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DOCTRINAL MYTHS AND THE MANAGEMENT OF COGNITIVE DISSONANCE: RACE, LAW, AND THE SUPREME COURT'S DOCTRINAL SUPPORT OF JIM CROW

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I. INTRODUCTION

One of the most intriguing questions in the study of American law during the period of Jim Crow is how American society could see itself as the city on a hill for constitutional equality while also creating and enforcing a formidable structure of legally mandated white supremacy. The peculiarly American contradiction between long-professed and deeply held equality and liberty principles and a devastating history of racism has often been noted, and as one scholar has observed, the maintenance of both aspects in law required significant cultural and legal self-deception.[1] This Article

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1. John R. Howard, *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to* Brown 171–172 (St. U. N.Y. Press 1999). Benno Schmidt wrote an important series of articles on this conflict in the 1980s. *See generally* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 Colum. L. Rev. 444 (1982) [hereinafter Schmidt, *Race 1*] (discussing how the principles of Reconstruction conflicted with the prejudice of American race relations and law during this period); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage Cases, 82 Colum. L. Rev. 646 (1982) (same); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme*

argues that the answer can be found, in part, by studying how the law operates to manage societal cognitive dissonance. It is not enough simply to identify the contradiction; we also should look at the mechanisms by which law manages the contradiction to see how equal citizenship principles were so grossly violated, yet so willingly accepted, by the white legal elite. This analysis may also help us see how the doctrines and rhetoric of equal citizenship can both facilitate and hinder real progress.

In this Article, I argue that law manages its dissonance by creating doctrinal myths.[2] These myths enable law, legal actors, and society to accept the basic principles of equality and liberty and reformulate them to accord with and facilitate the underlying inequality of segregation. During the period of Jim Crow, the primary doctrinal myths employed by the Supreme Court and other legal actors included federalism and its implementing doctrine of State Action, the separate-but-equal doctrine (including

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Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause, 82 Colum. L. Rev. 835 (1982) (same). For an important critique of Schmidt's approach, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 Colum. L. Rev. 1622 (1986) (arguing that there is little to celebrate in the Supreme Court's record on race, even in the cases Professor Schmidt identified as promising or hopeful). Michael Klarman has recently published a comprehensive book evaluating this period, as well. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford U. Press 2004). Klarman views the Court as motivated, not by a conflict between ideal and real (as Schmidt had argued), but by the political and social forces that dominated white society generally. *Id.* at 4. Thus, he argues, "[a]t a time when most whites were intent on preserving 'racial purity' and assumed that blacks were inferior, the justices were naturally predisposed to sustain racial segregation, which the Fourteenth Amendment does not plainly proscribe. Once racial attitudes had changed . . . the justices reconsidered the meaning of the Constitution." *Id.* at 6. While I agree with much of Klarman's emphasis on extralegal influences, he probably undervalues the role and importance of court decisions and the rhetoric employed in those decisions. For a good general history of the period from Reconstruction through Jim Crow, see John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom* 272–356 (8th ed., Alfred A. Knopf 2003).

2. The concept that law uses myth as a means of managing societal dissonance has been explored by several scholars. *See e.g.* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162 (1994) (discussing myth of colorblindness in constitutional law); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution* 28 U.S.F. L. Rev. 343 (1994) (analyzing the illusion of colorblindness in American legal history); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 Stan. L. Rev. 1 (1991) (discussing colorblindness as a metaphor which fosters an ideology of white domination); Joel F. Handler & Yeheskel Hasenfeld, *The Moral Construction of Poverty* (Sage Press 1991) (analyzing the symbols, myths, and ceremonies of poverty law which implement capitalist cultural norms and disadvantage the poor).

its concomitant division of civil, political, and social rights), and the doctrine of the reasonableness of segregation.

The operation of these myths resulted in at least three significant effects. First, there was a reformulation and erosion of the idealistic principles in law so that after a period of years, legal justifications which would not have been obviously acceptable in a prior period became standard over time. This is particularly evident in the implementation of the separate-but-equal doctrine and the justification of segregation as a reasonable basis for avoiding interracial violence, both evident in *Plessy v. Ferguson*.[3] Second, there are tension points at which the dissonance between the underlying inequality and the guiding principles become patent and result in a clear rejection of the equality principles, as in *Cumming v. Richmond County Board of Education*[4] in which the Court approved of separate-but-unequal education. Third, there are times when the tension is resolved in favor of the underlying equality and liberty principles, which may or may not have occurred with the case outlawing residential segregation ordinances: *Buchanan v. Warley*.[5] The question remains, however, whether the doctrinal attempt to implement equality and liberty standards itself enables a further management of the dissonance by creating a nominal legal standard with little change in the actual experience of segregation. As this final question takes us past Jim Crow to *Brown*[6] and its progeny, I will do no more than raise it in my concluding thoughts.

II. CREATING DISSONANCE: RECONSTRUCTION TO JIM CROW

The roots of Jim Crow are rather directly found in slavery, and the origins of America's cognitive dissonance between race and democratic ideals of equality and liberty run at least to the Revolution.[7] Yet it was only with the end of slavery itself and the

3. 163 U.S. 537 (1896).

4. 175 U.S. 528 (1899).

5. 245 U.S. 60 (1917).

6. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 438 (1954), *supplemented*, 349 U.S. 294 (1955).

7. *Compare Declaration of Independence* [¶¶ 1–2] (1776) (purporting to embrace the equality of all men) *with* Thomas Jefferson, *Notes on the State of Virginia* 138–143 (William Peden ed., U.N.C. Press 1982) (recognizing the entrenched prejudices of the period);

closely related establishment of equal citizenship through the Reconstruction Amendments[8] to the Constitution that this dissonance appeared with such importance in federal and constitutional law. To understand how strong the tensions in the law were during Jim Crow, it helps to consider how revolutionary were the ideals constitutionalized during Reconstruction.

