RACE NUISANCE : THE POLITICS OF LAW IN THE JIM CROW ERA

Rachel D. Godsil

Abstract

This article explores a startling and previously unnoticed line of cases in which state courts in the Jim Crow era ruled *against* white plaintiffs trying to use common law nuisance doctrine to achieve residential segregation. These "race-nuisance" cases complicate the view of most legal scholarship that state courts during the Jim Crow era openly eschewed the rule of law in service of white supremacy. Instead, the cases provide rich social historical detail showing southern judges wrestling with their competing allegiance to precedent and the white plaintiffs' pursuit of racial exclusivity. Surprisingly to many in the academy, the allegiance to precedent generally prevailed.

The cases confound prevailing legal theories, particularly new formalism and critical race theory's interest convergence. While new formalists may at first see these cases as supportive of their claims, the Article illustrates the limitations of formalism's reach by also exploring the related line of racially restrictive covenant cases. Similarly, while interest convergence scholars might attempt to read many of the cases as supporting white property owners' interests, this Article demonstrates that the race-nuisance cases are better understood as demonstrating that white interests are multi-faceted. Interest convergence is therefore a useful way to explain unexpected outcomes but not to predict such outcomes. In sum, the article casts substantial doubt on the background assumptions about the way law worked during the Jim Crow era, and thus provides a more textured understanding of that period.

The article also derives important insights into the present from the race-nuisance and related cases. These insights offer both optimism for those concerned about racial liberation, but also realism about the limits of the law. First, common law doctrine may be a potentially powerful vehicle for people of color and other disenfranchised groups since courts in the United States do not lightly disassociate themselves from common law precedent or operative legal norms and ideals. Second, the fact that white interests are not as monolithic as often presumed offers potential for strategic alliances that may significantly influence opportunities for success – both legal and political. Lastly, and less hopefully, legal norms do not easily and always translate into social practice. Any hope for lasting change will be accomplished only by social and political movements.

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I. INTRODUCTION

In 1883, a white family brought a law suit in state court claiming that a black family moving in next door would be a nuisance. The case, *Falloon v. Schilling*, was litigated to the Kansas Supreme Supreme Court, which issued a unanimous decision.[2] This decision formed the precedent for 28 more such cases brought during the Jim Crow era in other state courts. Most cases were in the south, Louisianna, Mississippi, Texas, Tennessee, but a few families brought what I call "race-nuisance" cases in the north as well. When I recount this story to my students, other law professors, and even non-lawyers, the vast majority assume that I am describing yet another instance of racist state courts warping doctrine in favor of white supremecy. The story's conclusion suprises my listeners: in most cases, the white plaintiffs lost.[3]

Many current scholars presume that "Jim Crow" [4] courts eschewed the rule of law, openly treating Black people as unworthy of legal protection.[5] Articles addressing Jim Crow describe countless

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[2] 29 Kan. 292 (1883).

[3] Few legal scholars have referenced the existence of white challenges to black people using common law nuisance and no one has yet analyzed the decisions. *See* Carol Rose, *The Story of Shelley v. Kraemer* in PROPERTY STORIES 173 (Gerald Korngold and Andrew P. Morriss eds.) (2004); John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 319 (2001).

[4] The term "Jim Crow" was originally popularized in the 1830s by a white minstrel, Thomas "Daddy" Rice. Donning "black face" and attired in beggar's clothes, Rice performed a routine he called "Jump Jim Crow," in which he imitated an elderly and crippled Black man owned by a Mr. Crow: "Weel about, and turn about / And do jis so; /Eb'ry time I weel about,/ I jump Jim Crow." Historians have not determined how Jim Crow came be synonomous with racial segregation. LEON LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

[5] *See e.g.*, MARY FRANCES BERRY, THE PIG FARMER'S DAUGHER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865

incidents of state courts' differential treatment of Blacks, and many court opinions contain blatantly racist language.[6] Needless to say, the Jim Crow era was replete with such behavior. However, the race nuisance cases complicate this view. Instead of the picture we expect, the cases show southern judges wrestling with their competing allegiance to precedent and the white plaintiffs' pursuit of racial exclusivity.

In these cases at least, the judges did not reflexively and consistently rule against Black people and for white plaintiffs in all cases. In light of the underlying racism of this era, this article explores multiple legal theories in search of an explanation: legal formalism,[7] property theory,[8] and critical race theory.[9] Each sheds light on aspects of judicial decisionmaking in these cases – but ultimately, none satisfactorily explains the entire picture.

My goal in this Article is, to use Randall Kennedy's words, to "confront the full, complicated vastness"[10] of this particular history, rather then viewing it as an alien caricature supporting a particular scholarly view. The value of these cases lies in their details and specificity. The details allow us then to critique and complicate the one-size-fits all theories so common in legal scholarship.[11]

When we look closely, we observe some southern state courts yielding to precedent, relying upon stated norms of equal treatment and race neutrality, and reaching outcomes obverse to white plaintiffs. A

TO THE PRESENT 91 (2000); A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521 (1990); *cf.* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 81 (Oxford Univ. Press 2004) *[hereinafter* KLARMAN, JIM CROW].

[6] *See infra* notes --.

[7] Others will contend from a different political perspective that the cases illustrate the potency of what David Bernstein calls "traditional jurisprudence" or legal formalism. *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001). The Jim Crow judges were reflexive formalists for whom race was not always as salient as is often assumed.

[8] Scholars including most recently Michael Klarman have argued that concern for private property rights transcends even its concomminant racism: in other words, property trumps. *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 81 (2004).

[9] A critical race theorist would likely read the cases as an example of Derrick Bell's white interest convergence. According to this view, the cases likely reaffirm broader white interests. Obviously, the fact that white plaintiffs lost does not necessarily guarantee that the interests of white elites were not furthered by the cases. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[10] Randall Kennedy, Race Relations and the Tradition of Celebration: The Case of Professor Schmidt, 86 COLUM. L. REV. 1622 n.36 (1986).

[11] Legal historians often critique what they refer to as "law-office history" – which is the practice of using historical facts selectively to support a predetermined normative position. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13.

"new formalist" might use these cases as evidence of both the normative value and the prevalence of formalist decisionmaking. I argue, however, that the race nuisance cases cannot be fully explained by formalist decisionmaking and, more significantly, that the related line of cases concerning racial zoning and the enforceability of racially restrictive covenants show the limits to formalism in some racially charged cases. State courts were split on the constitutionality of racial zoning cases and all southern courts and most northern courts with significant Black populations enforced restrictive covenants, while some western and northern courts did not.[12]

In other words, during the same period that courts were adhering to nuisance precedent to rule against whites seeking to exclude individual Black families or institutions from locating in their neighborhoods, courts were also twisting precedent to uphold the enforceability of racially restrictive covenants. The challenge for formalism is then to explain the difference between the two sets of cases.

Some scholars have suggested that our national commitment to property rights dictated the outcome of property disputes even when race was involved. This use of property explains divergent decisions in the property area without upsetting our general assumption that white interests always prevail. The problem with this argument is that in most property disputes, both parties will have a property interest at stake. In the nuisance context, the plaintiff is seeking to protect her interest in her enjoyment of her land, while the defendant is defending his use of his land. Both are "sticks" in the property "bundle." Similarly, in racially restrictive covenant cases, the plaintiff will be a property owner with an interest in enforcing a covenant which presumably bolsters her property value, while the defendant will be a current or prospective property owner seeking the right to alienate or purchase property. Both are property interests which courts have in other contexts gone far to protect. Therefore, the simple assertion that property trumps often made by scholars trying to explain decisions involving race and property that don't favor the white party fails to tell us anything helpful.

While a simplistic recitation of the importance of property does not explain much, property theory from this period is more enlightening. Recent scholarship reasserting a natural-law theory of property suggests that in the pre-20th century legal regime, a physical-invasion theory of property created a strong presumption in favor of free use of land unless one's use resulted in a physical invasion of another's property.[13] This argument helps establish a theoretical baseline for the race-nuisance cases. This theory, however, does not explain why race did not become one of the many exceptions to this general trend. Courts created

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[12] *Id.*

[13] *See* Eric Claeyes, *Jefferson Meets Coase: Train Sparks, Natural Rights, and Law and Economics* (draft on file with author).

exceptions for funeral homes, "bawdy" houses, and certain other uses that did not cause a physical invasion of another's land, but upset certain norms of order and morality. It was certainly conceivable that race might have become one of those exceptions.

Instead, there appears to have been some commitment to the norm of race neutrality or equal treatment – even in state courts during Jim Crow. In response to the "Black Codes" that proliferated in the post-Civil War South, the Reconstruction Congress enacted the Civil Rights Act of 1866, which provided to all persons regardless of race "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[14]

The first race-nuisance decision seems to have tracked the Civil Rights Act and the ideals underlying its passage. The Court stated:

> Equity will not interfere simply because the occupants of such house are by reason of race, color, or habits disagreeable or offensive. A negro family is not, per se, a nuisance; and a white family cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish or a French family.[15]

No court held to the contrary.

A critical race theorist may reply that courts were always seeking to maximize white interests even when the stated outcome of the case appeared to favor people of color. One variant of this claim is Derrick Bell's well-known theory of interest convergence.[16] This story plays out in the race-nuisance cases because a reasonable number of the race nuisance cases may have actually buttressed segregation by facilitating the existence of separate institutions for Blacks. Very few of the race-nuisance cases challenged the architecture of segregation. Rather, most of the cases were brought by white landowners seeking to exclude *segregated* institutions[17] or white families seeking to house Black

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[14] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[15] *Falloon*, 29 Kan. at 292.

[16] Bell, *supra* note __.

[17] Thoenebe v. Mosby, 101 A. 98 (1917); Green v. State ex rel. Chatham, 56 So.2d 12 (1952).; Morrison v. Rawlinson, 7 S.E.2d 635 (1940); Fox v. Corbitt, 194 S.W. 88 (1917); Giles v. Rawlings, 97 S.E. 521 (1918); Harty v. Guerra, 269 S.W. 1064 (1925); Mitchell v. Deisch, 18 S.W.2d 364 (1929); City Council of City and County of Denver v. United Negroes Protective Ass'n, 76 Colo. 86 (1924); Hall v. Moffett, 170 S.E. 193 (1933); Diggs v. Morgan College, 105 A. 157 (1918); Killian v. British Shalom Congregation, 154 S.W.2d 387 (1941); Dudley v. City of Charlotte, 27 S.E.2d 732 (1943); Crist v. Henshaw, 163 P.2d 214 (1945); Baptist Church of Madisonville v. Webb, 178 S.W. 689 (1915); Boyd v. Bd. of Councilmen of City of Frankfort, 77 S.W.669 (1903); Spencer Chapel M.E. Church v. Brogan, 231 P. 1074 (1924);

servants on their property.[18] Only a few of the cases were brought by whites trying to exclude individual Blacks of equal status from white neighborhoods.[19] For a segregated society to exist, segregated institutions had to be located somewhere, and the small Black enclaves may not have been big enough for cemeteries, hospitals, parks and sanatoriums. Therefore, the cases in which white plaintiffs were unsuccessful may simply have been instances in which the interests of a small number of white landowners were sacrificed for the greater good of racial segregation.

However, this theory does not explain all the cases. Several of the cases simply cannot be ascribed to the fulfillment of white supremacy – a Black funeral director permitted to move into a wealthy white Memphis neighborhood, a Black man dispensing medicine without a license to whites and Blacks alike.[20] If contrary outcomes to any dispute can be decided as interest convergence, then it is such a broad claim that it fails to explain any outcome. Moreover, it eliminates any agency on the part of the Black litigants.

A close read of these cases also complicates the interest convergence theory by showing the impossibility of identifying a universal "white" interest. Instead, the nuisance and related cases illustrate that white interests are not monolithic. At regular intervals, a particular outcome would help one group of whites and harm another. For example, cases involve white people challenging other white peoples' attempts to house Black servants on their property.[21] We can say that obviously the dominant class is the group able to hire servants rather than the group opposing their residence. However, others are not so easily categorized. Is the dominant class the developer seeking the right to sell to whoever would purchase, or the developer seeking to maintain a particular area's racial exclusivity? Indeed, the cases show that groups of whites sometimes collaborated with groups of people of color to seek jointly beneficial goals. The conventional view of white peoples' motives and behavior during the Jim Crow era would suggest the impossibility of these moves.

Lancaster v. Harwood, 245 S.W. 755; Wright v. DeFatta, 142 So.2d 489 (1962); City of Memphis v. Qualls, 64 S.W.2d 548 (1933); Jones v. Trawick, 75 So.2d 785 (1954); Woods v. Kiersky, 14 S.W.2d 825 (1929).

[18] *Lancaster*, 245 S.W. 755; *Woods*, 14 S.W.2d 825; Young v. St. Martin's Church, 64 A.2d 814 (1949).

[19] *Falloon*, 29 Kan. 292; Holbrook v. Morrison, 100 N.E. 1111 (1913).

[20] These cases undercut any dichotomous distinction between idealism and realism – neither theory can wholly explain our actions. *See* DON HERZOG, HAPPY SLAVES 11-14 (1989). Viewing the three sets of cases in detail suggest that ideals sometimes affect outcomes in ways that seem to diverge from interests, but that these same ideals are often overwhelmed by the pursuit of contrasting interests. Even in the latter scenario, though, the ideals may set the stage for later progress.

[21] *Lancaster*, 245 S.W. 755; Worm v. Wood, 223 S.W. 1016 (1920).

While the race-nuisance cases are filled with racist references, they nonetheless show that as an "ideal," race neutrality was in play during this era. As an operative ideal, it may help to explain the difference in the outcomes and ideals present in the nuisance, zoning and restrictive covenant cases. For race to affect the outcome in the nuisance cases, courts would have had to find expressly that race was salient to the outcome. The white plaintiffs were asking *courts* to make an affirmative finding that black people as a class were nuisances – akin to pollution. If courts considered the legal ideals of equal treatment to have any meaning at all, they precluded such a finding. By contrast, the racial zoning cases involved courts either invalidating or deferring to *legislative* decisions about the separation of the races, and the restrictive covenant cases allowed the judges to see themselves as simply enforcing private agreements. A court decision labeling Blacks a nuisance would have been a much more significant deviation from the *legal* ideal of equal treatment than a court decision upholding a private covenenant excluding Blacks. [22] The racial zoning cases were more troublesome because they clearly involved state action – but after *Plessy v. Ferguson*,[23] simply separating the races had of course been upheld. Indeed, in the cases upholding racial zoning, the courts often mentioned the beneficial effects of segregation.

From this rich historical source, we can also derive insight into the present. Some of these insights offer hope for the role of law in securing racial liberation. From these opinions, we can conclude that courts in the United States do not lightly disassociate themselves from common law precedent or operative legal norms and ideals. Therefore, legal doctrine and ideals are worth fighting over. The race-nuisance, and related cases, also shed light on the role of strategic alliances in legal battles. First, there have always been some in the dominant group who hold a firm ideological commitment to equality. Perhaps more importantly, the interests of the dominant classes are not monolithic – subsets of whites will at different points have more in common with people of color than with other groups of whites. These instances should be exploited through the formation of strategic alliances. These strategic alliances are age-old – the litigants in *Buchanan v. Warley* used them,[24] as did those favoring affirmative action in the recent *Grutter* litigation.[25]

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[22] According to formalist or classical legal scholars, most legal disputes "had 'right' answers dictated by a small number of relatively abstract principles.'" Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1521. If that were so, one would assume that courts with differing political views about race and integration would reach the same outcome when deciding whether the covenants were valid. *See infra* Part III.C. for a full discussion of the racially restrictive covenant cases.

