calculation of costs and benefits.

The clearest case for a social meaning defense of law is a law barring race discrimination in providing public accommodations, including rail services. Consider a provider who is personally indifferent about whom he or she serves. The provider may believe that he or she

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<sup>25</sup> See, e.g., Lawrence Lessig, 'The Regulation of Social Meaning', *University of Chicago Law Review* 62 (1995): 943–1045; Cass R. Sunstein, 'On the Expressive Function of Law', *University of Pennsylvania Law Review* 144 (1996): 2021–53.

would lose business from bigoted customers if the services were provided on an unsegregated basis, and that the loss of business would exceed whatever increment there is from providing such services. A law barring racial discrimination in providing services has two effects on this supplier. The law may demonstrate to the supplier that there is more latent support for, or at least indifference to, unsegregated service than the supplier believed. If so, the law allows the provider to increase his or her business by correcting this misestimate. In addition, the law allows the provider to explain to the bigots that he or she had no choice but to provide the services, and it deprives the bigots of an alternative supplier of segregated services. Suppliers and those customers who desire unsegregated services are better off, but they could not reach this position through voluntary contracts, nor was their problem that arriving at voluntary contracts was too costly.

I believe that the primary motivation for the development of this theme is that scholars have been persuaded that some laws and judicial decisions they find normatively attractive actually have fewer direct beneficial consequences than they first believed. They have been impressed by arguments that *Brown v. Board of Education* had limited immediate impact,<sup>26</sup> and that by the time schools in the deep South began to desegregate, the urban and suburban transformation of the South had proceeded so far that desegregation led to relatively little interracial contact within schools. *Brown* can still be defended, however, on the ground that it made a valuable moral statement, which signaled to African-Americans and whites alike that there might be greater latent support for desegregation than the market or ordinary politics, constrained by a particular history, suggested.

A libertarian would, I think, be suspicious of the uses of law to regulate social meaning.

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<sup>26</sup> The most influential work has been Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

On the most general level, laws regulating social meaning do not secure the basic conditions of personal liberty, nor do they address problems of contractual fraud, coercion, or third-party effects narrowly understood. More specifically, a libertarian would note that mere declarations would often seem sufficient to solve the coordination problems, or to signal greater unexpressed support for one or another position, but laws typically go beyond declarations to include sanctions. And sanctions directed at contracting behavior bother libertarians.<sup>27</sup> In *Plessy*, for example, a libertarian might say, “Let the legislature declare its view – and therefore the view of a majority of whites – that segregation is a good idea, and then see how railroads respond.”<sup>28</sup> A sanction might be needed to make credible the railroads’ response to African-Americans, that they had no choice about providing segregated services. But that only exacerbates the libertarian’s difficulty: The segregation law blocks people from writing contracts that might be acceptable to all.

A related difficulty is that laws regulating social meaning have no apparent limits. Suppose a declaratory law does not elicit changed behavior. Proponents can respond that the signal the law sent was not strong enough. Sanctions are necessary to make sure that people understand the seriousness of the message being sent, to understand, that is, that there really are others who would like to purchase segregated or desegregated services. If behavior continues unchanged, proponents can repeat their response and escalate the sanctions, up to some unspecified limit set by notions of proportionality.<sup>29</sup> The instrumental benefits of laws regulating social meaning by means of severe sanctions are likely to be too small. Properly speaking, this is

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<sup>27</sup> See, e.g. Lessig, *supra* note 25, at 1016 (describing though not endorsing the concern).

<sup>28</sup> Note as well that sanctions bar African-Americans from outbidding whites even if they wanted to.

<sup>29</sup> Lessig, *supra* note 25, at 1043–44, concludes by noting the need to identify limits on the use of law to regulate social meaning, while refraining from proposing them.

a liberal and not a libertarian concern.<sup>30</sup> By hypothesis this sort of law regulating social meaning does not alter the preferences people actually have, but only elicits behavior consistent with those preferences.<sup>31</sup>

Finally, using law to regulate social meaning is inconsistent with the fundamental libertarian assumption that preferences are entirely individual. As Professor Seidman puts it, advocates of segregation did not have a mere “taste” for segregation, but desired “to live within a more general system or culture in which...segregation is a part. The ability of individuals to purchase...segregated accommodations hardly satisfies those who believe that one system...is a moral imperative.”<sup>32</sup>

Libertarians reject this view, and therefore have a ground on which to reject the defense of *Plessy* as a form of regulating social meaning. Again to echo Professor Seidman, *Buchanan* is hard to understand except on the ground that it rejects the view that law can regulate social meaning.<sup>33</sup> The Court there treated the transaction as one between a willing seller and a willing buyer, with no external effects. The case for residential segregation on health or safety grounds was surely as weak in *Buchanan* as was the case for a maximum hours law on similar grounds in *Lochner*. But the desire to create a segregated society was patent, and the Court simply refused to entertain it as a permissible legislative goal.

A libertarian perspective illuminates *Plessy* in two ways. First, the connection between libertarianism and *Lochner* suggests that libertarianism might have impeded the development of the American system of apartheid. And yet, to the extent that the statute in *Plessy* really would have been futile, and would only have regulated the distribution of wealth between railroads and

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<sup>30</sup> Here I use *liberal* in its philosophical sense.

<sup>31</sup> Libertarians do object, distinctively, to laws attempting coercively to change the preferences people actually have.

<sup>32</sup> Seidman, *supra* note 11, at 689.

<sup>33</sup> *Id.* at 698. Professor Seidman uses the term “nonindividualist premises,” which seems to me equivalent, at least in this context, to “social meaning.”



white riders, the libertarian perspective in itself does not provide a basis for criticizing *Plessy*.

Second, some recent defenses of socially progressive programs emphasize how they might be instrumentally effective through their regulation of social meaning rather than through the incentives they directly provide. Libertarianism's emphasis on regulating behavior by appeal to reason rather than through coercion, even coercive regulation of social meaning, suggests that the regulation of social meaning through law has an underside. The reason is straightforward: Someone has to attempt to use law in that way, and whoever does so will have a set of social meanings in place already. They will deploy *their* background and to them uncontested meanings in an effort to change the social meanings of others' behaviors. But, as the law at issue in *Plessy* shows, the meanings already in place – the latent preferences of white riders – need not be defensible. In the end, therefore, the libertarian perspective offered here is at best incomplete. Sophisticated libertarians provide the necessary supplement in their account of individual rights.<sup>34</sup>

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<sup>34</sup> As we have seen the typical reliance on background common-law rights will be insufficient as well.