

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

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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 allegiances to both precedent and the pursuit of racial exclusivity. Surprisingly, 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. Another line of inquiry raised by the cases is whether courts racialized nuisance doctrine by marking as nuisance conduct associated with blacks and rewarding blacks who adhered to white norms. The first claim is impossible to verify with any certainty—and the second embraces gross oversimplifications of racial group behaviors. 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.

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INTRODUCTION

In 1883, a white family brought a lawsuit in state court claiming that a black family moving in next door would be a nuisance. The case, *Falloon v. Schilling*, was appealed to the Kansas Supreme Court, which issued a unanimous decision.¹ This decision was immediately reflected in nuisance treatises, which were then instructive for twenty-eight more such cases brought during the “Jim Crow”² era. Most of these “race-nuisance” cases

1. 29 Kan. 292 (1883).

2. 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 to be synonymous with racial segregation. LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW*, at xiv (1998).

were brought in the South, including Louisiana, Mississippi, Texas, and Tennessee, but a few were brought in the North as well. When I recount this history to my students, other law professors, and even nonlawyers, the vast majority assume that I am describing yet another instance of racist state courts warping doctrine in favor of white supremacy. But the outcomes of these cases surprise my listeners: in most of them, the white plaintiffs lost.³

Many current scholars presume that Jim Crow courts eschewed the rule of law, openly treating black people as unworthy of legal protection.⁴ Articles addressing Jim Crow describe countless incidents of state courts' differential treatment of blacks, and many court opinions contain blatantly racist language. Needless to say, the Jim Crow era was replete with such behavior. However, the race-nuisance cases complicate this monochromatic picture. These cases show southern judges wrestling with their competing allegiances to precedent and the pursuit of racial exclusivity.⁵

The judges in race-nuisance cases did not reflexively and consistently rule against black people. This Article explores multiple legal theories in search of an explanation for this anomaly: legal formalism,⁶ property theory,⁷ and critical race theory.⁸ Each sheds light on aspects of judicial decision-making 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"⁹ of this particular history. The value of these

3. Few legal scholars have discussed the existence of white challenges to black people using common law nuisance, and no one has yet critically analyzed the decisions. See John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 319 (2001); Carol Rose, *Property Stories: Shelley v. Kraemer*, in PROPERTY STORIES 169, 173 (Gerald Korngold & Andrew P. Morriss eds., 2004).

4. See, e.g., MARY FRANCES BERRY, THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT 91 (1999); A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521 (1990); cf. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 81 (2004) (arguing that courts of this era privileged property rights when property rights and racist goals conflicted).

5. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 49-72 (1962) (discussing the counter-majoritarian dilemma experienced by judges).

6. For a discussion of legal formalism or "traditional jurisprudence" see David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 802 (1998). The Jim Crow judges were reflexive formalists for whom race was not always as salient as is often assumed.

7. Scholars, including most recently Michael Klarman, have argued that concern for private property rights transcends even courts' concomitant racism; in other words, property trumps. KLARMAN, *supra* note 4, at 81.

8. A critical race theorist would likely read the cases as an example of Derrick Bell's interest convergence. According to this view, despite the fact that a white plaintiff lost, broader white interests are reaffirmed. 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).

9. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1631 n.36 (1986).

cases lies in their details and specificity. They allow us to critique and complicate the one-size-fits-all theories so common in legal scholarship.¹⁰

A “new formalist” might use these cases as evidence of both the normative value and the prevalence of formalist decision-making, claiming that the cases are purely a result of southern state court judges yielding to precedent. I argue, however, that the race-nuisance cases cannot be fully explained by formalist decision-making and, more significantly, that related cases concerning racial zoning and the enforceability of racially restrictive covenants show the limits to formalism in racially charged cases.

State courts were split on the constitutionality of racial zoning, and all southern courts and most northern courts with significant black populations enforced restrictive covenants.¹¹ In other words, during the same period in which courts were adhering to nuisance precedent by ruling against efforts to exclude black families or institutions from white neighborhoods, courts were also twisting precedent to uphold the enforceability of racially restrictive covenants. The challenge for formalism is to explain the difference between these 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. 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 is a property owner with an interest in enforcing a covenant that presumably bolsters her property value, while the defendant is a current or prospective property owner seeking the right to alienate or purchase property.

Property theory is more enlightening. Recent scholarship reasserting a natural-law theory of property suggests that in the pre-twentieth century legal regime, a physical-invasion theory of property created a strong presumption in favor of free use of land unless it resulted in a physical invasion of another’s property.¹² There were, however, many court-created exceptions to this principle, including ones 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.

Critical race theory, on the other hand, would explain these decisions by looking for the white interest that they were maximizing despite appearing

10. 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.

11. See *infra* notes 232–239.

12. See Eric R. Claeys, *Jefferson Meets Coase: Train Sparks, the Harm-Benefit Distinction, and Natural Property Rights* 10 (May 12, 2006) (unpublished manuscript), <http://ssrn.com/abstract=885199>.

to favor people of color. One variant of this claim is Derrick Bell's well-known theory of interest convergence.¹³ This story plays out in the race-nuisance cases because a number of them 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 either to exclude *segregated* black institutions from their neighborhoods,¹⁴ or to prevent a white family from housing black servants on the family's property.¹⁵ Only a few cases were brought by whites trying to exclude individual blacks of equal socioeconomic status from white neighborhoods.¹⁶ Segregated institutions had to be located somewhere for a segregated society to exist, and the small black enclaves may not have been big enough for cemeteries, hospitals, parks, and sanatoriums. Therefore, the race-nuisance 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 preservation 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.¹⁷ Ascribing these outcomes to white interest ultimately undercuts interest convergence as a theory because it appears to support either conclusion. Moreover, this understanding of the theory eliminates any agency on the part of the black litigants.

A close read of these cases also complicates application of the interest convergence theory by showing the impossibility of identifying a universal or monolithic “white” interest—in other words, a particular outcome may help one group of whites and harm another. Solving this tension by concluding that the courts consistently handed upper-class whites victory over lower-class whites may explain some cases, for example those in which white people challenged other white people's attempts to house black servants on their property. But it does not explain them all.¹⁸ Is the dominant

13. Bell, *supra* note 8.

14. *E.g.*, *Giles v. Rawlings*, 97 S.E. 521 (Ga. 1918); *Green v. State ex rel. Chatham*, 56 So. 2d 12 (Miss. 1952); *Thoenebe v. Mosby*, 101 A. 98 (Pa. 1917); *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940); *Fox v. Corbitt*, 194 S.W. 88 (Tenn. 1917).

15. *E.g.*, *Woods v. Kiersky*, 14 S.W.2d 825 (Tex. Comm'n App. 1929, judgm't adopted); *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922).

16. *E.g.*, *Falloon v. Schilling*, 29 Kan. 292 (1883); *Holbrook v. Morrison*, 100 N.E. 1111 (Mass. 1913).

17. 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 suggests 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.

18. *See, e.g.*, *Lancaster*, 245 S.W. 755 (Tex. Civ. App. 1922); *Worm v. Wood*, 223 S.W. 1016 (Tex. Civ. App. 1920).

class the developer seeking the right to sell to whoever would purchase, or the developer seeking to maintain a particular area's racial exclusivity?

While the race-nuisance cases are filled with racist references, they nonetheless show that race neutrality was an ideal during this era. The operation of this ideal may help to explain the different outcomes 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 a nuisance—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.¹⁹ 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 covenant excluding blacks.²⁰

My argument here depends on a certain understanding of how the legal ideal of equal treatment operates with respect to race. In other words, the legal ideal of equal treatment predicts the conclusion that the courts should not legally credit group-based assumptions in the nuisance context. The courts appeared to reach this conclusion as well. The white plaintiffs that argued that blacks constitute a *per se* nuisance were contending that all blacks—blacks as a class of people—created a nuisance by their very presence. The plaintiffs made this view clear by using the classic nuisance language: people who are black necessarily will create odors, noise, and a loss of property value. In rejecting these cases, then, the courts were rejecting broadscale assumptions about blacks as a group—and embedding the concept of equality in law with some substance. A contrary decision might conceivably still have begun with a ritual assertion that blacks are entitled to equality under law, but then gone on to accept the claims that all blacks are malodorous, loud, and the cause of reduced property value.

The cases are notable for this adherence to formal equality—they rejected a categorical determination that blacks constituted a nuisance based upon their status as blacks. However, there are two other possible ways that some might argue these cases may have nonetheless racialized nuisance law. One—which is more overt—is that the courts adjudged certain conduct as a

19. The racial zoning cases were more troublesome because they clearly involved state action—but after *Plessy v. Ferguson*, 163 U.S. 537 (1896), 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.

20. 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 (2001). 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* Section III.C for a full discussion of the racially restrictive covenant cases.

nuisance *because* it was associated with black people. This practice may have been conscious or not. This would play out as follows—black people engage in exuberant and noisy forms of religious worship; we the court condemn conduct typical of black people; therefore, exuberant and noisy worship is a nuisance.

A second possibility is that the court utilized shared norms when determining what sorts of conduct constituted a nuisance. These norms were developed by white judges and communities; in some arenas, blacks often did not adhere to these norms, and, therefore, their conduct was deemed a nuisance. In other words, the courts may have been “adjudging whether or not black [people were] behaving in ways that might indicate their adherence to the white norms of the time—i.e. ‘acting white.’”²¹ Even in *Falloon*, the opinion noted that the home at issue looked neat and that the family in fact was the family of a preacher and “behaved well” and were not “worthless negroes.”²²

The determination that the family “behaved well” likely was based upon norms of behavior arising from the dominant white community. While this preacher and his family behaved well and were allowed to remain, another court rejected the joyous and loud worship of a black congregation because nearby white residents found the “din” unbearable.²³ These determinations are stubbornly contextual—while quiet worship and keeping to oneself are ideals in some communities, these same behaviors might suggest coldness and lack of sufficient fervor in others. One court, overturning a conviction of a black preacher 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, stated 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”²⁴

This Article will explore the implications of the competing ways in which race may have played into these decisions. If courts were concluding that certain conduct was a nuisance because it was typical of conduct engaged in by black people, then nuisance law was being racialized (and is subject to critique) even if the courts were claiming an adherence to equality. In other words, the claimed adherence to equality seems obviously disingenuous if the courts are simply using conduct they associate with black people as a guise for finding black people to be nuisances. The second scenario is more complicated. Was it disingenuous (or was equality being shortchanged) if courts applied dominant community standards to determine what conduct constituted a nuisance in instances in which

21. See E-mail from Sheila Foster, Professor of Law, Fordham Univ., to author (Apr. 1, 2006) (on file with author). Don Herzog also raised this issue in comments on an earlier draft of this paper.

22. *Falloon v. Schilling*, 29 Kan. 292, 295 (1883).

23. *Morison v. Rawlinson*, 7 S.E.2d 635, 638 (S.C. 1940).