[23] 163 U.S. 537 (1896).

[24] Buchanan v. Warley, 245 U.S. 60 (1917).

[25] Grutter v. Bollinger, 539 U.S. 306 (2003).

However, the fact that cases such as these were decided during the Jim Crow era should also caution us about the limits of the law. It is intriguing to anyone interested in the historical development of law that some judges in the Jim Crow era subscribed – or felt obligated to invoke – ideals of equal treatment. It is also obvious that this norm did not translate into social practice. Indeed, the litigants in the cases themselves may not even have benefited from the legal ideals. There are limits to relying solely upon legal opinions to deduce any conclusions about life as it was lived. The white plaintiffs who sought to use nuisance law to exclude Blacks from their neighborhoods may have turned to other means to achieve this end once they lost in court. As Carol Rose has argued:

> [O]ur everday lives are filled with instances that call on us to respect property, even when no policemen or private retaliation can restrain us: we don't steal the unlocked and unguarded bicycle, we don't pocket the bubble gum when no one is looking, we live up to our side of a deal, even with a stranger who would have no easy way to enforce the bargain. A property regime, in short, depends upon a web of respect, honor, and acceptance that somehow modifies the immediate appetite for 'more.'[26]

Regardless of the outcomes of certain cases, this crucial web of respect, honor and acceptance of the rights of Blacks to own property was lacking. Indeed, land ownership often incited violent reprisal by whites.[27] A Savannah Black newspaper reported, "It is getting to be a dangerous thing, to acquire property, to get an education, to own an automobile, to dress well, and to build a respectable home."[28] Another Black newspaper reported, "[n]ot infrequently, successful blacks found themselves accused of improper relations with a white woman and were forced to sell their property at a loss and leave town."[29] During a public debate between two young Black women in Charlotte in 1901 entitled, "Is the South the Best Home for the Negro?", Laura Arnold noted: "All too many blacks . . .had placed their fondest hopes in the security of property, only to be devastated without notice or reason."[30]

The cases do not present a rosy picture of life or law in the Jim Crow era. They are replete with the racism of the day. Nor do they undercut the reality of lynchings, violence, and disenfranchisement that took place during this period. Instead, they illustrate that these social practices occurred despite a legal system that had somewhat more in

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[26] Carol Rose, *'Enough and As Good' of What*?, 81 N.W.U.L.R. 417, 438 (1987).

[27] Despite formidable obstacles, by 1910, Blacks acquired fifteen million acres of land in southern states. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NORTHWESTERN L. REV. 505, 526 (2001).

[28] *Id*. at 153.

[29] *Id*.

[30] *Id*.

common with our own than we like to remember. As importantly, the cases introduce us to people who challenged the white supremacist status quo during its ascendance – and prevailed.

This article begins with a detailed description of the race-nuisance cases. I divide the cases into the "mere presence"[31] cases, in which white landowners argued that the presence of certain racial minorities interfered with their use and enjoyment of land, and the "conduct" cases, in which whites contended that the particular uses of land by these same groups resulted in common law nuisances. Part II examines competing jurisprudential theories formalism, property theory, and critical race theory, and the related linen of cases involving racial zoning and racially restrictive covenants. This Part concludes that each is useful in understanding the outcomes of the race-nuisance cases, but none sufficient. Part III offers a series of insights into the present from the race-nuisance and related cases.

II. RACE AND NUISANCE IN THE COURTS

Conventional wisdom would predict during the worst of the Jim Crow era, white plaintiffs would have been able to use nuisance doctrine successfully to challenge the presence of Black people in white neighborhoods. Nuisance doctrine during this era was an elastic concept that formally at least precluded any use of land that would cause annoyance to adjacent landowners.[32] The presence of Black people would undoubtedly have caused such annoyance to the many racist and segregationist whites of this era. The first two decades of the 20th century saw waves of pseudo science supporting notions of Black inferiority that cemented racist attitudes and supported the need to segregate the races.[33] According to historian George Fredrickson, whites began to conclude that there was a need to "segregate or quarantine a race liable to be a source of contamination and social danger to the white community, as it sank even deeper into the slough of disease, vice and

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[31] Nagle, *supra* note __, at 275 (noting that some neighbors complained of the "mere presence" of an unmarried couple and African-American family).

[32] *See*, *e.g.*, Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 273 (Rose notes that "late nineteenth and early twentieth century American states increasingly recognized rights of action for nuisance against landowners who caused undue smoke, fumes, noise, water pollution, and even loss of light and air", but also cites cases involving the breeding of mares and stallions within the sight and hearing of a dwelling).

[33] *See*, *e.g.*, Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 651-56 (1985) (Hovenkamp explores the science and social science racial inferiority theories of the late 19th and early 20th century and concludes that the science of the day created a great fear of the social costs of racial mixing, prompting segregation legislation); *Schmitt*, *supra* note __ at 453.

criminality."[34] The white plaintiffs in the race nuisance cases sought to enshrine these views into law in the race nuisance cases.

This Part surveys the race nuisance cases in detail. I have identified 28 reported appellate decisions in which white homeowners or municipal governments sought to use nuisance doctrine to preclude the use of land by Blacks or other racial minorities. The first section describes those cases in which white homeowners claimed that the "mere presence" of racial minorities constituted a nuisance. These cases were uniformly unsuccessful. The second section describes cases in which white homeowners or municipal governments challenged certain conduct occurring on the land by Blacks or other racial minorities. The results are significantly more mixed in these cases. Because few readers are likely to be familiar with the cases, this Part is intended to be descriptive and not analytical.[35] I explain my conclusions and impressions from the cases in Parts IV and V.

A. Overview of Nuisance Doctrine

Nuisance law was in the midst of tremendous change from the late 19th to the mid-20th century. The doctrine originally protected each landowner's right to the quiet enjoyment of his land.[36] Courts thus enjoined any use – even if otherwise legal – that infringed upon the essential elements of a landowner's enjoyment.[37] According to Blackstone's Commentaries, "'it is incumbent on a neighboring owner to find some other place,'" if the neighbor's use of his land "'causes injury to the land of another.'"[38]

As industrialization flourished, many courts became more restrictive with the concept of nuisance.[39] A primary means to allow industrialization without formally altering the doctrine was to refuse to

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[34] GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND 255 (1971).

[35] There are multiple ways to categorize the cases, chronologically in recognition that different historical periods may explain different outcomes, by state because different cultural contexts may explain different outcomes, and by type of conduct in recognition of jurisprudential differences. I chose the latter for ease of comparison among cases and because this essay is attempting to understand modes of judicial decisionmaking.

[36] MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 31 (Harvard U. Press 1977). As Louise Halper has written, nuisance has long been considered a "messy and dated doctrine." Louise Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998).

[37] Rachel Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L. J. 1807, 1851-1858 (2004).

[38] 3 W. BLACKSTONE, COMMENTARIES 217-218; *see also* Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeal 1850-1915*, 54 ALBANY L. REV. 301, 305 (1990); Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 195 (1990).

[39] *Id*. at 199.

issue injunctive relief to enjoin prospective nuisances.[40] Courts were in considerable disagreement over the degree of interference that should be legally tolerable and the relevance of social utility of defendants' use.[41] Some courts focused upon the plaintiff's right to be free from unreasonable interference. Others held that plaintiffs have an action only if defendant's use of his land is itself unlawful.[42] Ultimately, some courts began expressly to adopt a formulation of nuisance doctrine that balanced the interests of plaintiffs and defendants, focusing on such factors as the degree of harm, the locality, and the social value of defendant's actions.[43]

However, with regard to purely residential uses, not disputes between residents and industry, courts have arguably become less restrictive over the decades. Some courts never deviated from the more formalistic definition of nuisance as any action that resulted in a substantial harm to another's use of land.[44] Others, perhaps responding to the recognition of the importance of aesthetics in land use planning generally, have allowed aesthetic harms to form the basis for a nuisance action.[45] At bottom, nuisance doctrine was largely in flux during the era in which the race-nuisance cases were brought. Indeed, John Nagle, the only recent scholar to grapple with the question of what sorts of harm are or should be cognizable as nuisances,[46] both acknowledges the difficulty of identifying nuisance doctrine's inherent limitations, and uses early 20th century nuisance cases to define the contours of actionable harm.

B. The Mere Presence of a Black Family is Not a Nuisance

In 1883, the Kansas Supreme Court in a case entitled *Falloon v. Schilling* considered the question of first impression of whether nuisance doctrine entitled a white family to enjoin a neighboring landowner from renting homes to Black families.[47] In bold and sweeping language authored by Justice David Brewer, the Court declared that it did not:

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[40] *See* Andrew H. Sharp, Comment, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENVTL. AFF. L. REV. 627, 630 (1998). Some courts limited anticipatory nuisance findings to "per se nuisances." *See, e.g.*, Cooper v. Whissen, 130 S.W. 703, 704 (Ark. 1910); King v. Hamill, 54 A. 625, 627 (Md. 1903). Others denied injunctive relief by requiring specific and definite allegations of harm; *see* Adams v. Michael, 38 Md. 123, 128 (1873).

[41] Lewin, *supra* note __, at 201-203.

[42] *Id.* at 202.

[43] *Id.* at 209.

[44] *See, e.g.*, Jost v. Dairyland Power Coop., 172 N.W.2d 647 (Wis. 1969).

[45] *See, e.g.* Prah v. Maretti, 108 2d 223 (1982).

[46] Nagle, *supra* note __, passim.

[47] 29 Kan. 292.

> Equity will not interfere simply because the occupants of such house are by reason of race, color, or habits disagreeable or offensive. A negro family is not, per se, a nuisance; and a white family cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish or a French family.[48]

In *Falloon*, defendant Schilling owned an 80 acre tract in the rapidly growing town of Hiawatha. He sold less than an acre of the land, which was ultimately purchased by plaintiff Falloon, a white man who lived on the property with his wife and young sons. The Falloon family home was within 13 feet of the next lot. Schilling wanted to buy back the land, but his offer was rejected. In his complaint, Falloon claims that Schilling then "conceived the oppressive and unlawful idea of rendering [his] home obnoxious and unendurable by erecting cheap tenement houses on either side of [his] land and filling them with worthless negroes, that they may annoy [Falloon's] wife, who is a person of delicate health", and punish them for refusing Schilling's offer. Consistent with his plan, Schilling erected a small building of 12 by 20 feet, and placed it within four feet of Falloon's land. He then rented it to a "colored preacher, who occupied it with his wife and one child."[49]

Falloon brought suit, seeking to enjoin Schilling from erecting such buildings, on the grounds that the size of the homes and the race of the occupants violated the maxim "*sic utere tuo ut alienum non laedes*."[50] The Court found that Falloon failed to sustain his allegations since the homes, while small, looked neat and that the family in fact was the family of a preacher and "behaved well" and were not "*worthless* negroes."[51]

In addition to the language noted above, with respect to the renting to 'negroes,' the Court stated:

> The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as the neighbor's family is well behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially, it may be to plaintiff; plaintiff has no cause of complaint in the courts.[52]

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[48] *Id*. at 294.
[49] *Id*. at 292.
[50] *Id*. at 293.
[51] *Id*. at 292 (italics in the original). In addition, the court found that as a universal rule, the size and quality of a house never itself constitutes a nuisance. "A land-owner may erect upon his land the smallest or most temporary kind of dwelling house or store in close proximity to the finest mansion." *Id*. at 293.
[52] *Id*. at 294.

Nuisance treatises and digests immediately incorporated the *Falloon* holding.[53]

Falloon and the treatise language it inspired appear to have influenced at least two of the five other reported cases that considered whether the mere presence or potential for the presence of Blacks or other people of color near a white residence constituted a nuisance. In *Worm v. Wood*,[54] and *Lancaster v. Harwood*,[55] both decided by appellate courts in Texas in the early 1920s, the courts rejected plaintiffs' requests for injunctions to enjoin Blacks and Mexicans from moving nearby, despite the claim that their presence "will greatly injure and practically destroy the social conditions of the neighborhoods."[56]

The *Worm* court quoted a treatise in dismissing the argument that small shacks occupied by "negroes, and Mexicans and a low class of white people"[57] would allegedly cause unhealthy conditions and a greater likelihood of fire. While the court allowed that such uses may in the manner of their use constitute a nuisance, the court was firm that "character of use is not inherent in the houses of the character of those alleged in plaintiffs' petition, and as the same will not necessarily follow, the building of the houses, which is lawful, cannot be enjoined."[58] In other words, small shacks housing Blacks, Mexicans, and poor whites are not necessarily nuisances.

Worm was then cited by the court in *Lancaster v. Harwood*.[59] In contrast both to the egalitarian language employed by the court in *Falloon* and the terse conclusions reached in *Worm*, the *Lancaster* court chose to cite the plaintiffs' allegations at some length and to describe the inner turmoil of the judges.

Agnes Harwood sought to enjoin John Lancaster from erecting a garage and servants' quarters, which would house "negro" servants. The white family described the harm they would experience from the presence of the 'negro' servants in detail.[60] The Texas Supreme Court

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[53] For example, an early authoritative treatise, the R.C.L. text stated:

> It is true as a general proposition that a proprietor enjoys a right to improve his own property in any way he sees fit, provided the improvement is not such a one as the law will pronounce a nuisance; and this he may do, although he make such improvement through malice or ill will. And accordingly it has been held that the owner of land has the right to erect small, cheap and movable tenement houses thereon close to the line of an adjacent owner, and let them to orderly colored tenants.

20 R.C.L. s. 45, p. 429.

[54] 223 S.W. 1016 (1920).

[55] 245 S.W. 755 (1922).

[56] *Worm*, 223 S.W. at 1018.

[57] *Id*. at 1018.

[58] *Id*. at 1019.

[59] 245 S.W. at 757.

[60] *Id*. at 755-756.

dissolved the trial court's temporary restraining order, but made clear that the judges personally sympathized with the appellee:

> We earnestly deprecate the inexorable mandate of the law forbidding us the privilege of following our own personal sentiments, which, as individuals, we are frank to admit, are wholly with the appellee, and which if we were at liberty to follow, would result in granting the appellee the relief sought.[61]

The Court noted the inefficiency of law:

> To prevent all acts of injustice from being inflicted, and that, where the law is powerless in its application to prevent such injuries, the observance of the "Golden Rule" can only be looked to as a panacea in that portion of our country where there exists a just and a well-defined impassable gulf between the white element of its population and the negro race. But, as the hand of our invisible Guide leads us, we must follow on to a conclusion, ascertaining and declaring the rights of litigants as justified and determined by the established rules of law.[62]

In 1929, in *Woods v. Kiersky*,[63] a third Texas court dismissed without discussion an attempt by John W. Woods to enjoin his neighbor from building a garage that would house Blacks. The court dismissed as "mere surplasage" Woods' claim that his family would be disturbed by the use of the upper story of the garage by Black people.[64]

Neither *Falloon* nor the treatises were cited in the remaining three reported cases on this issue, *Holbrook v. Morrison*,[65] in Massachusets in 1913, *Diggs v. Morgan College*,[66] in Maryland in 1918, and *Crist v. Henshaw*,[67] in Oklahoma in 1945. Nonetheless, in each, the appellate courts denied the plaintiffs' requests for injunctions, holding that the presence of a disliked racial group fails to constitute a nuisance.