A. Reconstruction and the Foundations of Equal Citizenship

The Thirteenth Amendment ended slavery with a short, clear statement: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[9] Yet the meaning of this new freedom for African Americans remained unclear. For freed slaves and many other Republicans, it meant a full range of rights, liberties, and equality which constituted the full and equal citizenship apparently exercised by whites throughout the country. For Democrats, white planters, and other whites in power in the South, it just as surely meant a nominal end of legal slavery, which, in fact, retained the uniformly subordinate and dependant status of blacks in the region.[10] Based on the latter understanding, the post-war state governments in the South adopted the infamous Black Codes, establishing an apartheid regime under which race determined whether and where a person could own property and live, whether and how a person could contract, which fundamen-

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see generally Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (2d ed., M. E. Sharpe 2001); John Hope Franklin, *Race and the Constitution in the Nineteenth Century*, in *African Americans and the Living Constitution* 21 (John Hope Franklin & Gena Rae McNeil, eds., Smithsonian Instn. Press 1995).

8. U.S. Const. amends. XIII, XIV, XV. On how these Amendments sought to establish a constitutional ideal of equal citizenship, see generally Kenneth L. Karst, *Belonging to America* (1989) (discussing nationhood and the concept of equal citizenship as a unifying ideal); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717 (2003); and James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. Pitt. L. Rev. 421, 479–545 (1998–1999).

9. U.S. Const. amend. XIII, § 1.

10. *See e.g.* Eric Foner, *The Story of American Freedom* 102–104 (W.W. Norton & Co. 1998) (discussing meanings of freedom for former slaves and Southern whites); Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877*, 67–69 (Harper & Row 1989) [hereinafter Foner, *Reconstruction*] (discussing possible contemporaneous meanings of the Thirteenth Amendment); Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835–1875*, 389–391 (same).

tal rights people could exercise, and which punishments were meted out for violations of law.[11] Indeed, the Black Codes so nearly reimposed slavery that they moved Congress in a proactive and more radical direction during Reconstruction, eventually leading to the passage of the nation's first civil rights law—the Civil Rights Act of 1866[12]—and the simultaneously drafted Fourteenth Amendment.

It is worth reflecting for a moment on this series of events. Immediately after the war, which ended slavery and preserved the Union, the white South engaged in its first attempt to establish Jim Crow. This effort was not only rebuffed by the northern Republicans who held congressional power, it was also met with an even stronger statement of both equal citizenship and the federal power to preserve that citizenship as against local white supremacy than had been implemented in the language of the Thirteenth Amendment on its own. And this was so even though northern and midwestern states during the antebellum and early Reconstruction periods also had versions of Jim Crow legislation treating free blacks as second-class citizens.[13] In the radicalized era of Reconstruction, however, equal citizenship was viewed as incompatible with laws separating races and subordinating a particular race, and the southern states were required to repeal the Black Code legal apparatus as a condition of regaining political representation in the reconstructed United States.[14]

Thus, at the time of the framing of the Reconstruction Amendments, equal citizenship was understood to encompass, at a minimum, equality in the fundamental rights of contract, property, court access, and suffrage. While scholars continue to debate how much further equality principles were thought to extend by the writers and ratifiers of the Fourteenth Amendment, there is

11. *See* Foner, *Reconstruction*, *supra* n. 10, at 198–209 (discussing Black Codes and related aspects of Presidential Reconstruction); James D. Schmidt, *Free to Work: Labor Law, Emancipation, and Reconstruction 1815–1880*, at 130–132 (U. of Ga. Press 1998) (discussing Texas Black Codes); *id.* at 167–168 (discussing Alabama Black Codes).

12. *Civil Rights Act of 1866*, 39th Cong. ch. XXXI, 14 Stat. 27, 27 (1866).

13. Leon F. Litwack, *North of Slavery: The Negro in the Free States 1790–1860*, at 64–152 (U. Chi. Press 1961) (describing legal, political, and educational segregation). This book remains the classic treatment of antebellum segregation in the North.

14. Foner, *Reconstruction*, *supra* n. 10, at 243–245 (discussing the Civil Rights Bill of 1866), 253–258 (discussing the Fourteenth Amendment), 276–277 (discussing the Reconstruction Act of 1867).

agreement that the Jim Crowism represented by the Black Codes was plainly unconstitutional.[15]

Moreover, during the framing of the Fourteenth Amendment and in the years immediately following, Congress was realizing the need for further action by the federal government to counter the persistent and violent efforts of white southerners to subordinate African Americans. Congress passed a series of enforcement acts in the early 1870s to prevent violent repression of black political and economic activity.[16] In the brief period when the federal government backed up this legislation with federal prosecutorial powers, the government actually succeeded in substantially reducing Klan and Klan-like violence against African Americans.[17] Finally, in 1875, a lame-duck Republican Congress passed a public accommodations act that attempted to secure equal access to public and semi-public institutions such as theaters and inns and paralleling similar legislation adopted by multiracial governments in the Reconstruction South.[18] This period of active federal enforcement of the Reconstruction Amendments demonstrates a realization among many key legal and political elites, both white and black, that equal citizenship meant far more than minimal equality of fundamental rights and probably required some degree of active federal support of rights beyond contract and property, and in particular, the protection of black political and economic activity.

15. *See e.g.* Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 172–175 (Liberty Fund, Inc. 1997); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 162, 264–265 (Yale U. Press 1998).

16. Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 Chi.-Kent L. Rev. 1013, 1018–1019 (1995).

17. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876*, at 79–99 (Oceana Publications, Inc. 1985).

18. For my own views on this legislation and the Court's response, see James W. Fox Jr., *Re-readings and Misreadings:* Slaughter-House*, Privileges or Immunities, and Section Five Enforcement Powers*, 91 Ky. L.J. 67 (2002) [hereinafter Fox, *Readings and Misreadings*]; James W. Fox Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 Temp. Pol. & Civ. Rights L. Rev. 453, 475–481 (2004) [hereinafter Fox, *Defining Privileges*].