24. *City of Louisiana v. Bottoms*, 300 S.W. 316, 318 (Mo. Ct. App. 1927).

blacks often deviated from this standard? If white congregations in a particular community were typically quiet while black congregations were typically noisy, was it a deviation from an ideal of equal treatment for courts to declare that the black churches located near white residential neighborhoods were nuisances?²⁵

From these rich historical sources, we can also derive insight into the present. 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. This offers hope for the role of law in securing racial liberation, and demonstrates that 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. While there have always been some in the dominant group who hold a firm ideological commitment to equality and would partner with minority groups, these cases show the beneficial exploitation of the divergent interests of the dominant class. Subsets of whites will at different points have more in common with people of color than with other groups of whites.²⁶ These instances can and should be exploited through the formation of strategic alliances. These strategic alliances are age-old—the litigants in *Buchanan v. Warley* used them,²⁷ as did those favoring affirmative action in the recent *Grutter* litigation.²⁸

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. While some judges in the Jim Crow era subscribed to—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. Carol Rose has argued as follows:

[O]ur everyday lives are filled with instances that call on us to respect property, even when no public 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 a bargain. A prop-

25. This inquiry is of current as well as historical relevance and has been explored in depth in two competing accounts of the role of anti-discrimination law. Compare RICHARD THOMPSON FORD, *RACIAL CULTURE* (2005) (critiquing law reform efforts to extend the reach of civil rights to prohibit "cultural discrimination"), with KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (contending that the oppressed groups are harmed by cultural requirements to assimilate).

26. For a full discussion of the possibility of inter-class coalitions, see LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

27. 245 U.S. 60 (1917).

28. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

erty regime, in short, depends on a web of respect, honor, and acceptance that somehow modifies the immediate appetite for “more.”²⁹

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.³⁰ 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.”³¹ 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.”³² During a 1901 public debate (argued by two young black women in Charlotte and entitled “Is the South the Best Home for the Negro?”), Laura Arnold noted that too many blacks had rested their hopes on the security of property, only to be devastated without warning or purpose.³³

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 common with our own than we like to remember. As important, 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”³⁴ 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 the related lines of cases involving racial zoning and racially restrictive covenants, and analyzes the race-nuisance cases under competing jurisprudential theories of formalism, property theory, and critical race theory. This Part concludes with a discussion of whether the race-nuisance cases, despite ostensibly adhering to a norm of equality, in fact racialized nuisance law. Part III offers a series of insights into the present from the race-nuisance and related cases.

29. Carol M. Rose, “*Enough, and As Good*” of What?, 81 Nw. U. L. REV. 417, 439 (1987).

30. 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 Nw. U. L. REV. 505, 526 (2001).

31. LITWACK, *supra* note 2, at 153 (quoting newspaper report).

32. *Id.* (paraphrasing newspaper report).

33. *Id.* at 486–87.

34. Nagle, *supra* note 3, at 275 (noting that some neighbors complained of the “mere presence” of an unmarried couple and black family).

I. RACE AND NUISANCE IN THE COURTS

Conventional wisdom would predict that 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 at the time was an elastic concept that at least formally precluded any use of land that would have caused annoyance to adjacent landowners.³⁵ The presence of black people would undoubtedly have caused such annoyance to the many racist and segregationist whites. The first two decades of the twentieth century saw waves of pseudoscience supporting notions of black inferiority and the need to segregate the races.³⁶ 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 criminality.”³⁷ The white plaintiffs in the race-nuisance cases sought to vindicate these views legally.

This Part explores the race-nuisance cases in detail. I have identified twenty-eight 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 engaged in 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.³⁸

35. See, e.g., Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 273 (1996) (noting that “late nineteenth-century and early twentieth-century American law 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 citing cases involving the breeding of mares and stallions within the sight and hearing of a dwelling).

36. See, e.g., Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 651–56 (exploring the science and social science racial inferiority theories of the late nineteenth and early twentieth century and concluding that the science of the day created a great fear of the social costs of racial mixing, prompting segregation legislation); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 444, 453 (1982).

37. GEORGE FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 255 (1971).

38. 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 Article attempts to understand modes of judicial decision-making.

A. Overview of Nuisance Doctrine

Nuisance law was in the midst of tremendous change from the late nineteenth to the mid-twentieth century. The doctrine originally protected each landowner's right to the quiet enjoyment of his land.³⁹ Courts thus enjoined any use—even if otherwise legal—that infringed upon the essential elements of a landowner's enjoyment.⁴⁰ 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.⁴¹

As industrialization flourished, many courts became more restrictive with the concept of nuisance.⁴² A primary means to allow for industrialization without formally altering the doctrine was to refuse to grant injunctive relief for prospective nuisances.⁴³ Courts were in considerable disagreement over the degree of interference that should be legally tolerable and the relevance of the social utility of defendant's use.⁴⁴ 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.⁴⁵ 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.⁴⁶

However, with regard to purely residential uses, 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.⁴⁷ 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.⁴⁸

39. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 31 (1977).

40. Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1851–58 (2004).

41. WILLIAM BLACKSTONE, 3 COMMENTARIES *217; see also Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeal 1850–1915*, 54 ALB. L. REV. 301, 306–07 (1990); Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 195–96 (1990).

42. Lewin, *supra* note 41, at 199.

43. See Andrew H. Sharp, Comment, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENVTL. AFF. L. REV. 627, 630 (1988). Some courts limited anticipatory nuisance findings to "per se nuisances." *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. *E.g.*, *Adams v. Michael*, 38 Md. 123, 128 (1873).

44. Lewin, *supra* note 41, at 201–03.

45. *Id.* at 202.

46. *Id.* at 209.

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

48. See, *e.g.*, *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

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,⁴⁹ acknowledges the difficulty of identifying nuisance doctrine's inherent limitations.

B. *The Mere Presence of a Black Family Is Not a Nuisance*

The first decision rejecting race as a category of nuisance, *Falloon v. Schilling*, began as a dispute between two white neighbors.⁵⁰ Defendant Schilling owned an eighty-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 thirteen 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 to himself and family, by erecting cheap tenement houses on either side of [his] land, and filling them with worthless negroes that they might annoy [Falloon’s] wife, who is a person in delicate health,” and punish them for refusing Schilling’s offer.⁵¹ Consistent with his plan, Schilling erected a small building of twelve-by-twenty feet, and placed it within four feet of Falloon’s land. He then rented it to a “colored preacher, who occupied it with his family, consisting of himself, wife, and one child.”⁵² 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 laedas*.⁵³

The court held that Falloon failed to sustain his allegations since the homes, while small, looked neat, and found that the family in fact was the family of a preacher and “well-behaved” and were not “worthless negroes.”⁵⁴ In bold and sweeping language, the court further stated that:

[E]quity 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 man 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. The law makes no distinction on account

49. Nagle, *supra* note 3, *passim*.

50. 29 Kan. 292 (1883).

51. *Id.* at 293–94.

52. *Id.* at 294.

53. *Id.* at 295. This phrase means using “one’s own property in such a way as not to injure the property of another.” JESSE DUKEMINIER ET AL., PROPERTY 639 (6th ed. 2006).

54. *Falloon*, 29 Kan. at 295. 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 295–96.

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.⁵⁵

Nuisance treatises and digests immediately incorporated the *Falloon* holding.⁵⁶

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*⁵⁷ and *Lancaster v. Harwood*,⁵⁸ both decided by appellate courts in Texas in the early 1920s, the courts rejected plaintiffs' requests for injunctions prohibiting blacks and Mexicans from moving nearby, despite the claim that their presence would "greatly injure and practically destroy the social conditions of [the] neighborhood."⁵⁹

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" would allegedly cause unhealthy conditions and a greater likelihood of fire.⁶⁰ The court said that people from these groups may cause nuisances by *using* the land in certain ways, "but that character of use is not inherent in 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."⁶¹ In other words, small shacks housing blacks, Mexicans, and poor whites were not inherently nuisances.

Worm was then cited by the court in *Lancaster v. Harwood*.⁶² In contrast to both 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.

55. *Id.* at 297.

56. For example, an early authoritative treatise, *Ruling Case Law*, stated as follows:

It is true as a general proposition that a proprietor enjoys a right to improve his own property in any way he may see 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 RULING CASE LAW § 45 (William M. McKinney & Burdett A. Rich eds., 1918) (citations omitted).

57. 223 S.W. 1016 (Tex. Civ. App. 1920).

58. 245 S.W. 755 (Tex. Civ. App. 1922).

59. *Worm*, 223 S.W. at 1018 (quoting Petition for Writ of Injunction, *Worm*).

60. *Id.* at 1018–19.

61. *Id.* at 1019.

62. *Lancaster*, 245 S.W. at 757.

Agnes Harwood sought to enjoin John Lancaster from erecting a garage and servants' quarters that would house "negro" servants. The white family described the harm they would experience from the presence of the "negro" servants in detail.⁶³ The Texas Court of Civil Appeals 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 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.⁶⁴

The court also noted that law cannot "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."⁶⁵

In 1929, in *Woods v. Kiersky*,⁶⁶ 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 "surplusage" Woods's claim that his family would be disturbed by the use of the upper story of the garage by black people.⁶⁷

Neither *Falloon* nor the treatises were cited in the remaining three reported cases on this issue: *Holbrook v. Morrison*,⁶⁸ in Massachusetts in 1913; *Diggs v. Morgan College*,⁶⁹ in Maryland in 1918; and *Crist v. Henshaw*,⁷⁰ in Oklahoma in 1945. Nonetheless, in each, the state's highest court denied the plaintiffs' requests for injunctions, holding that the presence of a disliked racial group failed to constitute a nuisance.

Holbrook, reminiscent of *Falloon*, involved a suit by a white landowner seeking to enjoin another white landowner from placing a "For Sale" sign in front of her house that concluded with "Best Offer from Colored Family."⁷¹ The Massachusetts 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 otherwise in the usual way, and to sell it if she sees fit to a negro family, even though the effect may be to impair the business of the complainants; just as, for instance, the owner of land on a

63. *Id.* at 755–56.

64. *Id.* at 756–57.

65. *Id.* at 757.

66. 14 S.W.2d 825 (Tex. Comm'n App. 1929, judgment adopted).

67. *Id.* at 828.

68. 100 N.E. 1111 (Mass. 1913).

69. 105 A. 157 (Md. 1918).

70. 163 P.2d 214 (Okla. 1945).

71. *Holbrook*, 100 N.E. at 1111.

hillside may cultivate it in the usual way even though the effect of the surface drainage may be to fill up his neighbor's millpond below.⁷²

The Maryland Court of Appeals rejected a white homeowner's suit in *Diggs* on constitutional grounds.⁷³ In that case, white homeowners sought to prevent a black college from expanding its housing, but instead of focusing on nuisance law doctrine, the court simply cited the Supreme Court's decision striking down racial zoning, *Buchanan v. Warley*.⁷⁴

After *Diggs*, the only other reported cases involving challenges to the mere presence of blacks came a few decades later. In *Crist v. Henshaw*, 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 or destroy the market value of their property and create "insufferable and unlivable conditions."⁷⁵ The plaintiffs also argued that the sale of property to blacks would destroy the school system and require plaintiffs to abandon their homes.⁷⁶ As in *Diggs*, the court decided on constitutional grounds, finding that such a holding would impair the Civil Rights Act of 1866 and the Fourteenth 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*.⁷⁷

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.

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

72. *Id.*

73. *Diggs*, 105 A. at 159.

74. 245 U.S. 60 (1917). The Maryland Court of Appeals stated, "Whatever view may have been entertained formerly, since the decision in *Buchanan v. Warley*, and *Jackson v. State*, it is clear that the improvement of land as a colored residential neighborhood is not of itself a public nuisance." *Diggs*, 105 A. at 158-59 (citations omitted).