Holbrook, reminiscent of *Falloon*, involved a suit by a white landowner seeking to enjoin another white landowner from placing a sign in front of her house stating "For Sale Best Offer from Colored Family."[68] The Massachusets Supreme Court equated the right to sell to a "colored family" with other land actions that are legal even if harmful to a neighbor's property:

> There can be no doubt that the respondent has the right to advertise her property for sale by signs or in the usual way, and to sell it if she sees fit to a negro family, even though the effect may

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[61] *Id*. at 756-757.
[62] *Id*. at 757.
[63] 14 S.W.2d 825.
[64] *Id*. at 828.
[65] 100 N.E. 1111 (1913).
[66] 105 A. 157 (1918).
[67] 163 P.2d 214 (1945),
[68] 100 N.E at 1111.

> be to impair the business of the complainants; just as for instance, the owner of land on a hillside may cultivate it in the usual way even though the effect of the surface drainage may be to fill up his neighbors millpond below.[69]

The Maryland Supreme Court rejected a white homeonwer's suit in *Diggs*, [70] on constitutional grounds. In that case, white homeowners sought to prevent a Black college from expanding its housing, and the court did not focus on nuisance law doctrine, but simply cited the Supreme Court's decision striking down racial zoning, *Buchanan v. Warley.*[71]

After *Diggs*, there were no reported cases involving challenges to the mere presence of Blacks for a few decades. In *Crist v. Henshaw*, decided by the Supreme Court of Oklahoma in 1945, white homeowners argued that subdividing a tract of land to create a settlement of persons "exclusively of African descent" was a public nuisance because it would reduce and destroy the market value of their property and create "insufferable and unlivable conditions."[72] The plaintiffs also argued that the sale of property to negroes would destroy the school system and require plaintiffs to abandon their homes.[73] As in *Diggs*, the Court decided on constitutional grounds, finding that such a holding would impair the Civil Rights Act of 1866 and the 14th amendment. The Court's reasoning, that "it would be discrimination for a court to restrict such sales" was the precise reasoning used by the Supreme Court three years later in *Shelley v. Kraemer*.[74]

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It appears that no appellate courts between the end of Reconstruction and the decision in *Brown v. Board of Education* found the mere presence of Blacks or Mexicans to be a nuisance. These outcomes are surprisingly contrary to the assumptions most academics would bring to their consideration of property doctrine arising from this era and should be food for thought for property and race scholars alike. However, it is worth noting that two *trial* courts reached contrary

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[69] *Id*.

[70] 105 A. at 159.

[71] 245 U.S. 60 (1917). The Court stated: "Whatever may have been entertained formerly, since the decision in *Buchanan v. Warely,* and *Jackson v. State*, it is clear that the improvement of land as a colored residential neighborhood is not of itself a public nuisance." 105 A. at 159.

[72] 163 P.2d 214.

[73] *Id*. at 215.

[74] 334 U.S. 1 (1948). The Court went on to say without any direct citations that: "The law is clear that the sale of land to negroes or the improvement of lands as a residential settlement is not itself a public nuisance. If such was not the law it would be almost impossible for negroes to ever start a new settlement for the betterment of themselves or their race. To hold otherwise would make the fourteenth amendment and the Civil Rights Act meaningless." 163 P.2d at .216.

conclusions. In *Holbrook* and *Lancaster*, the appellate courts reversed trial court decisions granting injunctions to the white homeowners. Because trial court decisions are typically unpublished, it is impossible to know with any certainty what number of other cases were brought and decided in favor of white homeowners and never appealed.

C. Mixed Results in Conduct Cases

In the "mere presence" cases described in the previous section, the reported court decisions and treatises on the issue were uniform. This section describes cases involving claims that certain conduct engaged in by people of color constituted a nuisance. White plaintiffs sought to paint Black churches, funeral homes, parks, homes for orphans and the aged, hospitals and tuberculosis sanatoriums, dance halls, crowded housing, and saloons as nuisances. In a slight majority, 13 of 23 cases, appellate courts rejected claims that these land uses by Blacks constituted a nuisance. As with the presence cases, however, even those opinions favoring Black landowners often evinced racial bias and stereotypes.

1. Churches

Outside of the race-nuisance context, it was well-established that churches were not nuisances per se, but could in rare circumstances be considered nuisances in fact if their operation had an ill effect on neighboring residents' enjoyment of their land.

In three instances, white communities sought to enjoin the construction or operation of Black churches. The Supreme Courts of both Kentucky (in 1903)[75] and Oklahoma (in 1924) [76] declined to grant the white communities the relief they sought, but in South Carolina (in 1940), [77] the Court found the way in which the prayer services were conducted to be a nuisance in fact. In all three cases, white communities inveighed against the perceived exuberant style of Black worship, which they claimed affected their use and enjoyment of their property and decreased its property value.[78] However, both *Boyd v. Bd. of*

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[75] *Boyd*, 77 S.W.669.

[76] *Spencer Chapel*, 231 P. 1074.

[77] *Morrison*, 7 S.E.2d 635.

[78] In a related context, the St. Louis Court of Appeals reversed the conviction of a Black minister for breaching the peace with his shouts of "Amen," "Praise God," and "Glory Hallelujah" in a voice loud enough to be heard six blocks away. City of Louisiana v. Bottoms, 300 S.W. 316 (1927) ("not to be officially published"). The court stated that it could not bring itself to construe the breach of the peace statute to embrace religious fervor, noting that "there was once a time in this country when a minister, whose voice would not have carried for a greater distance than two city blocks, would certainly have been accepted with greatly restrained enthusiasm." *Id.* at 318. The court also stated that it could not imagine that the city fathers could have intended for the ordinance to prohibit the sounds of worship in either "a lowly negro

Councilman of the City of Frankfort[79] and *Spencer Chapel Methodist Episcopal Church v. Brogan*[80] involved attempts to prohibit the construction of a new church facility, while *Morrison v. Rawlinson*[81] involved a City Council attempt to declare the existing church a nuisance in fact.

In *Spencer Chapel*,[82] white plaintiffs testified that they had been disturbed by noise and shouting at the church, and by those congregating around the church. Plaintiffs sought to show that "the construction of the church would decrease the salable value of the property in that community by making it impossible to sell to white people as residence property" – though plaintiffs also stated in their brief that:

> Property owners . . . are in no wise [sic] prejudiced against the negro race, that objections to the building of this church are not made solely for the reason that it is a negro church, but discloses proof that defendants in error are opposed to the construction of any church on said lot.[83]

The Oklahoma Supreme Court rejected plaintiffs' claim, stating that no case had previously held that a church is a nuisance.[84] The Court did not credit the evidence of commotion or disorder. Ultimately, the Court seemed to decide against plaintiffs because they were using the lawsuit as a device to transform a Black community into a white community. The Court stated that:

> The plaintiffs have bought property and established their residences in what was a negro community at the time the brick church was built. If this congregation should be prohibited from constructing the church building no doubt the negro population would gradually grow less. The negro is of a social and religious nature. Their social gatherings are usually at the church . . If they are required to build their church in some other community, no

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congregation, housed in a temporary frame shack on the outskirts of town, or of a fashionable white congregation, assembled together in a beautiful and costly edifice, erected in an exclusive residential district." *Id*.

[79] 77 S.W. 669.

[80] 231 P. 1074.

[81] 7 S.E.2d 635.

[82] 231 P. at 1075. White plaintiffs contended that Black churches in a white community "would constitute a nuisance, and thereby decrease the salable value of their property." The church had bought the property and built a brick church in 1903 or 1904, before any whites were living in the vicinity. The structure burned down and the church entered into a contract to build a modern new church building. The evidence showed that some of the blocks near the church were predominantly Black while others had recently become majority white.

[83] *Id*.

[84] *Id*. at 1075-76.

doubt their population will trend in that direction. This appears to be the theory of the plaintiffs.[85]

Petitioners in *Boyd v. Board of City Councilmen of the City of Frankfurt*,[86] were members of the First (Colored) Baptist Church who had been denied a permit to construct a new church building on their land and then arrested for beginning construction. The Kentucky Court of Appeals considered the enforceability of a statute which the Court found was "manifestly passed to prevent the erecting of the [First (Cb ored) Baptist Church] church building " on the ground that the erection of the church and the worship within it would constitute a public nuisance. The court rejected the City Council's attempt to designate the proposed church a nuisance, holding that: "the term 'nuisance' has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance."[87] The court explained that previous case law had declared that injunctions are not to be granted for threatened nuisances unless such proposed use is a nuisance per se. Despite some residents' complaints against the loud singing by church members in the old building, the court was unwilling to find that the proposed new building could be considered a per se nuisance. Accordingly, the court held, the common council was without power to deny the permit as a nuisance.[88]

By contrast, in *Morrison v. Rawlinson*,[89] the South Carolina Supreme Court did find the Black church to be a nuisance. In that case, plaintiffs, members of the House of Prayer, a Black church, sought to enjoin the Chief of Police and the City Council of Columbia, South Carolina from shutting them down as a public nuisance. Notably, white residents had protested the City Council's decision to grant the church a builing permit to construct its church in 1933 to no avail. However, in 1938, the City Council relented and declared the church a nuisance. The Court found that services were carried on daily from early in the morning til the evening, and resulted in "tumult [that] can be heard for many city blocks."[90] The Court stated that "white residents who live in the vicinity testified that life is made unbearable by the continual din, which deprives them of all peace and tranquility, and makes sleep impossible."[91]

The Court held that the church services did not constitute a nuisance per se and disagreed with the City Council that it had the power to declare the House of Prayer a public nuisance without a general ordinance. However, after its own determination that the manner of

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[85] *Id*. at 1076.
[86] 77 Sl.W. 669.
[87] *Id*. at 673.
[88] *Id*. The court also likened the arbitrary power exercised by the city council to the facts of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[89] 7 S.E.2d 635.
[90] *Id*. at 638.
[91] *Id*.

church services constituted a public nuisance the Court ultimately upheld the injunction. While the Court emphasized its "deep and sympathetic understanding of this type of worship carried on by members of this negro church,"[92] it stated that "their form of worship is inseparably connected with and accompanied by unrestrained noise and consequent public disturbance."[93]

2. *Funeral Homes and Cemeteries*

Challenges to funeral homes and cemeteries regardless of the race of the deceased were fairly regular in the late 19th and early 20th century.[94] Treatises generally state that cemeteries and funeral homes are not nuisances per se, but that they can become nuisances in operation. The treatises identify a small number of race-neutral cases in which cemeteries were found to be nuisances. Funeral homes in residential neighborhoods were regularly found to be nuisances as a result of odors from embalming fluid and the like and the fear that cadavers might introduce contagious disease.

The race-nuisance challenges to these land uses fall into two quite different categories: white challenges to proposed funereal or burial uses by Blacks,[95] and challenges *on behalf* of Blacks to funereal or burial uses. As with the church cases, these challenges met with mixed success. In the first category of cases, the Supreme Court of Georgia twice rejected claims that a Black cemetery proposed for a white residential neighborhood would constitute a nuisance per se, while the Supreme Court of Tennessee in 1932 found that a Black funeral home in a white residential neighborhood was properly determined a nuisance per se. In the second, a Florida Court upheld the finding that a cemetery in a Black community constituted a nuisance (against a vigorous dissent that the majority was improperly crediting the alleged special sensitivities of Blacks to death), while a Pennsylvania Court rejected the claim that a cemetery in a residential area was a nuisance despite the fact that "colored help" would be disinclined to work in the area if a cemetery were allowed to be built.

The Georgia cases are consistent with the treatment of challenges to white cemeteries. In 1933, in *Hall v. Moffett*,[96] the Supreme Court of Georgia rejected white plaintiffs' attempt to enjoin the use of city land for a Black cemetery. Plaintiffs claimed that such use would "be detrimental and injurious to the health, happiness, peace and contentment

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[92] *Id.*

[93] *Id.* at 640.

[94] *See, e.g.*, H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS 822 (Albany: 1875).

95 *Id. Qualls*, 64 S.W.2d 548; *Hall*, 170 S.E. 193; *Killian*, 154 S.W.2d 387; *Young*, 64 A.2d 814; *Jones v. Trawick*, 75 So.2d 785.

[96] 170 S.E. 193.

of . . . petitioners as well as a great many others, . . . that it will greatly depreciate the value of the property adjacent to said private cemetery," and finally, that "the injury and damage to petitioners' property and their sense of pride in their community will be irreparable."[97] The Court reaffirmed the rule that cemeteries are not nuisances per se, and that in previous decisions it had held that cemeteries will not be enjoined unless likely to contaminate water or air.[98] The Supreme Court of Missouri also followed this precedent in 1941, rejecting a challenge by Finton O. Killian and Gover Sibley to the operation of a cemetery for orthodox Jews.[99] Even before the orthodox congregation purchased the land, it had been designated as a cemetery. Therefore, it appears clear that plaintiffs objected specifically to the fact that Jews would be buried on the property.[100]

In *Qualls v. City of Memphis*,[101] the Supreme Court of Tennessee deviated from general precedent by holding that a proposed Black funeral home in a white residential area was a nuisance per se. S.W. Qualls, a successful Black funeral home director, brought suit against the City of Memphis to challenge the denial of a permit for him to open a funeral home in a white residential area. The area was zoned for commercial use, but the City denied Quall's permit on grounds that a funeral home in the area would constitute a nuisance per se, "whether for the white or colored race," because of possible emissions of odors and noises.[102] However, the Board resolution then stated:

> While the Board is of the opinion and finds, that it cannot and will not discriminate against said S.W. Qualls, because he is a member of the colored race, or because he intends to conduct a funeral home on the premises for colored persons, yet the Board finds, from the proof, that members of the colored race are very emotional, and that funerals of members of that race are attended by loud speaking, singing, moaning, and other sounds which would be obnoxious and offensive to persons in the immediate neighborhood.[103]

The Tennessee Supreme Court rejected Qualls' argument that the Board discriminated on the grounds of race. Instead, the Court credited the Board's conclusion that the plot was too small for use as a funeral

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[97] *Id*.

[98] *Id*. The Court also rejected the claim that an existing public cemetery for negroes should be the basis for denying the use of city land for a private cemetery stating: "We can see no reason why even a negro should not prefer to rest after death from both hunger and hardship." *Id*.

[99] *Killian*, 154 S.W.2d 387.

[100] *Id*.

[101] 15 Tenn. App. 575 (1932).

[102] *Id*. at 577.