B. Dissonance and Myth: Federalism and State Action

For a variety of reasons, including the reemergence of southern whites into national politics, northern white racism, significant economic downturns, and a general weariness over the sectional tensions created by the war and Reconstruction, federal support for civil rights and related protections for minorities essentially ended in the 1870s and with the disputed election of 1876.[19] Although black citizens retained some significant political power in the South through the 1880s,[20] this period represented a transition from the relatively optimistic period of Reconstruction to the comprehensive legal, political, and social subordination of Jim Crow. During this period, black voting and political participation plummeted due to legal restrictions, fraud, and violence.[21] In part because of this political repression, the proportion of governmental funding for black schools declined substantially;[22] what limited integration that did exist in public facilities, including railroads and streetcars, had been essentially eliminated by the early 1900s.[23] While the causes for the overwhelming success by whites in implementing legal and social segregation are multiple,[24] for purposes of this Article the key point is how the law, and in particular the Supreme Court, managed to justify this shift from a pro-equality position during Reconstruction to the pro-segregation position of the *fin de siècle*, while simultaneously, in

19. *See generally* Foner, *Reconstruction*, *supra* n. 10, at 512–601 (discussing multiple reasons for the end of Reconstruction).

20. *Id.* at 591–593; Klarman, *supra* n. 1, at 30.

21. Klarman, *supra* n. 1, at 31–32, 54–55.

22. Adam Fairclough, *Better Day Coming: Blacks and Equality 1890-2000*, at 52 (Penguin 2002) (showing that, between 1900 and 1915, the proportion of funds going to black schools and children declined by over 100 percent).

23. *See* Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 L. & Soc. Inquiry 377, 398–401 (1999) (discussing de jure segregation movement in Tennessee); Patricia Hagler Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 Chi.-Kent L. Rev. 993, 995 (1995) (arguing that de jure segregation ended a brief era of white judicial paternalism, which sometimes protected black, middle-class women from segregated transit); Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* 5–10 (Colum. U. Press 1983) (discussing passage of transit-segregation laws).

24. *See generally* Klarman, *supra* n. 1, at 8–60 (discussing, *inter alia*, many reasons for de jure segregation); Fairclough, *supra* n. 22, at 1–21 (same); Franklin, *supra* n. 7 (surveying the general history of that period).

cases such as *Yick Wo*[25] and *Allgeyer*,[26] proclaiming how the Reconstruction Amendments manifest the grand ideals of democracy. As we will see, the Supreme Court laid the groundwork for managing this dissonance by creating doctrinal myths with which to shield itself from responsibility for the injustice of segregation.

1. Slaughter-House *and the Origins of the Federalism Myth*

The Supreme Court's first major engagement with the Fourteenth Amendment came in the *Slaughter-House Cases*,[27] in which the Republican, Reconstruction legislature had enacted, as a health measure, legislation creating a state-sponsored corporation to regulate the horrendously filthy slaughterhouse trade in and around New Orleans.[28] White butchers alleged that the

25. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a San Francisco ordinance violated the Equal Protection Clause because it was administered in a way that excluded Chinese from engaging in the laundry business). The Court in *Yick Wo* is rather startling in its paean to these ideals:

> [T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Id. at 370. The Court's depiction of life, liberty, and the pursuit of happiness as progress of "the race" ironically calls upon a racist notion of constitutional rights as being predominantly Anglo Saxon. For discussion of this aspect of late-Nineteenth Century legal racism, see Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 355, 434 (Yale U. Press 1997).

26. *Allgeyer v. La.*, 165 U.S. 578, 589 (1897). The *Allgeyer* case noted that

> [t]he liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. See also Lochner v. N.Y., 198 U.S. 45 (1905) (articulating liberty-of-contract jurisprudence).

27. 83 U.S. 36 (1872).

28. Ronald M. Labbé & Jonathan Lurie, *The* Slaughterhouse Cases*: Regulation, Reconstruction, and the Fourteenth Amendment* 17–135 (U. Press of Kan. 2003) (exploring extensively the context of regulation of slaughterhouses, both in New Orleans and nationally); Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Su-*

measure was a guise for corrupt, state-controlled monopolism, and, as part of a carefully orchestrated and expansive legal attack on the Republican state government, they sued, arguing that their fundamental rights to conduct their trade, protected by the Thirteenth and Fourteenth Amendments, were being violated.[29] Nothing about the case directly raised questions of the rights and privileges of African Americans, although the setting in the Reconstruction political battles of postwar Louisiana and the fact that the courts were determining the meaning of the Reconstruction Amendments meant that the questions of racial equality and liberty were never far from the case.[30]

The Supreme Court held for the State.[31] Justice Miller, writing for the Court, acknowledged the importance of the Amendments for the freedom and protection of African Americans,[32] but then argued that the clause at issue—the Fourteenth Amendment's Privileges or Immunities Clause[33]—left the protection of fundamental rights, such as the right to contract, property, labor, and pursuit of a calling, to the states under an exclusively state-

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preme Court During the Civil War Era 189–198 (L.S.U. Press 2003) [hereinafter Ross, *Shattered Dreams*]; *see also* Kaczorowski, *supra* n. 17, at 144 (discussing growing use of slaughterhouse regulations for public health and safety); Michael A. Ross, *Justice Miller's Reconstruction:* The Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans, 1861–1873*, 64 J. S. Hist. 649 (1998) (same).

29. *See* Br. for Pls., (Nos. 475–480) *Slaughter-House Cases*, 83 U.S. 36 (1872) reprinted in 6 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 535, 570–572 (Philip B. Kurland & Gerhard Casper eds., 1975).

30. Ross, *Shattered Dreams*, *supra* n. 28, at 189 (noting that the case "influenced the course of American race relations for almost a century"). Michael Ross has also explored the racially charged background of the case and argues convincingly that the plaintiffs and their counsel undertook the case as part of a carefully orchestrated effort to challenge the biracial Republican government of Reconstruction Louisiana. *Id.* at 195. The law itself was passed almost in conjunction with the legislature's desegregation legislation, *id.* at 196–197, and the plaintiff's counsel, John A. Campbell, "detested the new order that permitted blacks to serve in public life." *Id.* at 198.