75. *Crist*, 163 P.2d at 215.

76. *Id.*

77. 334 U.S. 1 (1948). The Oklahoma Supreme Court continued without any direct citations:

The law is clear that the sale of land to negroes or the improvement of lands as a residential settlement is not of 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.

Crist, 163 P.2d at 216.

of color constituted a nuisance. White plaintiffs sought to classify 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—thirteen of twenty-three cases—appellate courts rejected claims that these land uses by blacks constituted nuisances.

1. Churches

Outside of the race-nuisance context, it was well established that churches were not nuisances per se. Courts in rare circumstances had found churches to be nuisances in fact, when they found that a particular church's 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 1903,⁷⁸ and Oklahoma, in 1924,⁷⁹ declined to grant the white communities the relief they sought, but in South Carolina in 1940,⁸⁰ 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 their property's value.⁸¹ However, both *Boyd v. Board of Councilman of Frankfort*⁸² and *Spencer Chapel Methodist Episcopal Church v. Brogan*⁸³ involved attempts to prohibit the construction of a new church facility, while *Morison v. Rawlinson*⁸⁴ involved a city council attempt to declare the existing church a nuisance in fact.

In *Spencer Chapel*, white plaintiffs testified that they had been disturbed by noise and shouting at the extant church, and by those congregating around the church.⁸⁵ 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 the following in their brief:

“[P]roperty 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 the defendants in error are opposed to construction of any church on said lot”⁸⁶

78. *Boyd v. Bd. of Councilmen of Frankfort*, 77 S.W. 669 (Ky. Ct. App. 1903).

79. *Spencer Chapel Methodist Episcopal Church v. Brogan*, 231 P. 1074 (Okla. 1924).

80. *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940).

81. In a related context, see *supra* note 24 and accompanying text (discussing a case in which the court looked favorably upon black worship).

82. 77 S.W. 669 (Ky. Ct. App. 1903).

83. 231 P. 1074 (Okla. 1924).

84. 7 S.E.2d 635 (S.C. 1940).

85. 231 P. at 1075.

86. *Id.* (quoting Brief of Plaintiffs in Error, *Spencer Chapel*). The church had bought the property and built a brick church in 1903 or 1904, before any whites were living in the vicinity. The

The Oklahoma Supreme Court rejected plaintiffs' claim, stating that no case had previously held that a church was a nuisance.⁸⁷ 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 as follows:

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 [sic] no doubt the negro population in that particular community 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 doubt their population will trend in that direction. This appears to be the theory of the plaintiffs.⁸⁸

Petitioners in *Boyd v. Board of Councilmen of Frankfort*⁸⁹ 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 without the permit. The Kentucky Court of Appeals considered the enforceability of a statute that characterized the erection of a church and the worship within it as a public nuisance and that the court found "manifestly was passed to prevent the erecting of the [First (Colored) Baptist Church] church building."⁹⁰ The court rejected the city council's attempt to designate the proposed church a nuisance, holding that "[t]he term 'nuisance' has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance."⁹¹ The court explained that previous case law had declared that injunctions are not to be granted for threatened nuisances unless the 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.⁹²

By contrast, in *Morison v. Rawlinson*,⁹³ 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

structure burned down and the church entered into a contract to build a new, modern church building. The evidence showed that some of the blocks near the church were predominantly black while others had recently become majority white.

87. *Id.* at 1075–76.

88. *Id.* at 1076.

89. 77 S.W. 669 (Ky. Ct. App. 1903).

90. *Id.* at 673.

91. *Id.*

92. *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). *Boyd*, 77 S.W. at 672.

93. 7 S.E.2d 635 (S.C. 1940).

them down as a public nuisance. Notably, white residents had protested the congregation's application for a building permit to construct its church in 1933, but to no avail—the City Council had granted the permit anyway. 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 until the evening and resulted in “tumult [that] can be heard for many city blocks.”⁹⁴ The court stated that “[w]hite 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.”⁹⁵ The court, however, refused to hold that the church services constituted 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. After its own determination that the manner of 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,”⁹⁶ it stated that “their form of worship is inseparably connected with and accompanied by unrestrained noise and consequent public disturbance.”⁹⁷

2. *Funeral Homes and Cemeteries*

Challenges to funeral homes and cemeteries were fairly regular in the late nineteenth and early twentieth centuries regardless of the race of the deceased.⁹⁸ 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, and challenges *on behalf* of blacks to funereal or burial uses on or near their land or land on which they worked. As with the church cases, these challenges met with mixed success. In the first category of cases, the Supreme Court of Georgia rejected a claim that a black cemetery proposed for a white residential neighborhood would constitute a nuisance per se,⁹⁹ while the Supreme Court of Tennessee in 1932 found that a black funeral

94. *Id.* at 638.

95. *Id.*

96. *Id.*

97. *Id.* at 640.

98. *See, e.g.*, H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS 822 (Albany, John D. Parsons, Jr. 1875).

99. *Hall v. Moffett*, 170 S.E. 192 (Ga. 1933).

home in a white residential neighborhood was properly determined a nuisance per se.¹⁰⁰ 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),¹⁰¹ 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.¹⁰²

The Georgia case is consistent with the treatment of challenges to white cemeteries. In 1933, in *Hall v. Moffett*,¹⁰³ the Supreme Court of Georgia rejected white plaintiffs’ attempt to enjoin the use of city land for a black cemetery. Plaintiffs made the following claims:

[Such use] will be detrimental and injurious to the health, happiness, peace and contentment 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 that] the injury and damage to petitioners’ property and their sense of pride in their community will be irreparable¹⁰⁴

The court reaffirmed the rule that cemeteries are not nuisances per se, and that they will not be enjoined unless they are likely to contaminate water or air.¹⁰⁵ The St. Louis Court of Appeals of Missouri also followed this precedent in 1941, rejecting a challenge by Finton O. Killian and Grover Sibley to the operation of a cemetery for orthodox Jews.¹⁰⁶ 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.¹⁰⁷

In *Qualls v. City of Memphis*,¹⁰⁸ the Court of Appeals 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 had been zoned for commercial use, but the City denied Qualls a permit on grounds that a funeral home in the area would constitute a nuisance per se, “whether for the white or colored race,”

100. *City of Memphis v. Qualls*, 64 S.W.2d 548 (Tenn. Ct. App. 1933).

101. *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954).

102. *Young v. Saint Martin’s Church*, 64 A.2d 814 (Pa. 1949).

103. 170 S.E. 192 (Ga. 1933).

104. *Id.* at 193 (quoting Petition for Writ, *Hall v. Moffett*).

105. *Id.* The Court also rejected the claim that an existing public cemetery for blacks 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.*

106. *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. Ct. App. 1941).

107. *Id.*

108. 15 Tenn. App. 575 (1932).

because of possible emissions of odors and noises.¹⁰⁹ However, the board resolution then stated as follows:

“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”¹¹⁰

The Court of Appeals of Tennessee rejected Qualls’s 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 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.¹¹¹

However, in a related case, published a year later, the Court of Appeals of Tennessee held *in favor of* 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.¹¹² While the language of the first case involving Mr. Qualls suggests that the decision there 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’s presence. The second *Qualls* case is in some sense more akin to the “mere presence” cases described in the earlier section.

In the “death” cases category in which the alleged special sensitivities of blacks to the presence of cemeteries were at issue, the courts also reached conflicting results.¹¹³ Both reported 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, traffic, noise, and potential groundwater contamination. The plaintiffs in these cases also alleged that thoughts of death would be generally annoying,

109. *Id.* at 579 (quoting Minutes of Bd. of Adjustment of Memphis, January 8, 1931).

110. *Id.* at 579–80 (quoting Minutes of Bd. of Adjustment of Memphis, January 8, 1931).

111. *Id.* at 586.

112. *City of Memphis v. Qualls (Qualls II)*, 64 S.W.2d 548 (Tenn. Ct. App. 1933). The court found that the zoning ordinance provided no basis for denying the permit and held that “[i]t 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.

113. *See Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954); *Young v. Saint Martin’s Church*, 64 A.2d 814 (Pa. 1949).

but would cause particular harm to blacks. *Young*,¹¹⁴ however, was brought by wealthy white residents, who claimed the cemetery would create a difficulty keeping “colored help,” while *Jones* appears to have been brought by black plaintiffs.¹¹⁵

The majority opinion in *Jones* does not mention the race of the plaintiffs or the race of those to be buried in the cemetery. However, the dissent contended that the race of the plaintiffs was central to the holding. The dissenting Justices noted that the area was covenanted to restrict occupancy to blacks, and stated that “it 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.”¹¹⁶ 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.”¹¹⁷

3. Hospitals, Sanatoriums, and Orphanages

Homeowners often objected to the presence of 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.¹¹⁸

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, which was across the street from Giles’s home, into a hospital for blacks. Giles claimed he and his family were unable to enjoy their home as a result of the obnoxious odors, the noise from patients

114. In *Young*, the Supreme Court of 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 of a cemetery as sufficient to brand it a nuisance within the legal meaning of that term.” 64 A.2d at 816–17. The Court rejected the plaintiffs’ attempt to analogize between cemeteries and funeral homes, since the latter but not the former possibly involved vapors from the embalming and autopsies, as well as possible danger of infection. *Id.* at 817.

115. In *Jones*, the Florida Supreme Court, in an *en banc* decision, rejected this precedent. 75 So. 2d 785 (Fla. 1954). 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 the lower court, on the ground that contact with funeral homes “may result in great discomfort, depression and unhappy thoughts.” *Id.* at 787. The Court then extended the rule generally applicable to funeral homes to cemeteries. *Id.*

116. *Id.* at 789 (Thomas, J., dissenting).

117. *Id.* (Thomas, J., dissenting).

118. 97 S.E. 521 (Ga. 1918).

“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.¹¹⁹ 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 ruled that plaintiff had a right to invoke the aid of equity. The ultimate resolution is unreported.

In 1924, in *City Council of Denver v. United Negroes Protective Ass'n*,¹²⁰ 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 the association a permit to operate a home for the 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 that vicinity.”¹²¹ 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, “[a]nother institution for white children . . . of the same general character” was operating on the same block.¹²² The court rejected the City's claim that the decision was fully within its discretion, holding that municipal decisions are not beyond the control of the courts when those decisions are arbitrary or the result of a gross abuse of discretion. Unlike the *Giles* court, which made no mention of the unchallenged white hospital, the *United Negroes Protective Ass'n* court thus appeared to equate the presence of black and white children.

The Mississippi Supreme Court in *Redmond v. State*,¹²³ 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, “constitut[ing] a nuisance.”¹²⁴ According to state testimony, the conditions at Redmond's office were unclean; “flies, spiders, and roaches also [were] in some of the concoctions,” and they found the presence of white girls, one with “her underclothing . . . above her knees”¹²⁵

The court concluded that Redmond was practicing medicine without a license, but held that an injunction was not a proper remedy. The court rea-

119. *Id.* at 521–22.

120. 230 P. 598 (Colo. 1924).

121. *Id.* at 599.

122. *Id.*

123. 118 So. 360 (Miss. 1928).

124. *Id.* at 361.