[103] *Id*. at 578.

home and indeed, blamed Qualls for purchasing the property in a white neighborhood in the first place: "Mr. Qualls purchased this property with full knowledge that it was in a residential district, and occupied as homes by white people, and he must have known that a funeral home conducted in this building within a very few feet, eight or ten feet, of homes occupied by families, would be very objectionable and very distasteful."[104]

However, in a related case, published a year later, the Court of Appeals of Tennessee held *for* Mr. Qualls when he sought a permit to use the downstairs of the same property as a showroom for caskets and the upstairs as a family residence.[105] While the language of the first case involving Mr. Qualls suggests that the decision was based in significant part on the race of the plaintiffs and defendants, the Court in the second *Qualls* case did not use race as an excuse to rule for the white neighbors who were resistant to Mr. Qualls' presence. The second Qualls case is in some sense more akin to the "mere presence" cases described in the earlier section.

In the second category of "death cases" in which the allegedly special sensitivities of Blacks to the presence of cemeteries were at issue, the courts reached conflicting results.[106] Both cases involved residential communities attempting to enjoin the establishment of a cemetery on grounds that it would change the character of the neighborhood with increased visitors and traffic, noise, potential groundwater contamination. The plaintiffs in these cases also alleged that thoughts of death would be generally annoying, but would cause particular harm to Blacks. *Young v. St. Martins*,[107] however, was brought by wealthy white residents, who claimed the cemetery would create a difficulty keeping "colored help" while *Jones v. Trawick* appears to have been brought by Black plaintiffs.[108]

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[104] *Id*. at 582.

[105] City of Memphis v. Qualls, 64 S.W.2d 548 (1933), *aff'd*. The court found that the zoning ordinance provided no basis for denying the permit, and held that "it cannot be said that [the use] would be a nuisance per se. It cannot be said that it would occasion unusual noises, or odors, or emotional expressions or street traffic congestions. *Id*. at 551.

[106] *Young*, 64 A.2d 814; *Jones v. Trawick*, 75 So.2d 785.

[107] In *Young*, the Supreme Court in Pennsylvania held that the alleged "psychic" objections were insufficient because equity "does not regard the melancholy reflections that may be engendered in sensitive minds by the close proximity as sufficient to brand it a nuisance within the legal meaning of that term." The Court rejected the plaintiffs' attempt to analogize between cemeteries and funeral homes since the latter but not the former involved the possible vapors from the embalming and autopsies, as well as possible danger of infection. 64 A.2d 814.

[108] In *Jones*, the Florida Supreme Court, in an *en banc* decision, rejected this precedent. The Court stated that while it had not decided the issue of whether a funeral home in a residential area would constitute a nuisance, it agreed with lower court, on the ground that contact with funeral homes "may result in great discomfort, depression and

The majority decision in the Florida case does not mention the race of the plaintiffs or the race of those to be buried in the cemetery. However, the dissent contends that the race of the plaintiffs was central to the holding. The dissenting Justices note that the area was covenanted to restrict occupancy to Blacks, and stated that:

> [I]t is insisted, in effect, that because of the peculiar aversion of Negroes to graveyards and the extreme lament of colored mourners, the normal lives of the appellants would be so affected as to render the use as a cemetery of the property so near them a nuisance.[109]

The dissent argued against deciding a case based upon particular aversions of one race: "I cannot agree that what might be a nuisance for one race would not be a nuisance for another."[110]

3. Hospitals, Sanatoriums, and Orphanages

Homeowners often objected to the presence hospitals, sanatoriums and orphanages in their midst even when race was not at issue. As with cemeteries and funeral homes, treatises from the decades in which the race-nuisance cases were brought state that such institutions are not nuisances per se, but can become nuisances in operation. Of the four race-nuisance cases challenging these sorts of land uses, only *Giles v. Rawlings*, decided by the Supreme Court of Georgia in 1918, found that such a claim was cognizable.[111]

In *Giles v. Rawlings*, a white plaintiff, J.P. Giles, sought to enjoin the operation of a hospital for Blacks. The neighborhood in which the hospital was operating was largely residential, except for a hospital operated by Rawlings for white people. Rawlings decided to transform a small house at the rear of the hospital into a hospital for Blacks, which was across the street from Giles' home. Giles claimed he and his family were unable to enjoy their home as a result of the obnoxious odors, the noise from patients "whether from the effects of being treated, or from their nature," the sight of the negro patients, and finally, the noise from the carrying of the dead from the hospital.[112] The lower court had denied the injunction, refusing to hold that the hospital was a nuisance per se and, finding that plaintiffs had an adequate remedy at law. The Georgia Supreme Court reversed; it did not hold that the hospital was a nuisance per se, but that plaintiff had a right to invoke the aid of equity. The ultimate resolution is unreported.

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unhappy thoughts." The Court then extended the rule generally applicable to funeral homes to cemeteries. 75 So.2d 785.

[109] *Id*. at 789 (Thomas, J., dissenting).

[110] *Id*.

[111] 97 S.E. 521 (1918).

[112] *Id*. at 521-22.

In 1924, in *City Council of City and County of Denver v. the United Negro Protection Ass'n*,[113] the Colorado Supreme Court unanimously granted the United Negroes Protective Association's request for a writ of mandamus against the Denver City Council, compelling the City to grant it a permit to operate a home for Black aged and an orphanage for Black children. According to the Court, a large number of residents of the neighborhood protested the petition for a permit to open the home on the ground that "such an institution would be detrimental to the public health and safety of the people living in the vicinity."[114] The committee on health agreed without investigation and at the same meeting, the council denied the permit.

The Court found the decision to be arbitrary and without justification, particularly since the area was heavily industrial and, most relevant perhaps, "another institution for white children . . . of the same general character" was operating on the same block.[115] The Court rejected the City's claim that the decision was fully within its discretion, finding that municipal decisions were not beyond the control of the courts when they are arbitrary or the result of gross abuse of discretion. Unlike the *Giles* Court, which made no mention of the unchallenged white hospital, the Colorado Court thus appeared to equate the presence of Black and white children.

The Mississippi Supreme Court in *Redmond v. State*,[116] decided in 1928, denied the State Attorney General's suit for an injunction to prohibit a Black man, H.R. Redmond, from administering drugs and medicine. The Attorney General alleged that Redmond was "an ignorant and illiterate person of the colored race" who was treating patients in unsanitary conditions, causing a public nuisance." According to state testimony, "the conditions at Redmond's office were unclean: flies, spiders, and roaches also being in some of the concoctions", and they found the presence of white girls, one with "underclothing . . . above her knees."[117]

The Court concluded that Redmond was practicing medicine without a license, but held that an injunction was not a proper remedy. The Court reasoned that at common law, a license was not necessary to prescribe medicine; Redmond's operation was therefore not a nuisance per se. Mississippi had enacted a statute that provided for a jury determination of whether a certain practice injured the health and was a nuisance. Accordingly, the Court held that Redmond had a right to a jury trial: "It is a delicate, though often a necessary, thing to condemn a business operated by a citizen. It may result in great loss, or even ruin,

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[113] 230 P. 598 (1924).
[114] *Id*. at 599.
[115] *Id*.
[116] 118 So. 360 (1928).
[117] *Id*. at 363

to his business. The Legislature, realizing the delicacy of the power conferred, ...has provided a jury, and the cause should have been proceeded with under that statute."[118]

In *Mitchell v. Deisch*,[119] decided in 1929, Ms. Frances Mitchell and other white landowners sought to enjoin the construction of the Arkansas Negro Tuberculosis Sanatorium near their homes as contrary to the state's policy of segregating the races and as a nuisance. The Court rejected the first claim on the ground that the decision of where to locate the sanatorium was within the Board's province. It rejected the second as well, supported by evidence that sanatoriums do not affect land values and case law and treatises for the proposition that sanatoriums and hospitals do not constitute nuisances per se. It is not clear from the appellate opinion whether plaintiffs argued that a sanatorium for Blacks in an otherwise white community should be considered a nuisance even if one for whites would not have been. Justice Mehaffy dissented, claiming that the location of the sanatorium in a white community violated the statute directing the Board to locate the facility near the Negro community, claiming "the Legislature would refuse to locate a tuberculosis sanatorium for white people among negroes. One would be as bad as the other, and each, in my judgment, would be in violation of the policy of the state."[120]

4. Places of Amusement

Courts generally held that places of amusement such as playgrounds, athletic fields, gardens, dance halls, and theatres were not nuisances per se, but could become so in operation. Saloons, except during prohibition, were similarly treated. In the race nuisance cases, courts generally refused to enjoin the operation of places of amusements for Blacks, despite white protest.

In 1931, in *Jones v. Little Rock Boys Club*, the Supreme Court of Arkansas refused to enjoin the construction of a club for underprivileged boys.[121] Similarly, in 1943, the Supreme Court of North Carolina, in *Dudley v. City of Charlotte*,[122] refused to enjoin the City of Charlotte from establishing a public park for Blacks. Both Courts relied upon precedent that places of amusement are not nuisances per se.

Two cases, *Theonebe v. Mosby*,[123] decided by the Supreme Court of Pennsylvania in 1917, and *Green v. State ex rel. Chatham*,[124] decided decades later by the Supreme Court of Mississippi in 1952, involved

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[118] *Id*. at 369.
[119] 18 S.W.2d 364 (1929).
[120] *Id*. at 368 (Mehaffy, J., dissenting).
[121] 34 S.W.2d 222. The race of the underprivileged boys is not entirely clear – so this could be a class-nuisance rather than a race-nuisance case.
[122] 27 S.E.2d 732.
[123] 101 A.98.
[124] 56 So.2d 12.

challenges to extant dance halls. Both Courts reaffirmed the principle that dance halls are not per se nuisances, but they diverged in their findings as to whether the dance halls at issue were nuisances in fact. In *Theonebe*, the Court refused to grant the white residents' request for an injunction to limit the hours of a dance hall patronized by "colored people."[125] The Court found that the patrons were "respectable, well-behaved people," and since the neighborhood was not strictly residential, residents must endure some noise from commercial and business establishments.[126] The race of the patrons is noted as a fact, but not discussed in the conclusions of law. By contrast, the Court in *Green* determined a nuisance a "juke box" that attracted large numbers of "the colored race" who danced, shouted and sang into the early morning hours of Sunday, depriving other residents of their sleep.[127] The Court appeared to be particularly troubled by the "swearing and unprintable profanity" to which the neighborhood women and children were subjected.[128] The situation was exacerbated by "calls of nature" for which there were no facilities, resulting in indecent exposure and horrible odors.[129] The Court found that the dance hall constituted a public nuisance, but limited its injunction, holding that the owner was restricted from playing the juke box during worship hours or too late at night. The Court resorted to a contextual definition of public nuisance -- "whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community or tends to its discomfort"[130]

Generally, courts distinguished between disorderly and orderly saloons, determining that the disorderly ones constituted a nuisance.[131] In *Fox v. Corbitt*,[132] for example, white homeowners challenged a grocer operating a saloon. In that case, the Court granted the white residents' request for an injunction, stating that the place was "in every sense of the word a "negro dive" in which "large crowds of negroes of low order" assembled.[133] The Court relied, along with racist stereotypes, on proof that people got drunk and had fights on the sidewalk and the "unmentionable indecencies and exposures of their persons."[134]

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[125] 101 A.98 at 98.
[126] *Id*.
[127] 56 So.2d at 13.
[128] *Id*. at 16.
[129] *Id*. at 13.
[130] *Id*. at 16.
[131] However, in *Smith v. Commonwealth*, a case decided before the Civil War, the Kentucky Court of Appeals held that even the peaceable congregation of slaves at a grocery selling liquor constituted a public nuisance because of the illegality of selling alcohol to slaves. 45 Ky. 21 (1845).
[132] 194 S.W. 88.
[133] *Id*. at 88.
[134] *Id*.

5. *Crowded Housing*

I have identified two cases in which white plaintiffs succeeded in designating as nuisances densely populated areas inhabited by Blacks or Mexicans. In *Harty v. Guerra*,[135] decided by an appellate court in Texas in 1925, the court found that defendants created a nuisance in a "white residential neighborhood" by dividing a home and stable into rooms housing up to 50 Mexican "peons," who kept cows and fowl, maintained a "din of noises from musical instruments, singing, wood chopping,…[and] the barking of dogs.[136] The court likened the conditions to the operation of a cotton gin, polluting factory, and the housing of cattle, and issued an injunction against the nuisance-like conditions. However, the opinion does not clarify exactly which conduct was enjoined or whether the residents were expected to move.[137] Indeed, the court specificially held that "[t]his order is, of course, not to be interpreted as prohibiting the indulgence in music or the cutting of wood upon the premises at reasonable hours and in such a manner as not reasonably to interfere with the rights of appellants."[138]

Similarly, in the last race-nuisance case, *Wright v. DeFatta*, decided in 1962, plaintiffs sought to enjoin the defendant from "placing an *excessiv*e number of Negro dwellings contrary to the Municipal Comprehensive Zoning Ordinance."[139] The court held that such a gross violation of the zoning ordinance constituted a nuisance per se.

III. THEORIES AND COUNTER-THEORIES

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[135] 269 S.W. 1064.

[136] *Id*. at 1065. The defendants failed to appear in either the trial or appeal and so the facts are entirely the characterizations of plaintiffs. The court reprinted them in some detail:

> they further constantly carried on and permitted to occur, practically throughout the whole of the night, such a din of noises from musical instruments, singing, wood chopping, the barking of dogs, crowing of chickens, and other performances as to make the usual and customary hours of the nights for slumber in that neighborhood so hideous that appellants were continually being deprived of necessary rest and sleep, and were at times forced to leave their home to obtain it.

Id.

[137] The court states that "this order is, of course, not to be interpreted as prohibiting the indulgence in music or the cutting of wood upon the premises at reasonable hours and in such a manner as not reasonably to interfere with the rights of the appellants." *Id*. at 1064.

[138] *Id*. at 1065.

[139] 142 So.2d 489.

Legal opinions are rich materials for insight into how the ruling elites within the particular states sought to express and understand their own moral and legal ideals.[140] As Robert Gordon has argued:

> Because [legal opinions] are the most rationalized and elaborated legal products, you'll find in them an exceptionally refined and concentrated version of legal consciousness. Moreover, if you can crack the codes of these mandarin texts, you'll often have tapped into a structure that isn't at all peculiar to lawyers but that is the prototype speech behind many different dialect discourses in the society.[141]

This Part will use the race nuisance cases to test the explanatory power of several prevailing scholarly theories of the role of courts during the Jim Crow era. The cases obviously refute the prevailing view that the courts were mere engines of white supremecy, openly eschewing the rule of law. Instead, the cases show that no single theory is fully explanatory. The cases reflect a strain of reflexive formalism and a surprising concern for the ideal of race neutrality. When the race nuisance cases are seen in concern with other attempts to whites to pursue residential segregation, however, many support Derrick Bell's interest convergence argument.[142]

A. *State Courts Furthering White Supremecy*

The Jim Crow era has been described as a "time when race relations in law, politics, and general social contemplation hit rock-bottom levels of injustice and callousness."[143] Randall Kennedy refers to

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[140] *See* MARK TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE 18 (University Press of Kansas: 2003) 18 (quoting Winthrop Jordan). Tushnet also quotes Eugene Genovese's description of such cases as setting out the standards of decency of a world in which "like most worlds, men strove to be considered decent." *Id*.

[141] Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 120 (1984).

[142] Bell, *supra* note __.