31. *Slaughter-House*, 83 U.S. at 71.

32. *Id.*

33. Section 1 of the Amendment states the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

based citizenship.[34] This interpretation has drawn much criticism over the years, as well as some defenses, but it remains the law regarding the Privileges or Immunities Clause.[35]

Regardless of one's views of the correctness of *Slaughter-House*, it is clearly a case about federalism. As Ronald Labbé and Jonathan Lurie have said, Miller's opinion "held that with the exception of the ex-slave, the new addition to the Constitution [the Fourteenth Amendment] had not altered in any significant fashion the traditional pattern of federalism."[36] The case importantly set the stage for a deferential federalism on matters of race that enabled the Court to justify its acquiescence in Jim Crow, even if that particular result would, as some have argued, have been contrary to Justice Miller's desire.[37] By beginning with *Slaughter-House*, we can trace the development of federalism into one of the predominant supporting myths for Jim Crow.

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34. *Slaughter-House*, 83 U.S. at 76–78.

35. For recent debates over *Slaughter-House*, see David S. Bogen, Slaughter-House *Five: Views of the Case*, 55 Hastings L.J. 333, 336–337 (2003); Fox, *Readings and Misreading*, *supra* n. 18, at 74; Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051 (2000) [hereinafter Wildenthal, *The Lost Compromise*]; Bryan H. Wildenthal, *How I Learned to Stop Worrying and Love the* Slaughter-House Cases*: An Essay in Constitutional-Historical Revisionism*, 23 Thomas Jefferson L. Rev. 241 (2001) [hereinafter Wildenthal, *How I Learned to Stop Worrying*]; Kevin Christopher Newsom, *Setting Incorporatinism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 Yale L.J. 643, 649 (2000); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 653–655 (1994); and Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House*,* Cruikshank*, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739 (1984).

36. Labbé & Lurie, *supra* n. 28, at 2; *see also* Bogen, *supra* n. 34, at 336–337; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 Yale L.J. 643, 688–708 (2000) (discussing Justice Miller's views on federalism and how *Slaughter-House* supports those views).

37. Ross, *Shattered Dreams*, *supra* n. 28, at 254. Ross notes that

> [Justice Miller's] most important decision . . . led to outcomes he did not intend, much less sanction. Despite Miller's ringing language about racial equality under the law, southern whites managed to turn his opinion on its head, using it as a states'-rights precedent that allowed the subjugation of African Americans without federal interference.

Id. See also Labbé & Lurie, *supra* n. 28, at 246 (highlighting the difference between Justice Miller's intentions and the manner in which Justice Miller's views were interpreted); *but see* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 660 n. 228 (noting that Miller apparently supported the Southern, Johnsonian alternative amendment that would have defanged the Fourteenth Amendment).

It is important to point out here that, by describing the federalism of *Slaughter-House* and subsequent cases as a myth, I do not mean to deny that this federalism had, and still has, significant legitimacy and importance as a constitutional doctrine. Indeed, the doctrine functioned even more effectively as a coherence-myth for the purpose of supporting Jim Crow precisely because it also provided strong support for legitimate legal, constitutional, and political principles. This is evident in *Slaughter-House* itself, in which Justice Miller, who had done extensive research into cholera as a medical professional, employed federalism to support the Republican legislature and its effort to clean up a notorious health hazard that was arguably responsible for cholera and other epidemics.[38] Even the supporters of the nationalizing aspects of the Fourteenth Amendment struggled with how properly to limit the federal government and so balance the perceived political and constitutional benefits of a limited federal government with the need to preserve and enforce civil rights for all Americans.[39] Yet the fact that the principle may itself have substantial justifications should not obscure the manner in which it also becomes a myth with which to evade the dissonance created by Jim Crow. The very rationality of the principle in some contexts makes it all the more dangerously acceptable when it functions as a myth to create coherence against the logically contradictory principles of law.

The first step in understanding how *Slaughter-House* federalism functions as myth creation is to see how Justice Miller's federalism rhetoric subtly shifts the federalism structure of the Fourteenth Amendment to a more pro-state view.[40] The Amend-

38. Ross, *Shattered Dreams*, *supra* n. 27, at 11–12, 20–21 (discussing Justice Miller's prior experience with and knowledge about cholera epidemics), 202 (suggesting that Miller's *Slaughter-House* opinion was based in part on his interest in the sanitation movement).

39. *See* Michael P. Zuckert, *Congressional Power under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 Const. Commentary 123, 139–141 (1986) (discussing the federalism views of John Bingham, the primary drafter of Section One of the Fourteenth Amendment, and arguing that Bingham advocated a federalism based on centralized government with decentralized administration); *see also* Fox, *Readings and Misreadings*, *supra* n. 18, at 127–128, 134–135 (discussing views of congressional Republicans in the 1870s).

40. For my previous discussions of these issues, see Fox, *Readings and Misreadings*, *supra* n. 18, at 72–118; and Fox, *supra* n. 8, at 545–551.

ment itself does not set forth clearly distinct spheres of citizenship. The first sentence, commonly known as the Citizenship Clause, states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[41] Thus, people are declared to be citizens of the federal government by birth or naturalization, and citizens of a state by their own voluntary choice of residence. The next sentence, containing the Privileges or Immunities Clause, states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[42]

Out of these two textual threads, Justice Miller wove a holding that declares that fundamental privileges of citizenship are exclusively the province of state governments. He did this first by declaring, early in the opinion, that the issues of the case are "important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States . . . ."[43] Notice that Miller has already re-characterized citizenship by referring to "citizens of the States and of the United States," indicating a parallelism of citizenship not at all present in the first sentence of § 1 of the Fourteenth Amendment, which subordinates state citizenship, as a voluntary act of the individual, to federal citizenship, which is granted by birth or governmental action. Miller then asserted that, once one understands that there are two distinct spheres of citizenship, one must assume that the privileges of citizenship in the second sentence of the Amendment refer only to privileges of the United States and that the Amendment was not meant to regulate state citizenship privileges.[44] Miller sealed his argument with an exposition of why the privileges of federal citizenship can only be those contained in the Constitution already, and certainly do not include the grand, fundamental rights and privileges of citizenship previously discussed by antebellum courts.[45]