125. *Id.* at 363.

soned 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, 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.¹²⁶

In *Mitchell v. Deisch*,¹²⁷ 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 deciding state board's province.¹²⁸ It rejected the second as well, on the basis of evidence showing that the operation of sanatoriums does not affect land values, along with case law and treatises stating 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, arguing that the location of the sanatorium in a white community violated the statute directing the board to locate the facility near the black community, and claiming that "the Legislature would refuse to locate a tuberculosis sanatorium for white people among the negroes. One would be as bad as the other, and each, in my judgment, would be in violation of the policy of the state."¹²⁹

4. *Places of Amusement*

Courts generally held that places of amusement—such as playgrounds, athletic fields, gardens, dance halls, and theaters—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.¹³⁰ Similarly, in 1943, the Supreme Court of North Carolina, in *Dudley v. City*

126. *Id.* at 369.

127. 18 S.W.2d 364 (Ark. 1929).

128. *Id.* at 367.

129. *Id.* at 368 (Mehaffy, J., dissenting).

130. 34 S.W.2d 222 (Ark. 1931). The race of the underprivileged boys is not entirely clear—so this could be a class-nuisance rather than a race-nuisance case.

of *Charlotte*,¹³¹ refused to enjoin the City of Charlotte from establishing a public park for blacks. Both courts relied upon precedent holding that places of amusement are not nuisances per se.

Thoenebe v. Mosby,¹³² decided by the Supreme Court of Pennsylvania in 1917, and *Green v. State ex rel. Chatham*,¹³³ decided decades later by the Supreme Court of Mississippi in 1952, involved challenges to extant dance halls. Both courts reaffirmed the principle that primarily black 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 *Thoenebe*, the court refused to grant the white residents' request for an injunction to limit the hours of a dance hall patronized by "colored people."¹³⁴ 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.¹³⁵ The race of the patrons was noted as a fact, but not discussed in the conclusions of law.

By contrast, the court in *Green* determined that a nuisance was created by a dance hall with a jukebox 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.¹³⁶ The court based the nuisance finding on 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."¹³⁷ The court appeared to be particularly troubled by the "swearing and unprintable profanity" to which the neighborhood women and children were subjected.¹³⁸ The situation was exacerbated by "calls of nature" for which there were no facilities, resulting in indecent exposure and horrible odors.¹³⁹ The court granted the injunction, but limited it to restricting the owner from playing the jukebox during worship hours or too late at night.

Nuisance actions against saloons were decided by distinguishing between disorderly and orderly saloons, and determining that the disorderly ones constituted nuisances.¹⁴⁰ In *Fox v. Corbitt*,¹⁴¹ for example, white homeowners challenged a grocer's operation of a saloon. In that case, the court

131. 27 S.E.2d 732 (N.C. 1943).

132. 101 A. 98 (Pa. 1917).

133. 56 So. 2d 12 (Miss. 1952).

134. *Thoenebe*, 101 A. at 99.

135. *Id.*

136. *Green*, 56 So. 2d at 13.

137. *Id.* at 16.

138. *Id.* at 13.

139. *Id.*

140. However, in *Smith v. Commonwealth*, a case decided before the Civil War, the Kentucky Court of Appeals, then Kentucky's highest court, 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. (6 B. Mon.) 21 (1845).

141. 194 S.W. 88 (Tenn. 1917).

granted the white residents' request for an injunction, stating that the place was "in every sense of the word a 'negro dive'" in which "[l]arge crowds of negroes of low order" assembled.¹⁴² The court relied, along with racist stereotypes, on proof that people got drunk and had fights on the sidewalk and that they engaged in "unmentionable indecencies and exposures of their persons."¹⁴³

5. Crowded Housing

In two cases, white plaintiffs succeeded in having designated as nuisances areas densely populated by blacks or Mexicans. In *Harty v. Guerra*,¹⁴⁴ decided by an appellate court in Texas in 1925, the court found that defendants created a nuisance in a "white residential section" by dividing a home and stable into rooms housing up to fifty Mexican "peon[s]," who kept hogs and fowl, and maintained "a din of noises from musical instruments, singing, wood chopping, the barking of dogs, [and] crowing of chickens"¹⁴⁵ The court likened the conditions to those of a cotton gin, a polluting factory, and a barn for the housing of cattle. It therefore 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. Indeed, the court specifically observed 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."¹⁴⁶

Similarly, in the last race-nuisance case, *Wright v. DeFatta*, decided in 1962, plaintiffs sought to enjoin the defendant "from placing an excessive number of Negro dwellings on certain lots contrary to the Municipal Comprehensive Zoning Ordinance."¹⁴⁷ The court held that such a gross violation of the zoning ordinance constituted a nuisance per se.¹⁴⁸

II. THEORIES AND COUNTER-THEORIES

Legal opinions are rich materials for insight into how the ruling elite within particular states sought to express and understand their own moral and legal ideals—and for variants of views from other groups as well.¹⁴⁹ Robert Gordon has argued as follows:

142. *Id.*

143. *Id.*

144. 269 S.W. 1064 (Tex. Civ. App. 1925).

145. *Id.* at 1065. The defendants failed to appear in either the trial or appeal and so the facts are entirely the characterizations of plaintiffs, which the court reprinted in some detail.

146. *Id.*

147. 142 So. 2d 489, 490 (La. Ct. App. 1962) (emphasis added).

148. *Id.* at 494.

149. See MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 59 (2003). Tushnet also quotes Eugene Genovese's description of such cases

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.¹⁵⁰

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 refute the prevailing view that the courts were mere engines of white supremacy, openly eschewing the rule of law. Instead, the cases show that no single theory is fully explanatory. The cases reflect a strain of formalism and a surprising concern for the ideal of race neutrality. When the race-nuisance cases are viewed in concert with other attempts by whites to pursue residential segregation, however, there is much support for Derrick Bell's interest convergence argument as well.¹⁵¹

A. State Courts Furthering White Supremacy

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."¹⁵² Randall Kennedy refers to it as the "Age of Segregation,"¹⁵³ and Cheryl Harris calls it "a time of acute crisis for blacks."¹⁵⁴ Between 1890 and 1907, Mississippi, South Carolina, Louisiana, North Carolina, Alabama, Oklahoma, and Georgia all amended their constitutions to disenfranchise virtually all black people.¹⁵⁵ Florida, Arkansas, Tennessee, and Texas employed statutory devices such as poll taxes to accomplish the same ends.¹⁵⁶ While the Supreme Court decided some cases that limited some modes of black disenfranchisement, blacks were not truly enfranchised again in the South until the enactment of the Voting Rights Act of 1965.¹⁵⁷ In addition to constitutionally and statutorily disenfranchising blacks, the southern and border states were also enacting segregation laws beginning with education and moving toward

as setting out the standards of decency of a world in which "[as in] most worlds . . . men . . . strove to be considered decent." *Id.* at 61 (internal quotation marks omitted).

150. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

151. Bell, *supra* note 8.

152. Schmidt, *supra* note 36, at 446. As discussed later, the race-nuisance cases actually undercut the argument in Schmidt's article that the Supreme Court during this era breathed life into the then dormant Civil Rights Amendments.

153. Kennedy, *supra* note 9, at 1650.

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

155. See AUGUST MEIER & ELLIOT RUDWICK, *FROM PLANTATION TO GHETTO* 178 (1970).

156. *Id.*

157. KLARMAN, *supra* note 4, at 86.

transportation, public accommodations, cemeteries, hospitals, prisons, and, infamously, drinking fountains.¹⁵⁸

Perhaps not surprisingly then, many legal scholars hold the view that state courts in the Jim Crow era abandoned the rule of law and became tools of racial subordination when issues of race emerged. In a recent revisionist account of civil rights lawyering, Professor Kenneth Mack asserts that the common law generally “was not neutral with regard to race, but was subject to discriminatory decision-making.”¹⁵⁹ The late A. Leon Higginbotham similarly concluded—in his discussion of the similarities and differences between racism in state courts during Apartheid Era South Africa and Jim Crow America—that these courts exemplified much of the racism present in the larger society.¹⁶⁰ Indeed, Higginbotham concluded his argument with a quote from Derrick Bell: “[t]he 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.”¹⁶¹

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.¹⁶² In her analysis of the interplay of race and sex in 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.”¹⁶³ Interestingly, Berry rests this conclusion on courts’ willingness to *uphold* wills that granted property to black women and mixed-race children.¹⁶⁴ Benno Schmidt agreed, noting that “law was the foundation of the structure of racial separation” beginning with the informal practices of sheriffs and judges.¹⁶⁵ 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.”¹⁶⁶

158. See MEIER & RUDWICK, *supra* note 155, at 184–85; Schmidt, *supra* note 36, at 472–473.

159. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 276 n.54 (2005).

160. 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 accuseds; 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.

Higginbotham, *supra* note 4, at 521.

161. *Id.* at 557 (quoting DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 33 (2d ed. 1980)).

162. BERRY, *supra* note 4, at 91.

163. *Id.*

164. *Id.* at 85.

165. Schmidt, *supra* note 36, at 474.

166. *Id.*

Michael Klarman has been less categorical. His recent book *From Jim Crow to Civil Rights* carefully distinguished between different decades in the late nineteenth and early twentieth centuries. While he has agreed with Schmidt that the Progressive Era was a period “before the culturally elite values of judges translated into egalitarian racial commitments,”¹⁶⁷ he acknowledged that southern judges after World War I began to overturn some egregious convictions of black defendants. Klarman has before claimed on the one hand that state courts’ “proud pretensions to colorblind justice were absurd”¹⁶⁸ in light of the barriers to blacks’ equal participation in the legal system, but he also granted in his book *Jim Crow* that judges may have believed their own rhetoric. He ultimately concludes that any “liberal sentiment tended to evaporate in cases that were perceived to involve broader challenges to white supremacy or that generated outside criticism of white southerners.”¹⁶⁹

In such a state court system, however, we would expect race-nuisance suits brought by white landowners to have been successful. Nuisance doctrine itself did not clearly preclude such a result. As John Nagle acknowledges, “virtually anything could interfere with somebody’s use and enjoyment of her land.”¹⁷⁰ Indeed, an early English treatise included “subdividing houses in good neighborhoods ‘that become hurtful to the place by overpestring [sic] it with poor,’” as a common nuisance.¹⁷¹ 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 of racial minorities? The realist critique would certainly have suggested such a result. But, as we have seen, they did not follow this reasoning. Instead, the cases stand squarely against the claims of many legal scholars that state courts expressly eschewed any need to apply the rule of law equally to blacks.¹⁷²

167. KLARMAN, *supra* note 4, at 81.

168. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 70 (2000).

169. KLARMAN, *supra* note 4, at 131.

170. Nagle, *supra* note 3, at 275.

171. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 60 (1989) (quoting WILLIAM SHEPPARD, *THE COURT-KEEPER’S GUIDE* (5th ed., London, W.G. 1662) (1649)). Spencer states that other treatises suggest that courts condemned property subdivision because they feared that the poor would catch the plague, “not because they thought they were one.” *Id.* at 60 n.15. However, the language cited clearly suggests that the presence of poor people creates harm.

172. Scholars outside of legal academia have been more careful in their descriptions of state courts during the Jim Crow era. Historian Charles Lofgren, for example, in his study of *Plessy* painstakingly describes the state and federal court decisions in which black plaintiffs sought money damages for alleged discrimination in accommodation. CHARLES A. LOFGREN, *THE PLESSY CASE* 116–47 (1987). However, Lofgren also found that generally “regularly reported case law . . . accepted separate-but-equal, so long as carriers met certain conditions.” *Id.* at 146. Other recent works also provide nuanced views of the confluence of race and state courts. See BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920* (2001); Jennifer B. Wriggins, *Race, Torts, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005).