[143] Schmitt, *supra* note __, at 446. Schmitt's article, however, is an exploration of the series of cases decided during the Supreme Court during this era that breathed life into the then dormant Civil Rights amendments. These cases include: *Bailey v. Alabama*, 219 U.S. 219 (1911) and *United States v. Reynolds*, 235 U.S. 133 (1914), in which the Court applied the 13th Amendment to strike down peonage laws, and *Buchanan*, 245 U.S. 60, in which the Court held that the 14th Amendment precludes de jure residential segregation. The latter case was cited by several state courts in the race nuisance cases and will be discussed more fully *infra*. *But see* Kennedy, *supra* note __, at 1650. Kennedy both rejects Schmitt's description of academic attitudes toward the Supreme Court during the Progressive era, providing examples of earlier scholars who praised the Court's under Chief Justice Edward White for beginning the "modern movement for black equality in the United States", and more generally criticizes Schmitt's "celebration" of the White Court. Kennedy argues that the Court was at bottom racist

it as the "Age of Segregation,"[144] and Cheryl Harris calls it "a time of acute crisis for Blacks."[145] Between 1890 and 1907, Mississippi, South Carolina, Louisiana, North Carolina, Alabama, Oklahoma, and Georgia all amended their constitutions to disenfranchise virtually all Black people.[146] Florida, Arkansas, Tennessee, and Texas statutorily employed devices such as poll taxes to accomplish the same ends.[147] While the Supreme Court decided some cases that prevented Black disenfranchisement, Blacks were not truly enfranchised again in the South until the enactment of the Voting Rights Act in 1966.[148] In addition to constitutionally and statutorily disenfranchising Blacks, the Southern and Border states were also enacting segregation laws beginning with education and moving toward transportation, public accommodations, cemeteries, hospitals, prisons, and, infamously, drinking fountains.[149]

Perhaps not surprisingly then, many scholars hold the view that state courts in the Jim Crow era abandoned the rule of law when issues of race emerged and became tools of racial subordination. In a recent revisionist account of civil rights lawyering that otherwise provides a facsciating and rich account of the development of civil rights legal strategies, Professor Kenneth Mack asserts generally that the common law was "not neutral with regard to race, but was subject to discriminatory decisionmaking."[150] In his discussion of the similarities and differences between racism in state courts during Apartheid era South Africa and Jim Crow America, the late A. Leon Higginbothom concluded with a general theory that these courts exemplified much of the racism present in the larger society.[151] He argued that the cases he analyzed "reflect the ways in which the courts have directly or indirectly contributed to the maintenance of black subjugation within an

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and rejected more progressive models of constitutional interpretation, thus, that Schmitt's praise was unwarranted.

144 Kennedy, *supra* note __, at 1650.

145 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1746 (1993).

146 *Id*. at 178.

147 *Id*.

148 KLARMAN, JIM CROW, *supra* note __, at 86.

149 *See* AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 184 (New York: 1970); Schmitt, *supra* note __, at 454-473.

150 Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L. J. 256, n54 (2004).

151 The late Judge Higginbotham examined segregation and overt discrimination in Jim Crow courts, as well as "more insidious forms of court-enforced racism, including: refusal to accord black witnesses the civilities customarily accorded to white witnesses; attacks on the credibility of blacks as witnesses or accused; prosecutorial appeals to fear of violence by blacks; reliance on claims that racial minorities have a propensity toward violence; use of racist comments; and overtly racist conduct by judges." A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521 (1990).

interlocking system of discriminatory practices and beliefs."[152] Higginbotham further concluded that during the Jim Crow era, "the courts, and along with them, the rule of law, became not impartial arbiters of societal relations but instead the mirror and enforcer of property interests."[153]

In her study, *The Pig Farmer's Daughter and Other Tales of American Justice*, Mary Frances Berry is equally critical of state courts during the Jim Crow era. [154] In her analysis of involving the interplay of race and sex in the courts from the post-Civil War era to the present, Berry concluded: "Judges continued to affirm the old story of propertied white male privilege and racial subordination." [155] Interestingly, Berry rests this conclusion on courts' willingess to *uphold* wills that granted property to Black women and mixed-race children.[156]

Benno Schmitt agreed: "law was the foundation of the structure of racial separation" beginning with the informal practices of sheriffs and judges.[157] He also claimed that: "Jim Crow laws reflected a society that felt itself under no constraint to treat blacks equally, not even in the formal constraint of legal fiction."[158]

Michael Klarman has been less categorical. His recent book *From Jim Crow to Civil Rights* carefully distinguished between different decades in the late 19th and early 20th century. While he has agreed with Schmitt that the Progressive era was a period "before the culturally elite values of judges translated into egalitarian racial ideals,"[159] he acknowledged that southern judges after World War I began to overturn some egregious convictions of black defendants. Klarman claimed on the one hand that state courts' "proud pretentions to color-blind justice were absurd"[160] in light of the barriers to Blacks' equal participation in the legal system. However, he also granted that judges may have believed their own rhetoric. He ultimately concludes that any "liberal sentiment tended to evaporate in cases that were perceieved to involve broader challenges to white supremacy or that generated criticisms of white southerners."[161]

In such a state court system, however, we would expect nuisance suits seeking to protect white landowners from the presence of Black

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[152] *Id*. at 529.

[153] *Id*. at 526.

[154] BERRY, *supra* note __ at 91.

[155] *Id*. at 91.

[156] "In inheritance case after inheritance case Southern state courts between 1868 and 1900 upheld the power of propertied white men to leave estates to their African American mistresses and their children." *Id*. at 85.

[157] Schmitt, *supra* note __, at 472.

[158] *Id*. at 474.

[159] KLARMAN, JIM CROW, *supra* note __ at 81.

[160] Klarman, The Racial Origins of Modern Criminal Procedure, 26 (working paper No.00-5).

[161] KLARMAN, JIM CROW, *supra* note __, at 131.

families to have been successful. Nuisance doctrine itself did not clearly preclude such a result. As John Nagle acknowledges, "virtually anything could interfere with someone's use and enjoyment of land."[162] Indeed, an early English treatise included as a common nuisance "subdividing houses in good neighborhoods 'that become hurtful to the place by overpestring it with the poor.'"[163] If common law English courts found that the presence of poor people constituted a nuisance, why did post-Reconstruction American courts not similarly judge the presence racial minorities? The realist critique would certainly have suggested such a result. But, as we have seen, they did not. Instead, the cases stand squarely against the claims of many scholars that state courts expressly eschewed any need to apply the rule of law equally to Blacks.

If the commonly held view is inaccurate, what was motivating these judges? The next section will consider the most obvious counter-theory: that these judges were strict rule-of-law formalists.

B. Reflexive Formalism in Operation?

It seems unlikely that the all of the many judges who decided the race-nuisance cases were closet anti-racists. Therefore, the most logical counter-explanation to the commonly held view is that the judges were simply acting in conformance with the prevailing jurisprudence of the day. The late 19th century and very early 20th century is often described as an era of reflexive formalism, so perhaps nuisance doctrine itself accounts for the cases.[164] Indeed, this theory offers an explanation for Berry's inheritance cases; she notes: "The courts decided to base their decisions on the formal legal rule that the law would implement the proven will of the testator."[165] To test this theory in the nuisance context, this section explores the contours of nuisance doctrine as applied by the judges in the race-nuisance cases and more significantly, assesses whether that doctrine actually operated as a constraint upon the judges' own preferred outcome.

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162 Nagle, *supra* note __, at 275.

163 J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L.J. 55, 60 (1989) (quoting William Sheppard, The Court-Keeper's Guide, or a Plain and Familiar Treatise needful and useful for the help of many that are employed in the keeping of Law-days, or courts Baron, 5th ed. 1662). Spencer states that other treatises suggest that courts condemned property subdivision because they feared that the poor would catch the plague, "not that they were one." *Id*. at 60 n.15. However, the language cited clearly suggests that the presence of poor people creates harm.

164 *See* Eric Claeyes, *supra* note __.

165 BERRY, *supra* note __, at 83.

This counter-theory is helpful. The cases suggest that formalist judging often prevailed then – as it often does now.[166] However, when considered with the related cases involving restrictive covenants and racial zoning, race and land use cases cannot ultimately support a particularly robust version of formalism. Two doctrinal principles emerge as most determinate in the race nuisance cases. First, a *proposed* land use was generally not a nuisance, and second, a use that caused only psychic or social harms was generally not a nuisance. There were exceptions to these principles, however. If a use was labeled a "per se" nuisance, it could be enjoined prior to operation, and second, psychological or social harms involving the specter of death, such as cemeteries and funeral homes, or the harms caused by immoral behavior, such as prostitution, were sometimes considered a nuisance. As a result, like the theory of courts-as-pawns, reflexive formalism fails to explain the range of decisions in these cases.

The most significant doctrinal constraint appears to have been courts' reluctance to grant an injunction in anticipatory nuisance cases. Of the 28 cases, 19 involved attempts to enjoin anticipatory nuisances and only three of these were successful.[167] By contrast, in the nine cases in which plaintiffs sought to enjoin present nuisances, courts found nuisances in five of the cases.[168]

Courts denying injunctions for proposed land uses often referred to some version of the maxim that:

> Where an injunction is sought merely on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection leaving the complainant free, however, to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance.[169]

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166 This conclusion runs counter to those who would contend that judges are rarely if ever controlled by any items of "traditional law." *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. Cin. L. Rev. 615, 618 (2000) (describing legal realist and attitudinal model of judicial decisionmaking). It is not, however, a particularly radical conclusion – and has support even among adherents to critical legal studies. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 13 (Harvard University Press, 1997).

167 *Wright*, 142 So.2d 489; *Qualls*, 64 S.W.2d 548; and *Jones v. Trawick*, 75 So.2d 785.

168 *Green*, 56 So.2d 12; *Morrison*, 7 S.E.2d 635; *Fox*, 194 S.W. 88; *Giles*, 97 S.E. 52; *Harty* 269 S.W. 1064.

169 *Jones v. Little Rock*, 34 S.W. at 224 (citing Murphy v. Cupp) ("The rule is well settled that no injunction will be issued in advance of the structure unless it be certain that the same will constitute a nuisance."); *City Council of City and County of Denver*, 76 Colo. at 89 ("The question before the trial court for determination was not, and it is not here, whether such an institution might or might not be so conducted or operated in the future as to become such."); and *Baptist Church*, 178 S.W. at 690 ("A jail is not a structure which in itself is a nuisance, nor does it necessarily become such by using it

This principle has long been recognized by nuisance scholars and clearly provides a powerful explanation for the outcome of a significant number of the race-nuisance cases.

However, courts did not always apply this doctrine.[170] In *Qualls*, for example, the Board of Adjustment of the City of Memphis found that the operation of a funeral home on the particular lot in question would be a nuisance as a matter of law because of the emission of odors and noises. Mr. Qualls challenged this finding, arguing that the Board could not find as a fact that his business would a nuisance prior to its operation. The Court agreed with the Board that the funeral home could be considered a nuisance per se, holding that to place such an institution near a residence would result in a condition of "discomfort and inconvenience."[171] Though the following year, Mr. Qualls was allowed to operate a casket show room and to move into the living quarters above.[172] The second doctrinal constraint appears to be the *ad coelum* rule, under which property owners are "entitled to be free from all *physical* invasions across the borders of their land,"[173] but not necessarily to be free from more inchoate assaults to a property owner's social or psychological state. Yet courts ignored this rule as well.

Nuisance law historically recognized harm across a broad spectrum.[174] On one end was the standard nuisance case involving air pollution (smoke or soot) that caused an actual physical harm.[175] In the middle of the spectrum were cases involving loud noises or noxious odors which did not result in injury but which were readily identified as sensory harms.[176] At the furthest end of the spectrum we see a doctrinal shift – some courts were sympathetic to claims of emotional harm emanating from the presence of dead people or people engaged in what was considered illicit or immoral conduct.[177]

In the death cases, for example, some courts agreed that the proximity of a funeral home or (in fewer cases) a cemetery caused "great

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for the purpose for which it is erected. It might become such in the manner of its use, and, if so, its maintenance in that manner could be and should be enjoined."); *see Falloon*, quoting High, Injunctions, § 488.

170 Virtually every case in which a court rejected a request for a preliminary injunction began with a discussion of whether the proposed use constituted a nuisance per se. *See*, *e.g.*, *Dudley*, 223 N.C. at 639 and *Qualls*, 64 S.W.2d 548.

171 64 S.W.2d at 550.

172 *Id*. at 548.

173 For a full discussion of the ad coelum rule and the "physical-invasion" conception of property, *see* Claeyes, *supra* note __, at 4-6.

174 Nagle, *supra* note __, at 280-90.

175 Godsil, *supra* note __, at 1851.

176 Nagle, *supra* note __, at 281-85.

177 *Id.* at 277-286 (discussing early 20th century nuisance challenges to bawdy houses, saloons, gambling parlors, and cemeteries).

discomfort, depression and unhappy thoughts,"[178]"depression, nervousness, lying awake at night, children made excited"[179] and the "dampening effect" on the use of outdoor spaces.[180] In the bawdy house cases, courts considered the sights and sounds of the prostitutes and customers offensive to neighboring residents; the presence of the activity caused the property values in the neighborhood to decline and rendered the properties unfit for families.[181]

The harms alleged in the death and bawdy house cases were not unlike those alleged in the race-nuisance cases. In *Falloon*, the plaintiff claimed that the presence of a Black family close to his property would "annoy plaintiff's wife, who is a person of delicate health."[182] In *Worm v. Wood*, plaintiffs claimed that the shacks would be occupied by "negroes, Mexicans, and a low class of white people, which will greatly injure and practically destroy social conditions in the neighborhood" and would thus "greatly depreciate plaintiff's property."[183] Most vividly, in *Lancaster v. Harwood*, plaintiffs alleged that the presence of a Black family a few feet away results in an odor that is "offensive, objectionable, and undesirable, and in a southern climate is so bad as to destroy the comfortable enjoyment of life in close proximity thereto, and is offensive at a distance of 10 to 15 feet to white persons of ordinary sensibilities, and of ordinary tastes and habits."[184]

In light of the racial mores of the late 19th and early 20th centuries, it would not have been surprising if courts had applied the reasoning in the death and bawdy house cases to the race-nuisance cases and found that the presence of a Black family in a white neighborhood constituted a nuisance per se. In other words, nuisance doctrine alone cannot explain the outcome in the race nuisance cases. It still remains to be determined why courts did not place the presence of Black families in white neighborhoods in the same category as funeral homes or bawdy houses – uses that do not cause a physical harm, but allegedly result in declining property values and an inability to enjoy their homes.

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178 *Jones v. Trawick*, 75 So.2d at 785.

179 Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 580 (1942) (*quoted in* Nagle, *supra* note __, at 289).

180 Brown v. Arbuckle, 198 P.2d 550, 551 (1948) (*quoted in* Nagle, *supra* note __, at 289).

181 *See* Nagle, *supra* note __, at 277-78 (quoting *e.g.*, Weakley v. Page, 53 S.W. 551 (1899); Marten v. French, 61 Tex. 173, 175 (1884) (the presence of a neighboring house of prostitution rendered plaintiff's house "unfit for a home for himself and his family").

182 29 Kan. at 292.

183 223 S.W. 1017.