41. U.S. Const. amend. XIV, § 1.
42. *Id.*
43. *Slaughter-House*, 83 U.S. at 67.
44. *Id.* at 74.
45. *Id.* at 75–82.

As Justice Field observed in dissent, the Court's reading of the Amendment seems plainly to contradict the fact that the Congress that framed the Amendment also passed the Civil Rights Act of 1866, which sought to enforce equality of fundamental rights such as contract and property.[46] Yet the Court was convinced that its constricted federalism was a proper reading of the Amendment. This conviction stemmed, in large part, from the Court's tremendous fear of a powerful national government. As the Court wrote, a decision holding that fundamental privileges of citizenship were properly the subject of federal law would "fetter and degrade the State governments by subjecting them to the control of Congress," and "radically change[ ] the whole theory of the relations of the State and Federal governments to each other and . . . to the people . . . ."[47]

By seeing its federalism as a bulwark against radical nationalism, the Court began a rhetorical process of limiting constitutional law and federal powers under precisely the amendments which were designed affirmatively to establish and allow the government to protect equal *national* citizenship for black Americans. In so doing, the Court established the mythical power of post-*Slaughter-House* federalism as superior to the implementation of that equal citizenship. This power was mythical because it did not really arise out of clear constitutional language. It was also mythical because it was imbued with such grand political and jurisprudential rhetoric that its importance became harder to question.

Interestingly, some scholars contend that, in the end, Miller's federalism itself did not win the day. The dissents of Justices Field and Bradley are often characterized as the precursors to *Lochner*; the Court simply shifted Field's arguments into the Due Process Clause via the substantive due process doctrine.[48] To a certain degree, this is true. This does not, however, account for the Court's persistent use of federalism arguments to limit the rights of black Americans (as opposed to the rights of corporate America) throughout the Jim Crow era. To understand this proc-

46. *Id.* at 91–92, 96–98 (Field, J., dissenting).

47. *Id.* at 78 (majority).

48. *See e.g.,* Kermit L. Hall, William M. Wiecek & Paul Finkelman, *American Legal History: Cases and Materials* 370 (2d ed., Oxford 1996).

ess, we need to see how the Court shifted the federalism arguments to doctrines that could support white supremacy.

The basic principle of the dual and exclusive sovereignty federalism espoused in *Slaughter-House* was rather quickly applied to deny African Americans basic rights. *United States v. Cruikshank*[49] involved the federal prosecution (under the Enforcement Act of 1870, enacted in large part to enforce the Fourteenth Amendment) of whites who had perpetrated the bloody and notorious Colfax massacre of blacks as part of a pattern of violent intimidation surrounding elections in 1874.[50] The Court, per Chief Justice Waite, began its opinion with citation to *Slaughter-House* and a further elaboration of the importance of respecting the separate, dual sovereignty of the State and Federal governments.[51] It then asserted that the indictment was deficient because the defendants were alleged to have interfered with the victims' right to assemble for any lawful purpose rather than for the purpose of petitioning the federal government.[52] Thus, the basic right of assembly remained a state-based right, absent a showing that the assembly involved discussion of federal or national issues. And thus did the Court employ a federalism distinction to simultaneously assert its willingness to protect truly national rights (the right to petition the government) and yet deny black victims the opportunity to receive federal protection (and therefore the opportunity to receive any protection in the South) in a case involving African American political activities which were central to the Reconstruction Amendments and legislation.

The Court performed a similar feat of rhetorical gymnastics on the question of interference with the right to vote. This indeed got to the heart of the matter: the assailants had attacked blacks to intimidate and prevent them from voting.[53] The Court even acknowledged that this was probably true, which indeed it had to, given the notoriety of the case at the time.[54] Yet the Court drew a

49. 92 U.S. 542 (1875).

50. Ross, *Shattered Dreams*, *supra* n. 28, at 245–246; Robert M. Goldman, *Reconstruction and Black Suffrage* 42–59 (U. Press of Kan. 2001).

51. *Lochner*, 92 U.S. at 548–551 (citing *Slaughter-House*, 83 U.S. at 74).

52. *Id.* at 551–553. The Court also held that the right to bear arms for lawful purposes was not a federal right. *Id.* at 553.

53. *Id.* at 543.

54. *Id.* at 556 (suspecting "that race was the cause of the hostility"); Goldman, *supra* n.

line between the right to vote generally, which was not a federal right, and the right to be free from racial discrimination in voting, which was.[55] The failure of the prosecution, therefore, to aver an interference of the right to vote on account of race doomed the indictment. The prosecutors had simply erred. At bottom, the Court reasoned that

> [t]he charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.[56]

Mere police duty? For prosecution of members of a white mob attacking blacks trying to organize politically and exercise their right to vote in the late-Reconstruction South? While the Court left open a small door for future protection of the right to petition the national government and the right to not be discriminated against in voting on account of race, *Cruikshank* provided fertile soil for the use of federalism doctrines to assuage white legal elites, and white Americans generally, for the failure of the law to protect the basic liberties of African Americans.[57]

2. State Action: The Federalism Myth Embraced

As the Supreme Court wended its way through the conflicts of Reconstruction, it gravitated to the federalism-based doctrine of State Action as the surest, most firmly grounded doctrinal myth with which to limit federal protections of black citizens. The State Action doctrine appeared initially in *Cruickshank*[58] and

50, at 50 (noting that "the northern press called it what it was, a 'massacre' and an 'outrage'").

55. *Cruikshank*, 92 U.S. at 555–556.

56. *Id.* at 556.