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

B. *Reflexive Formalism in Operation?*

It seems unlikely that all of the many judges who decided the race-nuisance cases were closet antiracists. 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 nineteenth century and very early twentieth centuries are often described as an era of reflexive formalism, so perhaps nuisance doctrine itself accounts for the cases.¹⁷³ Indeed, this theory offers an explanation for Berry's inheritance cases; she notes that "[t]he courts decided to base their decisions on the formal legal rule that the law would implement the proven will of the testator."¹⁷⁴ 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' ability to ordain their own preferred outcome.

This counter-theory is helpful. The cases suggest that formalist judging often prevailed then—as it often does now.¹⁷⁵ However, when considered with 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 determinant 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. First, if a use was labeled a "per se" nuisance, it could be enjoined prior to operation. 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 racism-propelled courts, reflexive formalism fails to explain the range of decisions in these cases.

The most significant doctrinal constraint was exhibited by courts' reluctance to grant an injunction in anticipatory nuisance cases. Nineteen of the twenty-eight cases involved attempts to enjoin anticipatory nuisances and

173. See Claeys, *supra* note 12.

174. BERRY, *supra* note 4, at 83.

175. This conclusion runs counter to the argument of 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, 619–21 (2000) (describing legal realist and attitudinal models of judicial decision-making). It is not, however, a particularly radical conclusion, and it has support even among adherents to critical legal studies. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 13–14 (1997).

only three of these were successful.¹⁷⁶ By contrast, in the nine cases in which plaintiffs sought to enjoin present nuisances, courts found nuisances in five of the cases.¹⁷⁷

Courts denying injunctions for proposed land uses often referred to an idea roughly parallel to the following: 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 to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance.¹⁷⁸ 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.¹⁷⁹ In *Qualls*, for example, the Board of Adjustment of the City of Memphis held 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 be 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.”¹⁸⁰

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,”¹⁸¹ 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.

176. See *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954); *Wright v. DeFatta*, 142 So. 2d 489 (La. Ct. App. 1962); *Qualls v. City of Memphis*, 15 Tenn. App. 575 (1932).

177. See *Giles v. Rawlings*, 97 S.E. 52 (Ga. 1918); *Green v. State ex rel. Chatham*, 56 So. 2d 12 (Miss. 1952); *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940); *Fox v. Corbitt*, 194 S.W. 88 (Tenn. 1917); *Harty v. Guerra*, 269 S.W. 1064 (Tex. Civ. App. 1925).

178. See *Jones v. Little Rock Boys’ Club*, 34 S.W.2d 222, 224 (Ark. 1931) (“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.” (quoting *Murphy v. Cupp*, 31 S.W.2d 396, 400 (Ark. 1930))); *City Council of Denver v. United Negroes Protective Ass’n*, 230 P. 598, 599 (Colo. 1924) (“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 [a nuisance.]”); *Baptist Church of Madisonville v. Webb*, 178 S.W. 689, 690 (Tex. Civ. App. 1915) (“A jail is not a structure which in itself is a nuisance, nor does it necessarily become such by using it 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.”).

179. 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 v. Charlotte*, 27 S.E.2d 732, 733 (N.C. 1943); *City of Memphis v. Qualls*, 64 S.W.2d 548, 551 (Tenn. Ct. App. 1933).

180. 64 S.W.2d at 550.

181. For a full discussion of the *ad coelum* rule and the “physical-invasion” conception of property, see Claeys, *supra* note 12, at 10.

Nuisance law historically recognized a broad spectrum of harm.¹⁸² On one end was the standard nuisance case involving air pollution (smoke or soot) that caused an actual physical harm.¹⁸³ In the middle of the spectrum were cases involving loud noises or noxious odors that did not result in injury but were readily identified as sensory harms.¹⁸⁴ At the far 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.¹⁸⁵

In death cases, for example, some courts agreed that the proximity of a funeral home or, in fewer cases, a cemetery, caused “great discomfort, depression and unhappy thoughts,”¹⁸⁶ “depression, nervousness, lying awake at night, children made excited,”¹⁸⁷ and the “dampening effect” on the use of outdoor spaces.¹⁸⁸ 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.¹⁸⁹

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 in delicate health.”¹⁹⁰ In *Worm v. Wood*, plaintiffs claimed that the shacks would be occupied “by negroes and Mexicans and a low class of white people, which will greatly injure and practically destroy the social conditions of said neighborhood”¹⁹¹ and would thus “greatly depreciate plaintiffs’ property.”¹⁹² Most vividly, in *Lancaster v. Harwood*, plaintiffs alleged that the presence of a black family a few feet away resulted 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 or 15 feet to white persons of ordinary sensibilities, and of ordinary tastes and habits.”¹⁹³

182. Nagle, *supra* note 3, at 280–90.

183. Godsil, *supra* note 40, at 1840.

184. Nagle, *supra* note 3, at 281–85.

185. *Id.* at 277–81, 288–91 (discussing early twentieth century nuisance challenges to bawdy houses, saloons, gambling parlors, and cemeteries).

186. *Jones v. Trawick*, 75 So. 2d 785, 787 (Fla. 1984).

187. *Fraser v. Fred Parker Funeral Home*, 21 S.E.2d 577, 580 (S.C. 1942), *quoted in* Nagle, *supra* note 3, at 289.

188. *Brown v. Arbuckle*, 198 P.2d 550, 551 (Cal. 1948), *quoted in* Nagle, *supra* note 3, at 289.

189. *See* Nagle, *supra* note 3, at 278–79 (discussing cases such as *Weakley v. Page*, 53 S.W. 551 (Tenn. 1899) and *Marsan v. French*, 61 Tex. 173 (1884)).

190. 29 Kan. 292, 294 (1883).

191. 223 S.W. 1016, 1018 (Tex. Civ. App. 1920).

192. *Id.* at 1017.

193. 245 S.W. 755, 755 (Tex. Civ. App. 1922) (quoting *Petition for Writ of Injunction, Lancaster*).

In light of the racial mores of the late nineteenth and early twentieth 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.

C. A Race Neutrality Ideal at Work?

This Section considers whether the principle of equal treatment under law explains why race mixing was not added to the list of “per se” nuisances. This principle was, obviously, not found in common law. It was, however, introduced into federal legislation. 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 following:

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.¹⁹⁴

Blacks’ rights to purchase and enjoy private property had been made a matter of federal concern.

It may be significant that the first race-nuisance case was decided in 1883 in Kansas (a border state), during (though toward the end of) Reconstruction.¹⁹⁵ 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.

The decision may also be partially a result of the particular views of its author, Justice David Brewer. Brewer later ascended to the Supreme Court where he is best known as conservative member of the “four horsemen” on the United States Supreme Court. On the other hand, in a book entitled *The United States a Christian Nation*, he wrote the following:

Certainly, to me it is the supreme conviction, growing stronger as the years go by, that this is one purpose of Providence in the life of 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 homogeneous American life.¹⁹⁶

Brewer thus appeared to hold certain integrationist tendencies.

194. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

195. *Falloon*, 29 Kan. at 292.

196. DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* 81 (1905).

Brewer's integrationist tendencies did not always dictate outcomes, however. 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.¹⁹⁷ Brewer noted:

“[T]he 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.”¹⁹⁸

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 were initiated during more racist periods and often in the Deep South. The outcomes of the cases are the same: *Kiersky*, *Lancaster*, and *Worm* all denied white families' requests for injunctions preventing blacks and other reviled groups from locating in their neighborhoods.¹⁹⁹ However, these cases do not similarly celebrate the ideal of race neutrality or norms of racial equality. *Kiersky* and *Worm* simply applied precedent without an extended discussion of the norms underlying the precedent, and so appear unconcerned with governing ideals.²⁰⁰

Lancaster is more difficult to categorize and requires more extended analysis. The opinion in *Lancaster* belabors plaintiffs' racist contentions²⁰¹—particularly in contrast to the *Kiersky* opinion, in which the court calls plaintiffs' claims of race nuisance mere “surplusage.”²⁰² 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 personal sentiments, which, as individuals, we are frank to admit, are wholly with the appellee.”²⁰³ 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 one caste to the exclusion of another.”²⁰⁴ The judges end with the statement, “We feel constrained to say that the record in this case discloses the inefficiency of the law to prevent all acts of injustice from being inflicted”²⁰⁵ The opinion is firmly rooted in legal positivism with its express de-linking of law and justice or

197. 211 U.S. 45 (1908).

198. *Id.* at 53 (quoting *Berea Coll. v. Commonwealth*, 94 S.W. 623, 629 (Ky. 1906)).

199. *Woods v. Kiersky*, 14 S.W.2d 825 (Tex. Comm'n App. 1929, judgment adopted); *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922); *Worm v. Wood*, 223 S.W. 1016 (Tex. Civ. App. 1920).

200. 14 S.W.2d at 828; 223 S.W. at 1018.

201. 245 S.W. at 756–57.

202. 14 S.W.2d at 828.

203. *Lancaster*, 245 S.W. at 756.

204. *Id.* at 757.

205. *Id.*

morality. In addition, despite the judges' personal views, the opinion affirms race neutrality by refusing to apply the law differently from one group to another.

Falloon and cases that followed were decided in the nadir of race relations in this country.²⁰⁶ We would expect the judges in the more dramatically racist period of the end of the nineteenth century and the beginning of the twentieth century to have rejected the norm of equal treatment employed in *Falloon*,²⁰⁷ but they did not. The opinions suggest that these judges were formalists—searching for precedents or applicable treatises to follow rather than searching for policy outcomes they personally favored.²⁰⁸

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

Applying doctrinal formalism and the ideal of equality to racial zoning and racially restrictive covenants tests their explanatory power for the race-nuisance cases.²⁰⁹ While both racial zoning and racially restrictive covenants were ultimately held invalid by the United States Supreme Court,²¹⁰ the two practices fared better in state courts. Many court decisions addressing these areas both mangled precedent in predictably political ways and were dramatically unsympathetic to the ideal of equal treatment.

206. The historian Rayford Logan first used the phrase “nadir” to describe race relations in the Progressive Era in his book, *THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901* (1954).

207. After all, it is an integral part of American legal culture for appellate 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.” Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 464 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)). The point at which judges will 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.” *Id.* at 465. 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.

208. 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 175, at 13. This conclusion has been reached by scholars as varied as Thomas Grey, Margaret Radin, and Joseph Raz. Michael 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, *supra* note 4, at 62.

209. There is a vast literature addressing racial zoning and restrictive covenants, many of which are addressed *infra* Sections II.D.1–2.

210. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants); *Buchanan v. Warley*, 245 U.S. 60 (1917) (racial zoning).