184 245 S.W. 755.

C. A Race Neutrality Ideal at Work?

This section considers whether the principle or ideal of equal treatment under law was itself the explanation for why race mixing was not added to the list of "per se" nuisances. This principle was, obviously, not found in common law. However, in response to the "Black Codes" that proliferated in the post-Civil War South, the Reconstruction Congress enacted by the Civil Rights Act of 1866, which provided to all persons regardless of race "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[185] Therefore, Congress enshrined in law the rights of Blacks to private property.

The first case in which a plaintiff sought a legal injunction against the presence of a Black family, *Falloon v. Schilling*, was decided in 1883 in Kansas, toward the end of Reconstruction and in a border state.[186] Nuisance doctrine was not entirely dispositive – though it militated against a finding for the plaintiffs. In addition to nuisance doctrine, the Court had as a background principle the Civil Rights Act of 1866 – and the language of the opinion tracks the Civil Rights Act and the ideals underlying its passage. As noted above, in *Falloon*, the Court stated:

> Equity will not interfere simply because the occupants of such house are by reason of race, color, or habits disagreeable or offensive.[187]

The opinion went on:

> The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as the neighbor's family is well behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially, it may be to plaintiff; plaintiff has no cause of complaint in the courts.[188]

The author of this opinion, Justice David Brewer, is an interesting figure. He is known as among the most conservative of the "four horsemen" on the United States Supreme Court. On the other hand, in a book entitled *The United States as a Christian Nation*, he wrote:

> Certainly, to me it is the supreme conviction, growing stronger as the years go by, that this one purpose of Providence in the life of

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[185] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[186] 29 Kan. 292.

[187] *Id*. at 294.

[188] *Id*. at 293.

> this Republic, and that to this end we are to take from every race its strongest and best elements and characteristics, and mold and fuse them into one homogenous American life.[189]

Brewer thus appeared to hold certain integrationist tendencies. This view should not be overstated, however, since he was also the author of the majority opinion in *Berea College v. Kentucky*, upholding the constitutionality of a Kentucky statute that prohibited integrated education.[190] Brewer noted that: "the right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant as a corporation created by this State has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether, or qualify it."[191]

An even more complex question is whether the same picture of race neutrality or equal treatment also prevailed in the "mere presence" cases following *Falloon*, all of which occurred during more racist periods and often in the deep South. The outcomes of the cases are the same: *Worm, Kiersky,* and *Lancaster* all denied white families' requests for injunctions preventing Blacks and other reviled groups from locating in their neighborhoods.[192] However, these cases do not similarly celebrate the ideal of race neutrality or norms of racial equality. *Worm* and *Kiersky* simply applied precedent without an extended discussion of the norms underlying the precedent so appear unconcerned with governing ideals.[193]

Lancaster is more difficult to categorize and requires more extended analysis.[194] The opinion belabors plaintiffs' racist contentions – particularly in contrast to *Kiersky* in which the court calls plaintiffs' claims of race nuisance "mere surplusage."[195] In their legal analysis, the judges go to some length to criticize the ideals of equal treatment, but in the end, they follow them. The judges lament that precedent prevents them from "following our own personal sentiments, which, as individuals we are frank to admit, are wholly with the appellee."[196] The judges then explain that "we as a court, must follow as our only guide, the rules of law applicable alike to all, bearing in mind that the law is no respecter of persons and was not made to apply to once caste to the exclusion of another."[197] The judges end with the statement: "we feel constrained to say that the record in this case discloses the inefficiency of

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[189] DAVID J. BREWER, THE UNITED STATES AS A CHRISTIAN NATION 81 (1905).
[190] 211 U.S. 45 (1908).
[191] *Id.* at 48.
[192] *Worm*, 223 S.W. 1016; *Kiersky*, 14 S.W.2d 825; *Lancaster*, 245 S.W. 755.
[193] 223 S.W. 1016; 14 S.W.2d 825.
[194] 245 S.W. 755.
[195] 14 S.W.2d at 828.
[196] 245 S.W. at 756.
[197] *Id*. at 757.

the law to prevent all acts of injustice from being inflicted."[198] The opinion is firmly rooted in legal positivism with its express delinking of law and justice or morality. In addition, in one sense, the opinion can be seen as affirming race neutrality in its suggestion that law cannot apply differently to one group than another. On the other hand, by choosing to express their affinity for the racist views of Mrs. Lancaster, the judges are also sending a message of racial hostility and intolerance.

The cases following *Falloon* were decided in the "nadir" of race relations in this country.[199] Why did these judges not abandon the precedent set in *Falloon* and find for the white plaintiffs who sought to exclude Blacks from their midsts?[200] We would expect the judges in the more dramatically racist periods of the 1890s through the 1930s to have rejected the norm of equal treatment exemplified in *Falloon*. The opinions suggest that these judges were acting as reflexive formalists.[201]

D. Formalism and Equal Treatment Reconsidered – Racial Zoning and Restrictive Covenants

If the race nuisance can be explained through a combination of nuisance doctrine and the ideal of equal treatment of the races under law, this paper seems to present a much more egalitarian vision of law in the Jim Crow era than one would ever have anticipated.[202]

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[198] *Id*.

[199] LITWACK, *supra* note __, at __.

[200] After all, it is an integral part of American legal culture for appellates courts to create new law when moral and political views so demand. As Fred Schauer has stated, "common law adjudication is a process that allows judges to remake the existing doctrinal propositions in the process of applying them." The point at which judges will apply overrule precedent and alter doctrine is the point at which the new doctrine would "achieve a certain level of consistency with other doctrinal propositions within the system, and more importantly, only if they are congruent with the social propositions applicable to the same type of conduct." Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 464-465 (1989). Allowing white property owners to be free from close proximity to Blacks would seem to be entirely consistent with the moral, political and social dictates of the day.

[201] As Duncan Kennedy has argued, "judges understand themselves to be bound by a norm of interpretive fidelity to the body of legal materials that are relevant to whatever dispute is before them." KENNEDY, *supra* note __, at 13. This conclusion has been reached by scholars as varied as Thomas Grey, Margaret Radin, and Joseph Raz. Klarman also reaches this conclusion, noting that "where the law is relatively clear, the Court tends to follow it, even in an unsupportive context." KLARMAN, JIM CROW, *supra* note __ at 62.

[202] The courts in the Jim Crow south may have played a role akin to the courts during slavery when, according to Mark Tushnet, law was "relatively autonomous" from dominant economic interests, explaining that the system of precedent and the requirement that judges explain their decisions may "lead to the development of a conceptual structure that [does] not directly reflect any of the underlying relations of production." TUSHNET, *supra* note __, at __. Tushnet also notes (somewhat ironically) that even though precedent can be manipulated, most judges do not regularly do so,

While race was certainly a factor in some of these cases and the language and stereotypes that emerge are very troubling to a modern reader, race did not uniformly dictate outcomes nor were judges blithely ignoring the norm of equal treatment. However, this small set of cases was only the first legal maneuver whites used to entrench racial segregation and it cannot be considered in isolation. The next two maneuvers are much beter known: racial zoning and the proliferation of racially restrictive covenants.[203] While both were ultimately held invalid by the United States Supreme Court,[204] the two practices fared better in state courts. Many court decisions addressing racial zoning and racially restrictive covenants both mangled precedent in predictably political ways and were dramatically unsympathetic to the ideal of equal treatment.

1. Racial Zoning

White politicians introduced residential segregation zoning ordinances beginning in 1910 in response to the influx of higher earning Blacks to white neighborhoods.[205] The purported purposes of the ordinances were to "preserve social peace, protect racial purity, and safeguard residential property values."[206] Methods to impose racial housing segregation differed: some cities sought to keep each block either all white or all Black by prohibiting anyone of a different race from entering, others divided the municipality into distinct racial districts, some limited new entrants to a particular block to the race of the majority of current residents, and one, New Orleans, required new residents of a particular race to obtain the consent of the current residents if of a different race.[207]

These ordinances were very popular and spread quickly. Between 1910 and 1916, they were enacted in Baltimore, several cities in Virginia, Winston-Salem, North Carolina, Greenville, North Carolina, Atlanta, Louisville, St. Louis, Oklahoma City, and New Orleans.[208]

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often because they are intellectually not up to the task. It is hard to disagree with Tushnet's conclusion that while judges' decisions overall generally serve the interests of the dominant class, this generalized conclusion does not predict individual cases. *See* TUSHNET, *supra* note __.

[203] There is a vast literature addressing racial zoning and restrictive covenants, many of which are addressed *infra*.

[204] *See Buchanan*, 245 U.S. 60, and *Shelley*, 334 U.S. 1.

[205] *See*, *e.g.*, DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948, 105-150 (U. Texas Press 1998); KLARMAN, JIM CROW, *supra* note __, at 79; David Bernstein, *Phillip Sober Controlling Phillip Drunk*, 51 VAND. L. REV. 797, 836; WOODWARD, *supra* note __, at 100.

[206] KLARMAN, JIM CROW, *supra* note __, at 79.

[207] WOODWARD, *supra* note __, at 100. New Orleans' statute was slightly different from the others: it required a person of either race to obtain consent from the majority of people living in the area. KLARMAN, JIM CROW, *supra* note __ , at 79; Bernstein, *supra* note __, at 836 fn. 191; BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920 23 (1946).

[208] Bernstein, *supra* note __, at 836 (quoting MASSEY & DENTON, *supra* note __).

Sadly, they were also very popular. St. Louis' ordinance, for example, was enacted by referendum by a margin of approximately three to one.[209]

Legal challenges to these ordinances met with mixed success. Three states courts to consider the question, Maryland, Georgia, and North Carolina, held that the segregation laws were unconstitutional,[210] and two others, Virginia and Kentucky, found them constitutional.[211] Both the Maryland and the Georgia courts ruled narrowly, however, holding the local laws unconstitutional on the grounds that they applied retroactively and limited the rights of current property owners to occupy their property. In addition, the Georgia Supreme Court later held that a racial zoning law was a reasonable exercise of the police power because it would "prevent race friction, disorder, and violence."[212] Only the North Carolina Court directly addressed the harm to Blacks from state-mandated segregation.[213]

The North Carolina case was brought on appeal from the conviction of William Darnell, a Black man, for purchasing a home for his family in the "white" territory in Winston-Salem, North Carolina. The Court based its decision primarily upon whether the local government was empowered by state enabling legislation to enact a racial zoning ordinance. First, the Court mocked the board of alderman by stating that to affirm the ordinance would create a precedent allowing the board to require:

> Republicans to live on certain streets and Democrats on others; or that Protestants shall reside only in certain parts of the town and Catholics in another; or that Germans or people of German descent should reside only where they are in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen.[214]

The Court then likened the ordinance to the residential prohibitions upon the Irish and the Jews in Europe, and stated that: "We can hardly believe that the Legislature by the ordinary words in a charter authorizing the aldermen to "provide for the public welfare" intended to initiate so revolutionary a public policy."[215]

While this language suggests respect for the ideal of equal treatment, the decision also sends more complex messages. Among the reasons the Court provides for its skepticism that the legislature intended to enable local governments to enact racial zoning ordinances is the

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209 *Id*. at 836.

210 State v. Gurry, 88 A. 546 (Md. 1913); Carey v. City of Atlanta, 84 S.E. 456 (Ga. 1915); State v. Darnell, 81 S.E. 338 (N.C. 1914).

211 Hopkins v. City of Richmond, 86 S.E. 139 (Va. 1915).

212 Harden v. City of Atlanta, 93 S.E. 401, 402-403 (Ga. 1917).

213 State v. Darnell, 81 S.E. at 339.

214 *Id*.

215 *Id*.

state's commitment to retaining Blacks as laborers in the state. The Court concluded that this goal that would not be furthered by racial zoning ordinances, explaining that similar ordinances in Ireland and Eastern Europe prompted rapid emigration to the United States. This discussion evinces a more material reason for the Court's vehement condemnation of racial zoning. In addition, the Court was deciding in a post-*Plessy* era and thus the Court noted: "There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters."[216] The Court differentiated racial zoning by appealing to the primacy of property rights.

In *Buchanan v. Warely*, the Kentucky Supreme Court directly addressed race as well with a different set of concerns than maintaining a laboring class. The Court began its opinion by describing the problems "caused by close association of races under congested conditions found in modern municipalities."[217] The Court dismissed the concerns raised by the North Carolina Court that upholding a racial zoning ordinance would empower a local government to segregate by ethnicity or political party as "time-worn sophistries" rejected by the Supreme Court in *Plessy*.[218] Rather, the Court evinced concern for the "racial integrity" which it found was imperiled by "mere propinquity."[219] The Court cloaked its opinion in supposed concern for the interests of Blacks by endorsing Booker T. Washington's notion of racial solidarity and group uplift, and contended that the Black community would be better off if middle class Blacks were required to stay in Black communities and accept "the duties and responsibilities laid upon them by virtue of their own success."[220] The Court took more seriously the concern for private property rights relied upon by other state courts to invalidate racial zoning, but ultimately, the Court accepted progressive era arguments in support of government regulation to undercut the primacy of property rights.[221]

Both the Virginia Supreme Court and the Georgie Supreme Court adopted the *Buchanan* reasoning and upheld the racial zoning ordinances enacted in Richmond, Ashland, and Atlanta.[222] However, these decisions were overturned the following year in *Buchanan v. Warely* when the Supreme Court of the United States invalidated the Louisville

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216 *Id*. at 340.

217 *Buchanan*, 177 S.W. 472. For a thorough discussion of the *Buchanan* litigation, *see* DELANEY, *supra* note __, at 123-150.

218 *Buchanan*, 177 S.W. at 474.

219 *Id*. at 477.

220 *Id*. *See* DELANEY, *supra* note __, at 124.

221 *Id*.

222 *See Hopkins*, 86 S.E.139; *Harden*, 93 S.E. at 401.

ordinance as interfering with property rights in violation of the Due Process Clause.[223]

The latter state court decisions addressing racial zoning were thus strinkingly different from the "mere presence" race-nuisance cases. The courts were willing to accept race as a ground to prevent property ownership and to distinguish the role of race from ethnicity or party membership. Unlike the Kansas Supreme Court in *Falloon*, these state court decisions do not then follow the tenet of the Civil Rights Act. Race was central to the outcome of the cases – an ordinance creating Democratic and Republican, or Irish and Dutch blocks would have been invalid, while an ordinance creating white and Blacks blocks was not. The salience of race was also expressly communicated – not cloaked in neutral rhetoric. The courts described the legislatures to be acting in the inte ests of both whites and Blacks by keeping them separate, but the centrality of race was considered completely legitimate.

2. Racially Restrictive Covenants

The state courts in the restrictive covenant cases are equally willing to allow race to impede property rights – and they mangle property doctrine in blatantly result-oriented ways. This line of cases is perhaps even more relevant to thinking about the race-nuisance cases because both involve attempts by white homeowners (rather than local government) to use legal mechanisms to enforce segregation. As property scholars have long recognized outside the context of race, covenants are private attempts to pre-empt disfavored land uses and became widespread early in the twentieth century.[224] In contrast to the race-nuisance cases, which the small number of reported cases suggests were fairly rare, racially restrictive covenants became quite common during the early 20th century and bear significant responsibility for the entrenched housing discriminating that continues to exist.[225]

Unlike the relatively uniform outcome in the race-nuisance cases, there were significant jurisdictional splits in state courts concerning the enforceability of racially restrictive covenants. Most of these cases were brought during the same time period as the race-nuisance cases -- the early 20th century up until 1948 when the Supreme Court held such covenants unenforceable under the Equal Protection Clause.[226] During

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[223] 245 U.S. at 78.