57. *Cruikshank* also involved the question of state action under the Fourteenth Amendment. *Id.* at 542. While State Action is also a protection of federalism, because of its own doctrinal significance, I treat it separately below.

58. *Id.*

gained its strongest support in Justice Bradley's opinion for the Court in the *Civil Rights Cases*.[59]

The basic proposition of the State Action doctrine was that the Fourteenth Amendment contained the potentially limiting language, "No State shall," in expressing the prohibitions on discrimination, and so, regulated only governmental action.[60] Thus, in the *Civil Rights Cases*, the Court determined that Congress had no power to pass the Civil Rights Act of 1875 because the Act regulated private conduct, such as racial segregation of public conveyances and theaters.[61]

The State Action doctrine is particularly revealing here because it shows how the Court was able to focus on a plausible argument and, as if wearing doctrinal blinders, exclude related doctrinal interpretations which were equally plausible. Thus, the Court latched onto the State Action argument to invalidate civil rights legislation despite the possibility, emphasized by Justice Harlan in dissent,[62] that Congress could have been acting validly under the Citizenship Clause of the Fourteenth Amendment or under the Thirteenth Amendment, neither of which was limited by the "No State shall" language, and despite the possibility that state *inaction* was arguably just as logical an argument for federal action under a "No State Shall" rubric as was state *action*.[63]

In this way, the Court condoned segregation and encouraged the white South to engage in extensive private segregation and systematic state-governmental abandonment of its black citizenry, all without fear of federal judicial or congressional interference. Here we see the myth behind the doctrine: The Court

59. 109 U.S. 3 (1883).

60. U.S. Const. amend. XIV.

61. 109 U.S. at 24–26.

62. *Id.* at 32–43, 46–47 (Harlan, J., dissenting).

63. *See* Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* 68–133 (Greenwood Press 2001) (exploring in detail the variety of meanings of state action for members of the Reconstruction Congresses); *see e.g. U.S. v. Hall*, 26 F. Cas. 79, 81–82 (C.C.S.D. Ala. 1871) (holding that § 5 of the Fourteenth Amendment enabled Congress to pass legislation protecting fundamental rights, including the Bill of Rights, from state action or inaction). The Hall court stated that

> [d]enying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws.

Id. at 81.

created the appearance of federal powers under the Amendments by leaving space for regulation of state "action" while in fact setting the doctrinal line of federalism so far in favor of segregation that little chance of any civil rights protections existed. This myth, therefore, served to harmonize for the court, legal actors, and white society generally, the conflict between the Reconstruction Constitution, which required civil rights, and de facto segregation.

3. Federalism and Lynching: Myth Made Transparent?

The use of federalism and state action as a means of avoiding federal responsibility for protecting the most basic of liberties for blacks became particularly significant during Jim Crow in the response to the white practice and custom of lynching. Lynching, and in particular the lynching of black victims by white "mobs" (although mob is perhaps not the right word, since many lynchings were orchestrated social events[64]), was one of the most emblematic and horrific symbols of white supremacy in the Jim Crow era.[65] The very threat of violence, which periodic lynchings created, and the publicness of the lynching itself, reinforced both feelings of power among many whites and a powerless fear among some blacks.[66] As Ida B. Wells said, lynching was part of an overall program to "get rid of Negroes who were acquiring wealth and property and thus keep the race terrorized."[67] Because lynchings

64. *See e.g. Spectators at the Lynching of Jesse Washington*, May 16, 1916, Waco, Texas, photo #9 in collection at Without Sanctuary web site, http://www.musarium.com/withoutsanctuary/main.html (last visited July 7, 2004); *see also* Michael R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown *South*, 1 (U. Ga. Press 1987) (discussing lynching of Jesse Washington); Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America*, 135 (Palgrave Macmillan 2002) (describing contemporary view of lynching as "murder by community").

65. Belknap, *supra.* n. 64, at 1 (describing lynching as a "bulwark" of white supremacy).

66. Fairclough, *supra* n. 22, at 24–28; Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow*, 280–325 (Alfred A. Knopf 1998).

67. Fairclough, *supra* n. 22, at 32 (quoting Ida B. Wells, *Crusade for Justice: the Autobiography of Ida B. Wells*, 47–65 Alfred M. Duster ed., U. Chi. Press 1970)). Wells was one of the most important African-American civil rights activists of the period and a leading force in the nationalization and internationalization of the anti-lynching campaign. *Id.* at 22–39; *see also* Patricia A. Schechter, *Unsettled Business*, in *Under Sentence of Death: Lynching in the South* 292, 294–299 (W. Fitzhugh Brundage ed., U.N.C. Press 1997); Deleso Alford Washington, *Exploring the Black Wombman's Sphere and the Anti-Lynching*

were very rarely prosecuted by local and state officials, resort to the federal government, both in the courts and in Congress, was essential to redressing the brutal custom. And the response from these federal bodies reveals both how strong the myth of federalism was and how the dangers of the myth could become transparent.

The case involving Joseph Shipp and Ed Johnson starkly reveals many of these issues.[68] Ed Johnson, an African American who was accused of raping a white woman in Chattanooga, was tried by a white jury in a mob atmosphere.[69] Johnson's initial defense team of white lawyers refrained from a vigorous defense, in part due to fear that Johnson would be lynched.[70] Johnson obtained black lawyers more willing to pursue the defense and appeal on the grounds of systematic exclusions of blacks from the jury and the general mob atmosphere of the trial, and the United States Supreme Court, at Justice Harlan's instigation, stayed Johnson's execution in order to hear the appeal.[71] Immediately after word of the stay reached Sheriff Joseph Shipp, a mob lynched Johnson, leaving a note on his body that read, "To Justice Harlan. Come get your nigger now."[72] Local governmental officials refused to prosecute, and Sheriff Shipp won a landslide reelection.[73] Even the federal Justice Department refused prosecution, in part because it was uncertain of its constitutional authority to do so (recall the words of the *Cruikshank* court, which described such protection as "mere police duty").[74]

Crusade of the Early Twentieth Century, 3 Geo. J. Gender & L. 895, 896–898 (2002). Wells' work itself demonstrated how white efforts to terrorize blacks could also serve to galvanize and radicalize activism among blacks.