1. Racial Zoning

White politicians introduced residential segregation zoning ordinances beginning in 1910 in response to the influx of wealthier blacks to white neighborhoods.²¹¹ The purported purposes of the ordinances were “to preserve social peace, protect racial purity, and safeguard property values.”²¹² 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.²¹³

These ordinances spread quickly with wide approval. 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.²¹⁴ The ordinances were very popular: St. Louis’s ordinance, for example, was enacted by referendum by a margin of approximately three to one.²¹⁵

Legal challenges to these ordinances met with mixed success. Three states’ courts that considered the question—Georgia, Maryland, and North Carolina—held that the segregation laws were unconstitutional,²¹⁶ and the courts of two others, Virginia and Kentucky, held them constitutional.²¹⁷ 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. The Georgia Supreme Court also later held that a racial zoning law was a reasonable exercise of the police power because it would “prevent conflicts between [races] resulting from close association.”²¹⁸ Only the North Carolina court directly addressed the harm to blacks from state-mandated segregation.²¹⁹

211. See, e.g., DAVID DELANEY, *RACE, PLACE, AND THE LAW, 1836–1948*, at 105–150 (1998); KLARMAN, *supra* note 4, at 79; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 100–01 (3d ed. 1974); Bernstein, *supra* note 6, at 836.

212. KLARMAN, *supra* note 4, at 79.

213. WOODWARD, *supra* note 211, at 100–01. New Orleans’s 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, *supra* note 4, at 79; BERNARD H. NELSON, *THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920*, at 23 (1946); Bernstein, *supra* note 211, at 836 n.191.

214. Bernstein, *supra* note 211, at 836.

215. *Id.*

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

217. *Harris v. City of Louisville*, 177 S.W. 472 (Ky. 1915); *Hopkins v. City of Richmond*, 86 S.E. 139 (Va. 1915).

218. *Harden v. City of Atlanta*, 93 S.E. 401, 402–03 (Ga. 1917).

219. *Darnell*, 81 S.E. at 339.

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 to enact a racial zoning ordinance by state enabling legislation. First, the court mocked the Board of Aldermen by stating that affirming the ordinance would create a precedent:

[It would allow 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 were 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.²²⁰

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.”²²¹

While this language suggests respect for the ideal of equal treatment, the decision also sends more complex messages. Among the reasons the court provided for its skepticism that the legislature intended to enable local governments to enact racial zoning ordinances was the 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 had 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.”²²² The court differentiated racial zoning by appealing to the primacy of property rights.

In *Harris v. City of Louisville*, the Kentucky Court of Appeals, then Kentucky’s highest court, directly addressed race as well with a set of concerns different from maintaining a laboring class. The court began its opinion by describing the problems “caused by the close association of the races under the congested conditions found in modern municipalities.”²²³ The court dismissed the North Carolina court’s concern that upholding a racial zoning ordinance would empower a local government to segregate by ethnicity or

220. *Id.*

221. *Id.*

222. *Id.* at 340.

223. *Harris v. City of Louisville*, 177 S.W. 472, 474 (Ky. 1915). For a thorough discussion of the *Buchanan* litigation, see DELANEY, *supra* note 211, at 123–150.

political party as “time-worn sophistry” rejected by the Supreme Court in *Plessy*.²²⁴ Rather, the Kentucky court evinced concern for the “race integrity” that it found was imperiled by “mere propinquity.”²²⁵ 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.”²²⁶ 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 strong government regulation trumping private property rights.²²⁷

Both the Georgia Supreme Court and the Virginia Supreme Court adopted the *Harris* reasoning and upheld the racial zoning ordinances enacted in Atlanta, Richmond, and Ashland.²²⁸ However, these decisions were overturned the following year in *Buchanan v. Warley* when the Supreme Court of the United States invalidated the Louisville ordinance as interfering with property rights in violation of the Due Process Clause.²²⁹

The later state court decisions addressing racial zoning were thus strikingly 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 quality 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 black blocks was not. The salience of race was also expressly communicated—not cloaked in neutral rhetoric. The courts described the legislatures as acting in the interests 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 were equally willing to allow race to determine property rights—and they mangled 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

224. *Harris*, 177 S.W. at 474.

225. *Id.* at 477.

226. *Id.*; see DELANEY, *supra* note 211, at 124.

227. *Harris*, 177 S.W. at 477.

228. See *Harden v. City of Atlanta*, 93 S.E. 401 (Ga. 1917); *Hopkins v. City of Richmond*, 86 S.E. 139 (Va. 1915).

229. 245 U.S. 60, 78 (1917).

legal mechanisms to enforce segregation. As property scholars have long recognized outside the context of race, covenants became widespread early in the twentieth century as private attempts to preempt disfavored land uses.²³⁰ 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 twentieth century and bear significant responsibility for the entrenched housing discrimination that continues to exist.²³¹

Unlike the relatively uniform outcome in the race-nuisance cases, there were significant jurisdictional splits among 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 twentieth century up until 1948, when the Supreme Court held such covenants unenforceable under the Equal Protection Clause.²³² During this time, no state court held that racially restrictive covenants were invalid on public policy grounds, despite the link between race and property rights. 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 1946,²³³ even those jurisdictions that found racial restrictions on *sales* invalid as restraints upon alienation nonetheless upheld racial restrictions regarding *occupancy*.²³⁴

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.”²³⁵ The court continued, “There is no prohibition by statute of such restraints imposed by way of condition nor was there any at common law.”²³⁶ 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 blacks and affirmed the eviction of a black pastor from the church.²³⁷ The court first noted that outside of the context of race, use restrictions against liquor, types of construction, and the like were quite common. With regard

230. See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 607–08 (2001).

231. *Id.*; see also Godsil, *supra* note 40.

232. *Shelley v. Kraemer*, 334 U.S. 1 (1948). In 1892, a federal district court in California found a restriction prohibiting the rental of property by a “Chinaman or Chinamen” in violation of the Fourteenth Amendment. See *Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D. Cal. 1892). However, subsequent courts declined to follow this ruling, and the Supreme Court in *Corrigan v. Buckley* dismissed a constitutional challenge to restrictive covenants themselves, on the ground that the covenants were merely private contracts and did not involve state action. 271 U.S. 323 (1926).

233. *Yoshida v. Gelbert Improvement Co.*, 58 Pa. D. & C. 321 (Ct. Com. Pl. 1946).

234. See *L.A. Inv. Co. v. Gary*, 186 P. 596 (Cal. 1919); *Perkins v. Trs. of Monroe Ave. Church of Christ*, 70 N.E.2d 487 (Ohio Ct. App. 1946).

235. *Gary*, 186 P. at 597.

236. *Id.*

237. *Perkins*, 70 N.E.2d 487.

to restrictions against occupancy by a class of persons the court stated the following:

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.²³⁸

The fallacy of the distinction between alienation and occupancy is quite plain. As Judge MacDade 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.”²³⁹

Contemporaneous commentators noticed and described the courts’ deviance from 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 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.”²⁴⁰ In a book entitled *The Legal Status of the Negro*, originally published in 1940, Professor Charles Mangum wrote:

[T]he state’s former attitude toward restrictions 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 one 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.²⁴¹

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.

238. *Id.* at 491.

239. *Yoshida v. Gelbert Improvement Co.*, 58 Pa. D. & C. 321, 322–23 (Ct. Com. Pl. 1946).

240. Arthur T. Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721, 735–36 (1934).

241. CHARLES S. MANGUM, JR., *THE LEGAL STATUS OF THE NEGRO* 148 (photo. reprint 1970) (1940).

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.²⁴² Derrick Bell is best known for the argument that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”²⁴³ If a primary goal of the Jim Crow period was racial segregation,²⁴⁴ 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.²⁴⁵ Another set of cases involved wealthy white families seeking to house their black servants on their property.²⁴⁶ Only a small subset of the cases involved the potential integration of racial minorities as equals into white neighborhoods.²⁴⁷

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,

242. See Bell, *supra* note 8, at 523.

243. *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 Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005).

244. See DELANEY, *supra* note 211, at 93 (“In the decades following the *Civil Rights Cases*, the geopolitics of race became centered on segregation in U.S. cities.”).

245. See, e.g., *Jones v. Little Rock Boys' Club*, 34 S.W.2d 222 (Ark. 1931); *Mitchell v. Deisch*, 18 S.W.2d 364 (Ark. 1929); *City Council of Denver v. United Negroes Protective Ass'n*, 230 P. 598 (Colo. 1924); *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954); *Hall v. Moffett*, 170 S.E. 192 (Ga. 1933); *Giles v. Rawlings*, 97 S.E. 521 (Ga. 1918); *Boyd v. Bd. of Councilmen of Frankfort*, 77 S.W. 669 (Ky. 1903); *Diggs v. Morgan Coll.*, 105 A. 157 (Md. 1918); *Spencer Chapel Methodist Episcopal Church v. Brogan*, 231 P. 1074 (Okla. 1924); *Young v. Saint Martin's Church*, 64 A.2d 814 (Pa. 1949); *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940); *City of Memphis v. Qualls*, 64 S.W.2d 548 (Tenn. Ct. App. 1933).

246. See, e.g., *Young*, 64 A.2d 814 (Pa. 1949); *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922); *Worm v. Wood*, 223 S.W. 1016 (Tex. Civ. App. 1920). Mangum notes that white people were averse to living near blacks unless the latter are servants. MANGUM, *supra* note 241, at 138. Thus, *Lancaster* and *Worm* were arguably not against interests of the dominant class. Litwack quotes a white Mississippian and former slaveowner 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 2, at 219.

247. See, e.g., *Falloon v. Schilling*, 29 Kan. 292 (1883); *Holbrook v. Morrison*, 100 N.E. 1111 (Mass. 1913); *Qualls*, 64 S.W.2d 548 (Tenn. Ct. App. 1933).

courts rejected the claims of the individual white landowners in favor of the broader societal interest of a segregated society.²⁴⁸

Several of the cases seem contrary to the goal of segregation, however. *Falloon*, *Lancaster*, and *Woods* all involved suits seeking to prevent blacks from living in white neighborhoods. These can perhaps be explained by slightly altering the articulation of the white interests at stake. Perhaps segregation per se was not the primary goal of Jim Crow, but rather, the goal was racial subordination or white dominance. Though the presence of black servants obviously offended the particular neighbors in *Lancaster* and *Woods*, this sort of racial proximity did not challenge the societal goal of racial subordination. Generally, even those hostile to living near blacks made exceptions for black servants since “[i]t 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.’”²⁴⁹ According to a white Mississippian 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.”²⁵⁰

Allowing for a broad definition of white interest, the vast majority of the race-nuisance cases did not challenge the dominant racial mores of the times. Rather, all but five cases were consistent either with the goal of establishing a segregated society or with maintaining the role of blacks as a servant class. Only *Qualls II*, *Falloon*, *Hollbrook*, *Worm*, and *Redmond* involved the potential for the integration of racial minorities as relative equals. Indeed, one can argue that even *Falloon* and *Worm* did not truly challenge racial supremacy. 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 because 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. Those who previously adhered to the “pawn” view of state courts may be surprised by the idea of courts perceiving value in the appearance of evenhandedness. This, however, does not undercut the interest convergence theory. This argument is similar to Berry’s analysis of the inheritance cases. She contends that “[j]udges 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.”²⁵¹

248. See, e.g., *City of Rome v. Shadyside Memorial Gardens, Inc.*, 92 S.E.2d 734 (Ga. Ct. App. 1956) (overruling zoning decision to reject black cemetery).