[224] Richard Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. 597, 607 (2001).

[225] *Id. See also* Rachel Godsil, *Viewing the Cathedral from Behind he Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807 (2004).

[226] In 1892, a federal district court in California found a restriction prohibiting the use or occupancy of property by a "Chinaman or Chinamen" in violation of the Fourteenth Amendment. *See Gondolfo v. Hartman*, 49 F. 181 (1892). However, subsequent courts declined to follow this ruling, and the Supreme Court in *Corrigan v. Buckley* dismissed a constitutional challenge to the covenants, on the ground that the covenants were merely private contracts and did not involve state action. 271 U.S. 323 (1926).

this time, no state court held that the racially estrictive covenants were invalid on public policy grounds despite the link between race and rights to property. Only five courts, in California, Michigan, West Virginia, Pennsylvania, and Ohio, concluded that racially restrictive covenants were invalid restraints on alienation. And these cases were pyrrhic victories. With the exception of a lower court in Pennsylvania in 1946,[227] even those jurisdictions that found racial restrictions on *sales* invalid as restraints upon alienation upheld racial restrictions upon *occupancy*.[228]

In an illustrative case decided in 1919, the California Supreme Court reasoned that a deed restriction on occupancy "is not a restraint upon alienation, but upon the use of the property."[229] The court continued: " There is no prohibition of such restraints imosed by way of condition nor was there any at common law."[230] In a more searching opinion involving an occupancy restriction at the Monroe Avenue Church of Christ, the Court of Appeals of Ohio upheld the validity of a restriction against occupancy by Negroes and affirmed an injunction to evict a Black pastor from the church.[231] The court first noted that outside of the context of race, use restrictions against liquor, building requirements and the like are quite common. With regard to restrictions against occupancy by a class of persons the court stated:

> Comparisons are odious; none are intended. Only for the purpose of developing that which is glaringly obvious, we inquire: Would any one gainsay that one allotting and selling property . . . might . . . write into conveyances . . . a restrictive covenant against letting a property therein to be occupied and used as a house of prostitution? The absurdity of an affirmative answer negates the question. Yet even prostitutes are a class of our citizenry. If one class may by contract be denied the privilege of use and occupancy, why not another? White may exclude black. Black may exclude white.[232]

The fallacy of the distinction between alienation and occupancy is quite plain. As Judge McDade of the Pennsylvania Court of Common Pleas argued: "the distinction between restrictions on alienation and restrictions on occupancy certainly appear to be highly artificial and illogical, for as a practical matter, if a man not of the white race may not occupy land, obviously he cannot for economic reasons buy the same."[233]

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227 Yoshida et al. v. Gilbert Improvement Co., 58 Pa. D. & C. 321 (1946).

228 *See* Los Angeles Inv. Co. v. Gary, 181 Cal. 680 (1919); Perkins v. Trustees of Monroe Ave. Church of Christ, 79 Ohio App. 457 (1946).

229 *Los Angeles v. Gary*, 186 P. 596.

230 *Id*.

231 *Perkins*, 79 Ohio App. 457.

232 *Id*. at 465.

233 *Yoshida et al*., 58 Pa. D. & C. at 323.

Contemporaneous commentators noticed and described the courts' deviance from accepted applications of the legal rule prohibiting restraints on alienation. Professor Arthur Martin wrote in 1934 that, while there was some jurisdictional divergence in race-neutral covenant cases, "there is more than a lack of harmony in the results of the application of this Rule to race segregation cases; there is a failure to recognize the general purpose which justifies the existence of the Rule."[234] In a book entitled, *The Legal Status of the Negro*, originally published in 1940, Professor Charles Magnum writes that:

> The state's attitude toward restraints on alienation in general would no doubt influence the court in its consideration of the problem, but even this might not be allowed to interfere where there was an ingrained prejudice on way or the other. This is illustrated by the fact that the southern states have uniformly upheld such covenants whenever the question has been presented.[235]

The doctrinal manipulation and utter disavowal of the norm of equal treatment in the restrictive covenant cases – and in several of the racial zoning cases – undercuts any conclusion that formalism and the ideal of equal treatment alone explain the outcomes of the race-nuisance cases.

E. Interest Convergence: Race Nuisance and Segregation

Critical race theory offers a possible explanation for the different treatment of race nuisance and racial zoning and covenant cases: interest convergence.[236] Derrick Bell is best known for this theory and has articulated: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." [237] If a primary goal of the Jim Crow period was racial segregation,[238] then perhaps courts were rarely willing to find for individual white plaintiffs in the race nuisance cases because very few of the race-nuisance cases challenged the architecture of segregation. Rather, most of the cases involved white challenges to the location of all-Black institutions.[239]

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234 Arthur T. Martin, *Segregation of Negroes*, 32 MICH. L. REV. 721, 738 (1934).

235 CHARLES MANGUM, JR., THE PROBLEM OF THE NEGRO 148 (1940).

236 Bell, *supra* note __, at 523.

237 *Id.* Black theorists and political activists have long debated whether white self-interest is critical to the success of Black liberation. For a thoughtful exploration of this debate, *see* Sherryl Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005).

238 *See* DAVID DELANEY, RACE, PLACE, AND THE *Law* 93 (1998) ("In the decades following the Civil Rights Cases, the geopolitics of race became centered on segregation in U.S. cities.").

239 *Boyd*, 77 S.W.669; *Giles*, 97 S.E. 52; *Diggs*, 105 A. 157; *City Council of City and County of Denver*, 76 Colo. 86; *Spencer Chapel*, 231 P. 1074; *Mitchell*, 18 S.W.2d 364;

Another set of cases involved wealthy white families seeking to house their Black servants on their property.[240] Only a small subset of the cases involved the potential integration of racial minorities as equals into white neighborhoods.[241]

For a racially segregated society to exist, Black institutions had to be located somewhere, and the small Black enclaves may not have been big enough for cemeteries, hospitals, parks and sanatoriums. Therefore, the decisions to reject claims that all-Black institutions constituted a nuisance may have been consistent with the general societal goal of segregation. This conclusion has some support in other reported cases in which individual or small groups of white landowners tried to challenge zoning decisions or the use of municipal funds for Black cemeteries, parks and schools. In each, courts rejected the claims of the individual white landowners in favor of the broader societal interest of a segregated society.[242]

Several of the cases did seem contrary to the goal of segregation, however. *Falloon, Lancaster,* and *Woods v. Kiersky* all involved suits seeking to prevent Blacks from living in white neighborhoods. These can perhaps be explained by altering slightly the articulation of the white interests at stake. Perhaps segregation per se was not the primary goal of Jim Crow, but rather, racial subordination or white dominance. Though the presence of Black servants obviously offended the particular neighbors in *Lancaster* and *Woods v. Kiersky*, this sort of racial proximity did not challenge the societal goal of racial subordination or some descriptons of the general interests of the dominant class. Generally, even those hostile to living near blacks made exceptions for Black servants since "it had always been a central tenet of white racist ideology that . . . whenever the two races come into contact, the white man must rule, and the black man must serve."[243] According to a white Missippian and former slaveowner, whites had no objection to personal association with Blacks, "provided it be upon terms which contain no suggestion of equality of personal status."[244]

Jones v. Little Rock, 34 S.W.2d 222; *Qualls*, 64 S.W.2d 548; *Hall*, 170 S.E. 193; *Morrison*, 7 S.E.2d 635; *Young*, 64 A.2d 814; *Jones v. Trawick*, 75 So.2d 785.

[240] *Lancaster*, 245 S.W. 755; *Worm*, 223 S.W. 1016; *Young*, 64 A.2d 814. Mangum notes that white people are averse to living near blacks unless the latter are servants. MANGUM, *supra* note __. Thus, *Lancaster* and *Wood* are arguably not against interests of the dominant class. Litwack quotes a white Missippian and former slaverowner as stating that whites had no objection to personal association with Blacks, "provided it be upon terms which contain no suggestion of equality of personal status." LITWACK, *supra* note __, at 219.

[241] *Falloon*, 29 Kan. 292; *Holbrook*, 100 N.E. 1111; *Qualls*, 64 S.W.2d 548.

[242] City of Rome v. Shadyside Memorial Gardens, 92 S.E.2d 734 (1956) (overruling zoning decision to reject black cemetery).

[243] LITWACK, *supra* note __, at 219.

[244] *Id*.

Allowing for a broad definition of white interest, the vast majority of the race-nuisance cases did not actually challenge the dominant racial mores of the times. Rather, all but five cases were either consistent with the goal of establishing a segregated society or with maintaining the role of African Americans as a servant class. Only *Qualls II*, *Falloon, Hollbrook*, *Worm v. Wood,* and *Redmond* involved the potential for the integeration of racial minorities as relative equals. Indeed, one can argue that even *Falloon* and *Worm* did not truly challenge racial supremecy. In both cases, Blacks and other racial minorities were to be housed in small shacks in what seem to be more prosperous white neighborhoods. Arguably then, these cases involved proximity but not equality since the shacks did not connote that the residents were the equals of the neighboring whites.

This theory has some traction: unlike the racial zoning and restrictive covenant cases, race nuisance cases did not further segregation in any coherent way and therefore, courts were able to give lip-service to applying doctrine fairly and adhering to egalitarian norms. While courts perceiving value in the appearance of even-handedness is still perhaps surprising to those who previously adhered to the "pawn" view of state courts, it does not undercut the interest convergence take. This argument is similar to Berry's analysis of the inheritance cases. She contends that:

> Judges let African American mistresses and their children inherit according to the provisions of a white patriarch's will because their claims reinforced rather than threatened male domination and race relations.[245]

The primary limitation of the interest convergence take, in my view, is that it is most helpful as an ex post explanation for the outcomes of cases rather than for predicting how courts will rule ex ante. In both the race-nuisance cases and the inheritance cases, either conclusion the courts reached can be explained as supporting racist norms.

In addition, as noted above, a few of the race-nuisance cases would seem contrary to dominant white interests. Mr. Qualls, described as a highly successful funeral home director, brought two separate actions to overturn zoning decisions by the City of Memphsis seeking entry into what the courts describe as an affluent part of town.[246] Mr. Qualls and his lawyers expressly challenged the zoning decisions as racist actions, seeking to have the decisions overturned as violations of the Fourteenth Amendment. The fact that Mr. Qualls succeeded in his second action, and that the Supreme Court of Tennessee ruled that he should be allowed to operate his casket business and live in an affluent white part of Memphsis would be difficult to predict using an interest convergence analysis.

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[245] BERRY, *supra* note __, at 81.

[246] 15 Tenn. App. 575.

Redmond is perhaps even more quixotic. The suit was brought in Mississippi in 1928 and involved a Black man administering drugs and medicine to both Blacks and whites, including white women. The case raised all the specters of white paranoia – and it would seem in the interests of white doctors to preclude Blacks from administering medicine without a license. Yet the Court refused to issue an injunction prohibiting him from operating.

In addition, interest convergence seems to assume that white interests are monolithic and that racialized interests supercede all other interests or principles. These assumptions are disproved even in the small world of cases this essay considers. The preferences of whites often diverged from racist norms: in *Worm v. Wood*, it was in the landowner's interest to be able to have wide access to potential tenants of whatever race; the white patients of Mr. Redmond preferred his medical treatment to other available white doctors. Similarly, the white real estate broker plaintiff in *Buchanan v. Warely* like the defendant in *Worm v. Wood* inveighed against a racially restricted client base, and indeed the white owners of the railroad that colluded in *Plessy v. Ferguson* had financial reasons to prefer an end to segregated rail cars. While the majority of white voters sadly were supportive of racial zoning – many white financial interests were harmed by these same mechanisms.

1. Protecting the Rights of White Property Owners

Perhaps then the interest convergence theory need only be amended to add the primacy of property rights. Many commentators have contended that the importance of property rights has historically transcended even support for segregation.[247] This principle seems to explain the Supreme Court's decision invalidating the racial zoning ordinance in *Buchanan v. Warely*. Even the Supreme Court's "notorious racist,"[248] Justice James McReynolds, joined the opinion. The primacy of property rights was evident in the first set of southern courts cases invalidating racial zoning ordinances.[249] The North Carolina Supreme Court, for example, appeared moved not as much by constitutional concerns, as the "inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right."[250] Justice Brewer, for example, whom I noted above may have harbored integrationist views, is better known as a strong proponent of property rights.[251] In a speech at Yale Law School, he described the "sacredness" of property ownership and the "love of acquirement,

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[247] KLARMAN, JIM CROW, *supra* note __, at 79-81.

[248] *Id*. at 81.

[249] *Id*.

[250] *Id*. (quoting *State v. Darnell*, 81 S.E. at 340); Schmitt, *supra* note __, at 501-502.

[251] Steven Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427, 434 (1999).

mingled with the joy of possession."[252] The "natural-law/natural-rights" theory of property that Brewer and others of his time likely adhered to extolled the notion of man's "equal freedom of action" over his land.[253] This theory provides a powerful protection for individual's rights to use their property – unless that use results in a physical invasion of another's property.[254]

This natural right theory of property which included the rights to use and transfer as widely as possible may even have trumped the racism of the period. According to a contemporaneous scholar, the main concern animating courts during this period was protecting the ability of white property owners to sell their property:

> Courts have in many instances diverged from their usual policy of upholding the separatists. In abandoning their customary attitude toward policies of like nature, the courts have probably been influenced by the fact that white property owners would otherwise be limited in their ability to transfer their property.[255]

This view also correlates with the outcomes in the race-nuisance cases. Seven of the eight "mere presence" cases involved disputes between *white* landowners.[256] Ten of the cases clearly involved white property owners on *both* sides of the dispute.[257] In another elevent of the cases, it is not clear whether the property owner of the challenged land use was white or Black.[258] In only seven of the cases was the property owner or owners of the challenged use definitely Black.[259] Though it must be noted that of the six cases in which the property owner was Black, in all but one, the Black property owner prevailed.

The principle of protecting property owners from external intrusion helps distinguish between the race-nuisance and restrictive

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252 *Id*. at 435 (quoting David J. Brewer, *Protection to Private Property from Public Attack, Address Before the Graduating Classes at Yale Law School* (June 23, 1891)).

253 *See* Claeyes, *supra* note __, at 5-7.

254 *Id*.

255 MANGUM, *supra* note __, at 140-41.

256 *Falloon*, 29 Kan. 292, 44 Am.Rep. 642; *Worm*, 223 S.W. 1016; *Lancaster*, 245 S.W. 755; *Woods*, 14 S.W.2d 825; *Holbrook*, 100 N.E. 1111; *Crist*, 163 P.2d 214; *Wright*, 142 So.2d 489.