68. For a compelling narrative of this case, see Mark Curriden & Leroy Phillips, Jr., *Contempt of Court* (Faber & Faber 1999). Many of the basic facts are set forth in the Supreme Court opinions in the contempt proceedings against the sheriff. *See U.S. v. Shipp*, 214 U.S. 386, 386 (1909); *U.S. v. Shipp*, 203 U.S. 563, 571–572 (1906); *see also* Klarman, *supra* n. 1, at 56–57; Douglas Linder, *Famous American Trials: The Trial of Sheriff Joseph Shipp et al. 1907*, http://www.law.umkc.edu/faculty/projects/ftrials/shipp/shipp.html (accessed June 25, 2004) (presenting analysis and documents from the episode).

69. Curriden & Phillips, *supra* n. 68, at 34–129 (depicting mob atmosphere and trial); Klarman, *supra* n. 1, at 56.

70. Klarman, *supra* n. 1, at 56.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

The Supreme Court, however, recognized the transparency of the federalism claims and, in a remarkable move, found Shipp and others in criminal contempt for violating its order to stay the execution.[75] The very plain nature of the extra-legal violence and subversion of the basic judicial process demonstrated that claims of local police powers could not mask the injustices. Moreover, the Supreme Court acted even though there was a plausible claim of the lack of state action. It was, after all, a failure to protect Johnson that implicated the state. In fact, the State had made some effort to preserve the trial proceedings in spite of the earlier threats of lynchings, and the lynching was a "private" execution, not an execution by state authorities in violation of the Court's stay. The Court had well-established precedent supporting the State Action argument, including a similar case in *United States v. Harris*,[76] which had, along with the *Civil Rights Cases*, helped lay the foundation of the doctrine. Yet Justice Harlan (who had opposed the State Action doctrine in its formation in the *Civil Rights Cases*) was able to persuade his colleagues to bypass the doctrinal limitations and view these facts as showing state action in the sheriff's complicity with the mob even prior to the killing of Ed Johnson, when the stay was issued. When the mob then killed Johnson, the state's failure to protect Johnson and then its failure to prosecute his murderers was sufficient action by the State for the Court to find the defendants in contempt.

The *Shipp* case also demonstrates, however, the ineffectiveness of juridical recognitions of racial injustices. As Michael Klarman observes in discussing this episode,

> Though Shipp was ultimately convicted of criminal contempt in unprecedented proceedings before the Supreme Court, similar charges brought against most members of the lynch mob were dismissed because witnesses had been intimidated into silence. The few lynch mob members who were found guilty of contempt received sentences of just two to three

75. *Shipp*, 203 U.S. at 575.

76. 106 U.S. 629 (1883) (holding that there was no State Action violation in a case where a mob beat and killed African Americans who had been arrested and were in the sheriff's custody and that a federal statute prohibiting conspiracies to deprive people of their rights was invalid). Justice Harlan dissented in this case on jurisdictional grounds and without opinion. *Id.* at 639–640, 644.

> months in prison, and Shipp was greeted as a hero by a crowd of 10,000 when he returned home from jail.[77]

Ultimately, Klarman uses this episode to support his argument that the Supreme Court, even in the rare instances when it is so inclined, cannot overcome popular sentiment and norms.[78] The fact that the Court was willing to support racial equality and liberty interests itself did little to change even the lives of the perpetrators of the injustice, and, standing alone, could do nothing to change the widespread inequalities and dangers of a white supremacist society.

Moreover, the fact that it took a combination of a gross racial injustice with the flouting of the Court's own stay in order to obtain this minimal punishment reveals just how inefficient and ineffective legal actions were. Indeed, lynching was far more often seen as a "local" concern, unconnected to federal rights, liberties, and protections.[79] Yet, as Angela Harris has argued, lynchings were at once lawless and law: they used a regime of private violence, outside the (already white-biased) legal system, to enforce legal norms of segregation and subordination with the complicity of legal actors.[80] Lynching was precisely the state inaction that revealed itself as very active state and legal complicity with violence and subordination.[81]

This raises two critical problems with the operation of doctrinal myths. First, even when the myth itself breaks down in a particular instance, the underlying inequalities which cause the myth to break down cannot be solved through judicial intervention alone. Second, the merely episodic transparency of the myth often fails to cause a full reworking of the doctrine. The *Shipp* case broke no new doctrinal ground and served little precedential

77. Klarman, *supra* n. 1, at 56–57.

78. *Id.*

79. Belknap, *supra* n. 64, at 9 (noting that "[t]raditional concepts of federalism prevented the national government from suppressing lynching"); Waldrep, *supra* n. 64, at 135. Cf. Albert E. Pillsbury, *A Brief Inquiry into Federal Remedy for Lynching*, 15 Harv. L. Rev. 707 (1902) (admitting that "[p]robably a majority of public men and constitutional lawyers" would argue that federalism ideals prevented federal government action, but contending that the majority opinion was wrong).

80. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal. L. Rev. 1923, 1966–1969 (2000); Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 How. L.J. 1, 84–102 (1996).

81. *Cf.* Belknap, *supra* n. 64, at 8–9 (noting complicity of local officers in lynchings).

value. The dissonance created by the conflict between equal citizenship values and systemic, violent segregation was still rationalized through the doctrinal myths. Indeed, one could argue that the episodic and ineffectual response to justice claims, as in *Shipp*, simply operated to *bolster* the overriding myth itself because it convinced legal actors that the courts could respond to injustice in cases where it was particularly necessary. The fact that little changed on the ground in east Tennessee could be overlooked by the justices soon after they finished resolving the *Shipp* contempt hearing and satisfied themselves that their own powers were affirmed, even as the local powers of the white murderers were also affirmed.