249. LITWACK, *supra* note 2, at 219.

250. *Id.*

251. BERRY, *supra* note 4, at 80–81.

The primary limitation of the interest convergence hypothesis, 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. To gain entry into what the courts described as an affluent part of town, Mr. Qualls, a highly successful funeral home director, brought two separate actions to overturn zoning decisions by the city of Memphis.²⁵² 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 Memphis, would be difficult to predict using an interest convergence analysis.

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 to have been 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 supersede all other interests or principles. These assumptions are disproved even in the small world of cases this Article considers. The preferences of whites often diverged from racist norms: in *Worm*, it was in the landowner's interest to be able to have wide access to potential tenants of whatever race; Mr. Redmond's white patients preferred his medical treatment to that of available white doctors. Similarly, the white real estate broker plaintiff in *Buchanan*, like the defendant in *Worm*, inveighed against a racially restricted client base, and indeed the white owners of the railroad that colluded in *Plessy* 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.²⁵³ This principle seems to explain the Supreme Court's decision invalidating the racial zoning ordinance in *Buchanan*.

252. Qualls v. City of Memphis, 15 Tenn. App. 575, 576–77 (1932).

253. KLARMAN, *supra* note 4, at 79–81.

Even the Supreme Court's "notorious racist,"²⁵⁴ Justice James McReynolds, joined the opinion. The primacy of property rights was evident in the first set of southern court cases invalidating racial zoning ordinances.²⁵⁵ The North Carolina Supreme Court, for example, was not moved by constitutional concerns, because the "inalienable right to own, acquire, and dispose of property, . . . is not conferred by the Constitution, but exists of natural right."²⁵⁶

Justice Brewer, for example, who I noted above may have harbored integrationist views, is better known as a strong proponent of property rights.²⁵⁷ In a speech at Yale Law School, he described the "sacredness" of property ownership and "the love of acquirement, mingled with the joy of possession."²⁵⁸ 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.²⁵⁹ This theory provides powerful protection for individuals' right to use their property as they wish—unless that use results in a physical invasion of another's property.²⁶⁰

This natural right theory of property, which included broad rights to use and transfer, 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:

[C]ourts have in many instances diverged from their usual policy of upholding the doctrines of 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 deprived of the privilege of selling or renting houses in a restricted area to Negroes. The white landlords are not desirous of giving up any rights over the property which they own.²⁶¹

This view also correlates with the outcomes in the race-nuisance cases. Seven of the eight "mere presence" cases involved disputes between *white* landowners.²⁶² Ten of the cases involved white property owners on *both*

254. *Id.* at 81.

255. *Id.*

256. *Id.* (quoting *State v. Darnell*, 81 S.E. 338, 340 (N.C. 1914)); see also Schmidt, *supra* note 36, at 501–02.

257. See Steven K. Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427, 434–35 (1999).

258. *Id.* at 435 (quoting DAVID J. BREWER, PROTECTION TO PRIVATE PROPERTY FROM PUBLIC ATTACK 5 (New Haven, Hoggson & Robinson 1891)).

259. See Claey's, *supra* note 12, at 10.

260. *Id.*

261. MANGUM, *supra* note 241, at 139.

262. See *Falloon v. Schilling*, 29 Kan. 292 (1883); *Wright v. DeFatta*, 142 So. 2d 489 (La. Ct. App. 1962); *Holbrook v. Morrison*, 100 N.E. 1111 (Mass. 1913); *Crist v. Henshaw*, 163 P.2d 214 (Okla. 1945); *Woods v. Kiersky*, 14 S.W.2d 825 (Tex. Comm'n App. 1929, judgment adopted); *Lan-*

sides of the dispute.²⁶³ In another eleven of the cases, it is not clear whether the owner of the challenged land use was white or black.²⁶⁴ Only seven of the cases challenging use clearly involved a black property owner or owners.²⁶⁵ However, it must be noted that of the seven 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 covenant cases. The latter involve a property owner's desire to impose restrictions upon his own property into the future while the former involve interference by a non-owner. As Eric Claeys 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 mechanics; 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.²⁶⁶

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 respecting a property owner's control of his property.

Many scholars have suggested that these lines of cases protecting property rights in spite of racial implications were less important in the struggle for equal justice for people of color.²⁶⁷ Protecting property rights alone is obviously not sufficient when it is not accompanied by access to education, employment, capital, and evenhanded application of criminal

caster v. Harwood, 245 S.W. 755 (Tex. Civ. App. 1922); Worm v. Wood, 223 S.W. 1016 (Tex. Civ. App. 1920).

263. See *Falloon*, 29 Kan. 292; *Smith v. Commonwealth*, 45 Ky. (6 B. Mon.) 21 (1845); *Wright*, 142 So. 2d 489; *Holbrook*, 100 N.E. 1111; *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. Ct. App. 1941); *Dudley v. City of Charlotte*, 27 S.W.2d 337 (N.C. 1943); *Crist*, 163 P.2d 214; *Woods*, 14 S.W.2d 825; *Lancaster*, 245 S.W. 755; *Worm*, 223 S.W. 1016.

264. See *Jones v. Little Rock Boys' Club*, 34 S.W.2d 222 (Ark. 1931); *Mitchell v. Deisch*, 18 S.W.2d 364 (Ark. 1929); *City Council of Denver v. United Negroes Protective Ass'n*, 230 P. 598 (Colo. 1924); *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954); *Hall v. Moffett*, 170 S.E. 192 (Ga. 1933); *Green v. State*, 56 So. 2d 12 (Miss. 1952); *Young v. Saint Martin's Church*, 64 A.2d 814 (Pa. 1949); *Thoenebe v. Mosby*, 101 A. 98 (Pa. 1917); *Fox v. Corbitt*, 194 S.W. 88 (Tenn. 1917); *Harty v. Guerra*, 269 S.W. 1064 (Tex. Civ. App. 1925); *Baptist Church of Madisonville v. Webb*, 178 S.W. 689 (Tex. Civ. App. 1915).

265. See *Giles v. Rawlings*, 97 S.E. 521 (Ga. 1918); *Boyd v. Bd. of Councilmen of Frankfort*, 77 S.W. 669 (Ky. 1903); *Diggs v. Morgan Coll.*, 105 A. 157 (Md. 1918); *Redmond v. State*, 118 So. 360 (Miss. 1928); *Spencer Chapel Methodist Episcopal Church v. Brogan*, 231 P. 1074 (Okla. 1924); *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940); *City of Memphis v. Qualls*, 64 S.W.2d 548 (Tenn. Ct. App. 1933).

266. Claeys, *supra* note 12, at 12 (quoting James Wilson, *Lectures on Law: Of Man, as an Individual*, in 1 THE WORKS OF JAMES WILSON 250, 274 (James DeWitt Andrews ed., 2d ed., Chicago, Callaghan & Co. 1896) (1804)).

267. See, e.g., Schmidt, *supra* note 36, at 523–24. *But see* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 644–45 (2004) (reviewing KLARMAN, *supra* note 4).

laws. However, race-neutral protection of property rights was a critical step in the movement toward enforcement of 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.²⁶⁸ 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.²⁶⁹ The race-nuisance cases, then, along with the Supreme Court's decisions invalidating racial zoning and holding racially restrictive covenants unenforceable, were of enormous importance in the twentieth century's civil rights struggle.²⁷⁰

F. *Racialized Nuisance Doctrine—Was Nuisance a “White Thing”?*

Perhaps the cases were a ruse. While some cases suggest that the courts subscribed to the ideal of equal treatment of the races, the judges may simply have used this language as window dressing. Maybe these cases are simply examples of white judges promoting the dominance of white culture subtly by incorporating their own cultural mores into nuisance doctrine.²⁷¹ Of course, the cases are not all the same. In ten of these cases, the courts found the challenged conduct (vocal worship and grief, boisterous bar behavior, and noisy convalescence) to be nuisances; in a greater number, the courts denied the nuisance allegations in conclusory terms; and in a third category, the courts denied the nuisance allegations with specific references to the appropriateness of the behavior (the phrase “well-behaved” pops up in two separate cases). Each of these sets of cases raises slightly different questions.

The first subset might suggest that the courts were engaging in a fairly direct form of racialized decision-making in which they deemed conduct a nuisance in order to create an excuse to exclude black people. Under this hypothesis, the courts were engaging in subterfuge. They accepted that the equality ideal prevented them from expressly deeming racial status to be a

268. The centrality of property rights to liberal capitalist democracy is as old as John Locke's *Second Treatise of Government*. See Rose, *supra* note 35, at 267–68. Carol Rose's work provides ample discussion of the significance of property rights for liberal democracies. See, e.g., Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 3 (noting that Adam Smith identified property rights as “justice” itself).

269. See, e.g., Bernstein & Somin, *supra* note 267, at 632–33.

270. *Id.* Bernstein & Somin quote W.E.B. Du Bois as crediting *Buchanan* with “the breaking of the backbone of segregation.” *Id.* at 633–34 (quoting W.E.B. DuBois, 1 W.E.B. DuBois SPEAKS: SPEECHES AND ADDRESSES 1890–1919, at 52 (Philip S. Foner ed., 1970)). 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.” *Id.* at 634 (quoting A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 126 (1996)).

271. See, e.g., Dorothy Roberts, *Why Culture Matters to Law*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 85, 88–89 (Austin Sarat & Thomas R. Kearns eds., 1999).

nuisance, so they simply found a race-neutral excuse (vocal worship, for example) instead. We would also surmise that if the subterfuge hypothesis were accurate, whites could have engaged in the same conduct without it being considered a nuisance. Judicial decision-making of this kind—the courts claiming generally to be guided by a norm under which race does not dictate legal status, but then finding ways for a certain racial group to lose—would have been disingenuous.

Alternatively, the judges were not using nuisance law as an excuse to exclude anyone who was black—only those who “acted black.” Under this hypothesis, the judges were not offended by skin color alone; rather, they were offended by the behavior they considered typical of black people because they associated it with black people. We would then presume that whites who engaged in behavior the judges considered typical of blacks would have been deemed a nuisance, and blacks who did not engage in this behavior would not. Here, race also affected the decision-making in a direct way: the judges reached conclusions about what kinds of conduct they disfavored based upon the fact that the conduct was typically associated with a disfavored racial group.

Finally, these cases may not be the result of express racial decision-making, but what some would consider a more indirect form. The judges did not set out to disfavor blacks or to deem nuisance-like the conduct engaged in by blacks. Instead, the judges simply “incorporate[d] their own cultural perspective into legal principles” and then “impose[d] these principles without regard to . . . people from minority cultures.”²⁷² The judges developed their sense of what degree of noise was reasonable when engaging in worship, grieving a departed loved one, or enjoying a leisurely night out within the dominant white community, and did so without input from any other racial groups. They then imposed the white norms on these other groups. Under the “cultural imperialism” theory, the judges may have thought that they were adhering to a norm under which race does not matter to legal status, but they were misled by their position in the political hierarchy.

Two questions then emerge. First, whether it is possible to conclude with any certainty which of these dynamics drove the outcomes in particular cases. Second, whether the “cultural imperialism” theory should be grouped with the first two as an instance of racializing nuisance doctrine.

In the ten cases in which courts found a nuisance, the courts sometimes directly suggested that they considered the conduct at issue to be linked to racial status. In *Morison*, for example, the court proclaimed its “deep and sympathetic understanding of this type of worship carried on by the members of this negro church,”²⁷³ but stated that “their form of worship is inseparably connected with and accompanied by unrestrained noise and

272. *Id.* at 89, quoted in FORD, *supra* note 25, at 30.