257 *Falloon*, 29 Kan. 292, 44 Am.Rep. 642; *Worm*, 223 S.W. 1016; *Lancaster*, 245 S.W. 755; *Holbrook*, 100 N.E. 1111; *Crist*, 163 P.2d 214; *Wright*, 142 So.2d 489; *Woods*, 14 S.W.2d 825; *Killian*, 154 S.W.2d 387; *Dudley*, 223 N.C. 639; *Smith v. Commonwealth*, 45 Ky. 21.

258 *Baptist Church*, 178 S.W. 689; *Young*, 64 A.2d 814; *Green*, 56 So.2d 12; *Mitchell*, 18 S.W.2d 364; *Jones v. Little Rock*, 34 S.W.2d 222; *Fox*, 194 S.W. 88; *Harty* 269 S.W. 1064; *Jones v. Trawick*, 75 So.2d 785; *Hall*, 170 S.E. 193; *Thoenebe*, 101 A. 98; *City Council of City and County of Denver*, 76 Colo. 86.

259 *Diggs*, 105 A. 157; *Redmond*, 118 So. 360; *Giles*, 97 S.E. 52; *Spencer Chapel*, 231 P. 1074; *Qualls*, 64 S.W.2d 548, *Boyd*, 77 S.W.669; *Morrison*, 7 S.E.2d 635.

259 Property theorists discussion of the preference for forward looking covenants to ad hoc nuisance.

covenant cases. The latter involve a property owner's desire to impose restrictions upon his own property into the future while the former involves interference by purely external forces.[260] As Eric Claeyes has recently detailed, nineteenth century property theorists were loath to allow law to dictate how an individual used his land: "many are the degrees, many are the varieties of human genius, human dispositions, and human characters. One man has a turn for mechanicks; another for architecture; one paints; a second makes poems; this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character is not easy, is, perhaps impossible."[261] Accordingly, for judges to determine that Blacks constituted a per se nuisance was a significant deviation from the court's general protection of individual property owners' preferences. By contrast, the restrictive covenant cases involved property owner's attempts to control their own property through contract law.

Many scholars have suggested that the line of cases during the Jim Crow and Progressive eras that protected property rights even when such protections mitigated against racial segregation were somehow less important to the pursuit of equal justice for people of color.[262] Protecting property rights alone is obviously not sufficient when it is not accompanied by access to education, employment, capital, and even-handed application of criminal laws. However, race neutral protection of property rights was a critical step in the movement toward civil rights in this country. If the protection of private property is a central function of government in a capitalist society, the failure to protect the property of one class of citizens would have been significant indeed.[263] More specifically, court decisions invalidating the property rights of Black people on grounds that their presence was offensive could well have led to a juridical apartheid. As other commentators have argued, the protection of property rights illustrated Jim Crow's legal limits.[264] The race nuisance cases, then, along with the Supreme Court's decisions invalidating racial zoning and finally holding racially restrictive

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260 Property theorists discussion of the preference for forward looking covenants to ad hoc nuisance.

261 Claeyes, *supra* note __, at 7 (quoting James Wilson at 240-41).

262 *See*, *e.g.,* KLARMAN, PROGRESSIVE ERA, *supra* note __ and David Bernstein, *supra* note __. *But see* David Bernstein & Ilya Somin, *Review, Judicial Power and Civil Rights Reconsidered: From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 114 YALE L.J. 591 (2004).

263 The centrality of property rights to liberal capitalist democracy is as old as John Locke's Second Treatise of Government. *See* Rose, *supra* note __ (Dozen Prop) at 267. Carol Rose's work provides ample discussion of the significance of property rights for liberal democracies. *See*, *e.g.*, Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 3 (2000) (noting that Adam Smith identified property rights as "justice" itself).

264 *Id.*

covenants unenforceable were of enormous importance in the the 20th century's civil rights struggle.[265]

IV. RACE NUISANCE AND RACIAL LIBERATION -- INSIGHTS INTO THE PRESENT

One response to the race nuisance cases is: So what? If in most areas of law, state courts in the Jim Crow era did ignore the legal rights of Black people, why does this small set of cases matter in the big picture? I contend that these cases – and likely a host of others -- matter for multiple reasons, both intellectual and practical.

First, mischaracterizing the state courts' jurisprudential practices leads scholars to misinterpret the Supreme Court's practices. Scholars such as David Bernstein and Sonia Somin have described the Supreme Court's race decisions, and particularly *Buchanan*, during the Progressive era as remarkable. They emphasize the significance of a decision invalidating racial zoning during the most racist period in post-Civil War American history, and the facts that (1) the Court had to distinguish *Plessy* and "was not entirely persuasive in doing so:"; (2) during this period, sociological jurisprudence were in the ascendance; and (3) the Supreme Court had recently upheld nonracial zoning, on grounds that could as easily been applied to racial zoning. However, *Buchanan* is not nearly so remarkable if viewed in light of the race nuisance cases. The Supreme Court should not be given credit for progressive racial views if state courts during the same era were adhering to similar ideals. Our intellectual history of the Supreme Court will necessarily be incomplete and misinformed if we ignore the backdrop of state court decisions against which the Court acted.

Conversely, the cases are also provide insight into the limits of race neutrality. The last race-nuisance case, *Wright v. DeFatta*, was decided in 1962. In that case, white plaintiffs were successful in seeking an injunction prohibiting the construction of "an *excessiv*e number of Negro dwellings contrary to the Municipal Comprehensive Zoning Ordinance."[266] The date of that case is perhaps not surprising – by the 1960s, racism was at the beginning of its retreat to the shadows of human behavior. However, as we know, the legal mandate against explicit racism did not result in its demise.

Racial zoning may have been invalidated during the Progressive era, but as many have detailed, myriad race-neutral laws have

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265 *Id*. Bernstein & Somin quote W.E.B. Du Bois as crediting Buchanan with "the breaking of the backbone of segregation." *Id*. at 633-34. The late Judge Leon Higginbotham argued that "Buchanan was of profound importance in applying a brake to decelerate what would have been run-away racism in the United States." (quoted in Bernstein & Somin, *supra* note __, n254).

266 142 So.2d 489.

nonetheless been applied to create a segregated and unequal society.[267] Indeed, without expressly referencing "race," some have argued, governments used zoning intentionally to permit the intrusion of incompatible uses into Black neighborhoods and destroy the quality of life.[268] These schemes zoned low income residential areas occupied primarily by Blacks for industrial or commercial use.[269] Because other areas of a municipality prohibit such uses, industrial developers would locate in the Black neighborhoods – bringing with them the noise, odors, and pollution that zoning was ostensibly intended to eliminate. Yale Rabin named this practice "expulsive zoning" because it had the effect of expelling Black residents from their homes.[270] However, he contends that many Blacks were unable to leave these neighborhoods even after industry intruded because of housing discrimination elsewhere.[271] The combination of expulsive zoning and housing discrimination led Black comunities in urban areas to become blighted and overcrowded.[272] Many local governments also used their zoning power to prevent the poor from moving to newly established suburbs or to middle and upper income neighborhoods which had the effect of segregating the poor – and often people of color -- within cities.[273] Arguably, then, zoning has had dire effects upon people of color without violating the legal formalist impediment of race neutrality.

White plaintiffs' lack of success in classifying Black people as nuisances per se has not rendered nuisance law wholly free from racial effects either. Beginning in the Jim Crow era and continuing into the late 20th century, local officials have used their authority to eliminate public nuisances to enact various race neutral vagrancy, anti-loitering, and most recently, anti-gang statutes that have had a vastly disproportionate impact upon people of color.[274] As Dorothy Roberts

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267 *See*, *e.g.*, Godsil, *supra* note __.

268 YALE RABIN, EXPULSIVE ZONING: THE INEQUITABLE LEGACY OF EUCLID, IN ZONING AND THE AMERICAN DREAM 101, 101 (Charles M. Harr, et al. eds., 1989). Rabin undertook 12 case studies to determine why Black residential areas were often interspersed with industrial and commercial uses. *Id*. at 102. In each, he found that expulsive zoning was a major influence. *Id*.

269 *Id*. at 102.

270 *Id*. For a thoughtful discussion of expulsive zoning, see Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993).

271 RABIN, *supra* note__, at 102.

272 *Id*.

273 *See generally*, CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

274 Matthew Mickle Werdegar , Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999) (discussing People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal.), cert. denied, 117 S. Ct. 2513 (1997)). California enacted a statute that allowed police to obtain an order that a particular gang constituted a public nuisance, however, the hall-marks of who

and other scholars have argued, these ostensibly race neutral statutes were often by design or effect focused upon criminalizing and excluding African Americans from public spaces.[275] When the exclusionary intention or effect has been too obvious, the Supreme Court has often intervened even if on grounds other than the Equal Protection Clause. For example, in the 1970s, in *Papachristou v. City of Jacksonville*, the Supreme Court invalidated as vague an anti-loitering law, holding:

> Those generally implicated by the imprecise terms of the ordinance - poor people, nonconformists, dissenters, idlers - may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme ... furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[276]

And more recently, in *City of Chicago v. Morales,* the Supreme Court invalidated a loitering ordinance enacted in Chicago which allowed police officers to order any group of two or more people to disperse if one is a suspected gang member and to arrest and imprison anyone who refused.[277] The anti-loitering ordinance was race neutral, and race was not a basis for the Court's decision. However, as Roberts reported: "[d]uring the three years the law was in effect, it yielded arrests of more than 40,000 citizens, most of whom were Black or Latino residents of inner-city neighborhoods."[278] Most interesting, perhaps, is the debate as to whether people of color were ultimately helped or harmed by the Supreme Court's decision.[279]

In most facets of our society -- education, incarcertain rates, earnings, capitol, life expectancy, infant mortality, access to health care, quality of environment – race remains a salient fact. In some of these, law itself remains a barrier to equality. In this Article, I have suggested that the race neutrality ideal present in the race nuisance cases was a

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was a member of the gang were so broad that most young African-American and Latino men satisfied one or more of the criteria. *Id*. *See also* Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2261-62 (1998).

275 *See*, *e.g*., Dorothy E. Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

276 Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

277 City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1997), aff'd, 119 S. Ct. 1849 (1999). *See* Roberts, *supra*, for full exploration.

278 *Id*. at 776.

279 *See* Tracy L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (1998).

critical turn away from legalized apartheid, but I also recognize that it has never been sufficient to overcome the use of law to achieve racialized ends by some segments of society.

Apart from intellectual history, the cases' practical significance were primarily a negative: contary decisions in these cases -- Black people as a matter of law are a nuisance – would have signaled a turn toward a dramatically worse society. However, the cases yield several more nuanced insights that are useful in thinking through the current pursuit of racial liberation and equal justice.

The first insight is that those seeking to protect the interests of disempowered group should be willing to seek such protection in long-held common law precedents rather than focusing exclusively upon contested provisions of the Constitution or the civil rights regulatory framework.[280] Long before the Supreme Court overturned *Plessy v. Ferguson*, southern state courts were at least in some instances recognizing the norm of race neutrality in applying common law legal doctrines. The reflexive formalism found in the race nuisance cases is likely similarly to be triggered by strategies linked to property and contract law.[281] Judges may well be more protective of common law legal doctrines because they presume they will apply as well to white litigants. A variant of this argument has been waged by scholars seeking to understand *Buchanan*.

The insight that those seeking racial justice should utilize doctrines that apply more generally leads to the second insight: the cases remind us of the utility of interest convergence or as I'd prefer to call it "strategic alliances."[282] I must begin by acknowledging that Derrick Bell himself is deeply skeptical that interest convergence will lead to any true eradication of racism.[283] Bell has stated: "Beyond the ebb and flow of racial progress lies the still viable and widely accepted (though seldom expressed) belief that America is a white country in which blacks, particularly as a group, are not entitled to the concern, resources, or even empathy that would be extended to similarly situated whites."[284]

Others have more hope. Sherryl Cashin in a recent piece reflects upon the role of "coalition politics" in the civil rights revolution, and

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[280] *See* Godsil, Cathedral, *supra* note __, and MORGAN, GODSIL, MOSES, AWAKENING FROM THE DREAM .

[281] Indeed, Constance Rice, a noted civil rights litigator and activist, in her address to the AALS Engaged Scholarship Plenary, advanced the view that rights rooted in contract and property are more difficult to dislodge than those rooted in equality guarantees. (Comments on file with the author).

[282] There is a recent resurgence of academic interest in the possibilities of interest convergence or coalition politics. *See*, *e.g.*, Cashin, *supra* note __, at 253 (Cashin provides a compelling account of the history of coalition politics as it led to the passage of the Civil Rights Acts of the mid-1960s and also the political debate between Bayard Rustin and Black Power advocates).

[283] *Id*. at 253 (describing Bell).

[284] *Id*. at 76.

seeks to harness interest convergence "to build the sustainable multiracial coalitions that will be necessary if we are to close existing gaps of racial inequality."[285] Indeed, Cashin quotes Bell for the proposition that alliances can be beneficial:

> Despite its limited benefit, those who defended the University of Michigan affirmative action plans utilized diversity as a self-interest strategy planned for in advance rather than a happy coincidence recognized in retrospect. n80

This tradition has a long vintage, of course. As noted above, *Plessy* itself, while unsuccessful, was based upon the joint interest of African Americans and the railroads who found the segregation laws expensive and inexedient.[286] *Buchanan* also involved a strategic alliance between African Americans in Baltimore and a white real estate magnate who sought the freedom to sell to people of whatever race.[287]

I would also argue that organizing across race is not and should not always be based upon the perceived convergence of economic inte estsof people of color and the dominant class of whites. White interests, like the interests of people of color, are not monolithic. Class, gender, occupation, geography, political belief system – all are bases upon which particular groups of people may have more in common with particular groups of people of other races and ethnicities than with others of their own race. [288]

While a full exploration of this theme is beyond the scope of this article, and some will undoubtedly criticize my naivite, it has been my own experience in engaging in multi-racial coalitions in the environmental justice context that strategic alliances or interest convergence remind us that we share common humanity.

VI. CONCLUSION

The race nuisance cases are fascinating pieces of history. What remains unanswered from the appellate opinions alone, however, is

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[285] *Id*. at 254.

[286] As has been detailed at length, Mr. Plessy was a very light-skinned Black man who would only have been ejected from the rail car by an employee of the railroad who was working with lawyers to overturn the segregation statute. *See* Harris, *supra* note __. For a discussion of the disinclination of some whites to support segeregation if the costs are too high, *see* Bernstein & Somin, *supra* note __, at 612.

[287] 245 U.S. 60.

[288] *See* Cashin, *supra* note __, describing the success of multi-racial organizing by the Indusrial Areas Foundation ("IAF") and the Gamaliel Foundation, which "sponsors approximately fifty mostly church-based interfaith coalitions of suburban and inner city groups that are seriously attacking issues of racial and regional inequity. . . . Gamaliel is committed to redressing the race and class divides in metropolitan regions. Its "mass based organizing" is explicitly designed to bring together poor and working class urban communities with suburban communities." *Id*. at 286.

whether the unsuccessful white plaintiffs honored the decisions denying them relief or whether they pursued extra-legal means. Was Mr. Redmond run out of town after the decision was rendered? Did John Falloon respond violently to the preacher and his family? Were the houses ever constructed for the prospective Black, Mexican, and poor white tenants from Texas? How did the tenacious Mr. Qualls fare? As always, the opinions were only the penultimate step, the real story lies in the implementation.