273. *Morison v. Rawlinson*, 7 S.E.2d 635, 638 (S.C. 1940).

consequent public disturbance.”²⁷⁴ In addition, in *Qualls*, the court noted the board’s finding 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.”²⁷⁵ Similarly, in *Giles*, in which the court found that a hospital for blacks would be a nuisance despite the presence of a hospital for whites nearby, the court referred to the noise associated with treatment, “or from their nature.”²⁷⁶

Despite racial generalizations, it is not clear that these particular courts were engaging in subterfuge or even determining nuisance behaviors to be those engaged in by a particular race. In the latter two cases, the courts suggest expressly that the conduct is typical of the “race,” but it is difficult to conclude that the courts deem the noise nuisance-like because the noise-makers are black or because they associate this noise with black people. This epistemic challenge is familiar: it is always difficult to deduce intent in race cases.²⁷⁷ I submit, though, that if the courts were engaging in either the subterfuge or racializing nuisance behaviors, these courts were racializing nuisance doctrine in a way that was inconsistent with equality norms of their own time as well as ours.

A more complex normative question is, if the courts were engaging in a form of cultural imperialism, should these decisions be considered to have “racialized” nuisance doctrine? Because the Jim Crow era was one in which blacks were kept from participating as full members of the political and legal community by express racial prohibitions, it is easy and appropriate to label any exercise of judicial discretion in some sense racialized because decisions were made by a group of entirely white judges. Some may argue, therefore, that these white judges were also adding to the racialized nature of nuisance doctrine by imposing “white” norms upon black people.²⁷⁸

Others, however, would contest the very terms of this argument. A host of assumptions underlie the claim that there are “white” norms that can be contrasted with “black” norms. As Richard Ford has recently written, the presumption that we can label certain social practices as white or black is fraught with political risk. I find Ford’s contention that “[w]hat passes for an objective description of group difference is all-too-often nothing better than a common stereotype” resonant here.²⁷⁹ Ford aptly notes that any cultural

274. *Id.* at 640.

275. *Qualls v. City of Memphis*, 15 Tenn. App. 575, 578 (1932).

276. *Giles v. Rawlings*, 97 S.E. 521, 522 (Ga. 1918).

277. The academic literature exploring this question is vast. I describe a great deal of it in Rachel D. Godsil, *Expressivism, Empathy and Equal Protection*, 36 U. MICH. J.L. REFORM 247 (2003).

278. See, e.g., Roberts, *supra* note 271, at 88–89; Alex M. Johnson, Jr., *Bid Whist Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1450 (1993).

279. FORD, *supra* note 25, at 41.

practices we might link with a particular racial group are likely to vary considerably by such factors as geography, age, income, and education level.²⁸⁰ Therefore, we would need a vast array of ethnographic information to accurately describe norms of behavior among white people and black people in multiple states during multiple decades. While I think it is important to acknowledge that the white judges reached conclusions about what kinds of behavior constituted nuisance without input from black judges, I am not ready to contend that the doctrine necessarily imposed “white” norms that necessarily differed from “black” norms.

To accept the cultural imperialism theory would lead to some disconcerting conclusions. An adherent to this theory would likely argue that the *Thoenebe* court was celebrating white norms when, on the grounds that the patrons were “respectable” and “well-behaved people,” it rejected white residents’ request for an injunction to limit the hours of a dance hall. Contrast this decision with the *Green* court’s finding a nuisance when large numbers of “the colored race” danced, shouted, and sang into the early morning hours of Sunday, depriving other residents of their sleep, and swearing and urinating in public.²⁸¹ Were the patrons in *Thoenebe* assimilating to white norms and the patrons in *Green* resisting? Are we less critical of the *Green* court when we recall that the court only restricted the owner from playing the jukebox during worship hours or late at night?

The relevance of class is a more plausible presumption: the judges were undoubtedly upper class and thus were applying norms about behavior learned within their own class (though sometimes attempting to surmise what standards should apply in areas comprised by other classes). In several cases, the courts made reference to the degree of gentility of the neighborhood and appeared to alter the standards of conduct expected. Undoubtedly, the race-nuisance cases will provide ample fodder for exploring the link between law and culture.

III. RACE NUISANCE AND RACIAL LIBERATION— INSIGHTS INTO THE PRESENT

This Part explores the intellectual and practical significance of these cases for the present. Their intellectual significance is most evident. First and foremost, they are important to any intellectual history of the Supreme Court. Scholars such as David Bernstein and Ilya Somin have described the Supreme Court’s race decisions, and particularly *Buchanan*, during the Progressive Era as remarkable.²⁸² 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) dur-

280. *Id.* at 72.

281. *Green v. State ex rel. Chatham*, 56 So. 2d 12, 13 (Miss. 1952).

282. Bernstein & Somin, *supra* note 267, at 629–30.

ing this period, sociological jurisprudence was in ascendance, and (3) the Supreme Court had recently upheld nonracial zoning, on grounds that could easily have been applied to racial zoning.²⁸³ However, *Buchanan* is not nearly so remarkable if viewed in light of the race-nuisance cases. The Supreme Court should not be credited with 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.

The cases also provide insight into the limits of race neutrality. The last race-nuisance case, *Wright v. DeFatta*, was decided in 1962.²⁸⁴ In that case, white plaintiffs were successful in seeking an injunction prohibiting the construction of “an *excessive* number of Negro dwellings . . . contrary to the Municipal Comprehensive Zoning Ordinance.”²⁸⁵ The date of the case is perhaps not surprising—by the 1960s, racism was only 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, numerous race-neutral laws were nonetheless applied to create a segregated and unequal society.²⁸⁶ Indeed, without expressly mentioning “race,” some have argued, governments used zoning to permit incompatible uses to intrude into black neighborhoods, thereby destroying the quality of life.²⁸⁷ Because other areas of the municipality generally prohibited 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 its intended effect was to expel black residents from their homes.²⁸⁸ However, he contends that many blacks were unable to leave these neighborhoods even after industry intruded because of housing discrimination elsewhere.²⁸⁹ The combination of expulsive zoning and housing discrimination led black communities in urban areas to become even more blighted and overcrowded.²⁹⁰ Many local governments also used their zoning power to prevent the poor from moving to newly

283. *Id.*

284. 142 So. 2d 489 (La. Ct. App. 1962).

285. *Id.* at 490 (emphasis added).

286. *See, e.g.*, Godsil, *supra* note 40.

287. *See* Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101 (Charles M. Hart & Jerold S. Kayden eds., 1989). Rabin undertook twelve 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.*

288. *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).

289. Rabin, *supra* note 287, at 102.

290. *Id.*

established suburbs or to middle- and upper-income neighborhoods, which had the effect of segregating the poor—often people of color—within cities.²⁹¹ 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 having black people classified as nuisances per se has not rendered nuisance law free from racial effects, either. Beginning in the Jim Crow era and continuing into the late twentieth 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.²⁹² As Dorothy Roberts and other scholars have argued, these ostensibly race-neutral statutes have often been focused upon criminalizing and excluding blacks from public spaces.²⁹³ When the exclusionary intention or effect has been too obvious, the Supreme Court has often intervened, albeit 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 as follows:

Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style 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.”²⁹⁴

And more recently, in *City of Chicago v. Morales*, the Supreme Court invalidated an anti-loitering ordinance enacted in Chicago that allowed police officers not only to order any group of two or more people to disperse if even one of them was a suspected gang member, but also to arrest and imprison anyone who refused.²⁹⁵ The anti-loitering ordinance was race neutral,

291. 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).

292. See 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. 1997)). California enacted a statute that allowed police to obtain an order that a particular gang constituted a public nuisance; however, the hallmarks of who was a member of the gang were so broad that most young black and Latino men satisfied one or more of the criteria. Werdegar, *supra*, at 417–419; 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).

293. See, e.g., 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); Dorothy E. Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

294. 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)).

295. 527 U.S. 41 (1999). See Roberts, *supra* note 293, for full exploration.

and race was not a basis for the Court's decision. However, as Roberts reported, "During 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."²⁹⁶ Most interesting, perhaps, is the debate as to whether people of color were ultimately helped or harmed by the Supreme Court's decision.²⁹⁷ In this Article, I have suggested that the race neutrality ideal present in the race-nuisance cases was a critical turn away from legalized apartheid, but I also recognize that the ideal of race neutrality has never been sufficient to overcome the use of law to achieve racially discriminatory ends.

These cases have a practical significance that is primarily positive; contrary decisions in these cases—holding that 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 a 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.²⁹⁸ Long before the Supreme Court overturned *Plessy*, 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 to be similarly triggered by litigation strategies linked to property and contract law.²⁹⁹ Judges may well be more protective of common law legal doctrines because they presume those doctrines will apply equally to white litigants. A variant of this argument has been waged by scholars seeking to explain *Buchanan*.

The insight that those seeking racial justice should utilize doctrines that apply more generally leads to a second insight: the cases remind us of the utility of interest convergence or, as I prefer to call it, "strategic alliances."³⁰⁰

296. Roberts, *supra* note 293, at 775–76 (citation omitted).

297. Compare Tracy L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, with Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, and Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245.

298. See Godsil, *supra* note 40, at 1838–71. See generally AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (Denise C. Morgan et al. eds., 2006).

299. 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. Constance Rice, Co-Dir., The Advancement Project, Address at the Ass'n of Am. Law Sch. Annual Meeting Luncheon (Jan. 7, 2005).

300. There is a recent resurgence of academic interest in the possibilities of interest convergence or coalition politics. See, e.g., Cashin, *supra* note 243, at 260–71 (providing 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 of the political debate between Bayard Rustin and Black Power advocates).

I must begin by acknowledging that Derrick Bell himself is deeply skeptical that interest convergence will lead to any true eradication of racism.³⁰¹ Bell has stated the following:

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.³⁰²

Others have more hope. Sheryll Cashin in a recent piece reflects upon the role of “coalition politics” in the civil rights revolution, and 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.”³⁰³ 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.’”³⁰⁴

This tradition has a long vintage, of course. As noted above, *Plessy* itself, while unsuccessful, was based upon the joint interest of blacks and the railroads that found the segregation laws expensive and inexpedient.³⁰⁵ *Buchanan* also involved a strategic alliance, one between blacks in Baltimore and a white real estate magnate who sought the freedom to sell to people of any race.³⁰⁶

CONCLUSION

The race-nuisance cases are fascinating pieces of history and offer us a more nuanced understanding of law during the Jim Crow era. This Article is only a first foray into the cases, however. What remains unanswered from examining the appellate opinions alone is the role the cases played in the lives of the litigants. Was Mr. Redmond run out of town after the decision was rendered? Did Mr. 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

301. *Id.* at 271–74 (describing Bell’s argument).

302. *Id.* at 272 (quoting DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 195 (2004)).

303. *Id.* at 255.

304. *Id.* at 273 (quoting BELL, *supra* note 302, at 200).

305. 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 154, at 1746–47. For a discussion of the disinclination of some whites to support segregation if the costs are too high, see Bernstein & Somin, *supra* note 267, at 609–11.

306. *Buchanan v. Warley*, 245 U.S. 60 (1917).

Mr. Qualls fare? As always, the opinions were only the penultimate step; the real story lies in the implementation.