Indeed, the fact that the myth of state action and federalism more generally remained disturbingly strong is apparent in the inability of Congress to respond to the grotesque practices of lynching in the 1910s and 1920s. The Shipp–Johnson episode was one of a number of well-publicized racial lynchings and mob actions. Yet President Taft refused to condemn lynching because he believed it was a matter of state and local, and not federal, concern.[82] In large part due to the efforts of the newly formed NAACP to publicize and combat lynching, political support for anti-lynching laws grew,[83] but such legislation was defeated by the opposition of southern senators who argued that the bill would violate basic tenets of federalism and local control over criminal justice.[84]

Here we see one additional aspect of how doctrinal myths can operate: the doctrinal myths which serve to manage dissonance can eventually lead actors to positions far less supportive of equal citizenship claims than are originally apparent. For the members of Congress during Reconstruction, many of whom had been involved in the framing of the Fourteenth and Fifteenth Amendments, legislation prohibiting mob violence and federal prosecutorial actions to enforce the legislation were the *sine qua non* of federal powers under the Amendments, and they passed several acts

82. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 60 (2000); Klarman, *supra* n. 1, at 67.

83. Fairclough, *supra* n. 22, at 105; Waldrep, *supra* n. 64, at 134–144.

84. Belknap, *supra* n. 64, at 17.

supporting this view.[85] But, by the early Twentieth Century, the doctrinal myth of federalism and the Court's efforts to reify the myth had become so imbedded that, even in the face of several decades of racially based mob violence, lynchings, and Jim Crow segregation, even sympathetic members of Congress doubted these fundamental powers.

C. Dissonance and Myth: Separate-but-Equal and the Legal Reasonableness of White Supremacy

The State Action doctrinal myth was itself insufficient to implement full juridical approval of Jim Crow because Jim Crow ultimately rested on the *legal* requirement of segregation. It was not enough for the white South to implement segregation in public spaces by private agreements. In part because such private customs were unstable, especially where economic interests of businesses, such as interstate railroads, might push in other directions, southern states began to implement legally mandated segregation. Once this process began, federal courts needed one further doctrinal myth with which to support the regime; after all, state-mandated segregation on railroads, in theaters, and elsewhere was itself state action, even under the *Civil Rights Cases*'s limited definition. To answer this problem, the Court developed a series of related myths about equality: separate-but-equal; a distinction among civil, political, and social rights; and the reasonableness of segregation as supporting the public order.

It should first be emphasized that a significant reason for the implementation of Jim Crow laws was the success with which the white South was able to implement total exclusion of black citizens from the political process. In the ten to twenty years of black participation in southern politics through voting and office holding, southern legislatures either implemented civil rights laws or at the very least avoided implementing segregation laws. Thus, it was only through the suppression of black political power that Jim Crow could emerge as a viable regime. The Court ultimately sanctioned this process in *Williams v. Mississippi,*[86] but most of

85. *See e.g.* Pub. L. No. 41–99, 16 Stat. 433 (1871); Pub. L. No. 42–22, 17 Stat. 13 (1871); Pub. L. No. 41–114, 16 Stat. 140 (1870); *see also* Belknap, *supra* n. 64, at 10–12 (discussing legislative attempts to curtail mob violence).

86. 170 U.S. 213 (1898) (upholding Mississippi's disenfranchisement provisions); *see*

the blame for federal abandonment of suffrage protections probably lies with Congress and the Executive, who failed to enforce the Fifteenth Amendment with sufficient vigor to preserve suffrage rights.[87]

1. Separate-but-Equal as a Standard for Legal Equality

The doctrine of separate-but-equal—the doctrine overturned by *Brown v. Board of Education* and so frequently identified with *Plessy v. Ferguson*[88]—is rightly seen as the lynchpin of legal support for Jim Crow. With legislative and regulatory implementation of separate facilities for white and black citizens, southern white lawmakers directly challenged the basic legal promises of the Thirteenth and Fourteenth Amendments. Indeed, southern white lawmakers were aware that Jim Crow laws confronted potentially significant constitutional issues; it was only with the Supreme Court's approval of Mississippi's rail-segregation law that most other southern states moved quickly to pass similar legislation.[89] Although much of the constitutional concern was with Commerce Clause issues,[90] there was also good reason to fear challenges based on the Reconstruction Amendments since the Amendments had been framed and ratified in large part to overturn a similar regime under the Black Codes. Although there is considerable evidence that segregation in fact existed in most public facilities, in both the North and South, prior to Jim Crow legislation,[91] the move to assert legal segregation was still recognized as constitutionally suspect. But, in an example of how white southern lawmakers continued to test limits and expand legal

also Giles v. Teasley, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903) (declining to overturn an Alabama Supreme Court decision rejecting a challenge to Alabama's election laws which disenfranchised black citizens).

87. *See generally* Robert M. Goldman, *A Free Ballot and a Fair Court: The Department of Justice and the Enforcement of Voting Rights in the South, 1877–1893*, (Fordham U. Press 2001) (analyzing federal enforcement of voting rights in the latter part of the Nineteenth Century).

88. 163 U.S. 537 (1896).

89. *Louisville, N. O. & T. R. Co. v. Miss.*, 133 U.S. 587 (1890); Joseph R. Palmore, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878–1946*, 83 Va. L. Rev. 1773, 1792–1793 (1997).

90. Palmore, *supra* n. 89, at 1782–1792 (discussing the Mississippi separate-coach law and interstate commerce).

91. Mack, *supra* n. 23, at 378–381; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1351–1357 (1996).

support for white supremacy, legislatures implemented laws mandating segregated facilities in the 1890s with the acquiescence of the federal government.

The groundwork for a doctrine of separate-but-equal had been laid for some time prior to *Plessy*. The historical actuality of de facto segregation of most facilities certainly made the legal approval at the very least easy, if not inevitable.[92] Moreover, legal support for separate facilities had long been a part of the law, in both the North and South, and even under the civil rights legislation of Reconstruction.[93] Just as significant, however, was the fact that separate-but-equal already had a foundational doctrine so ingrained in white perceptions of equality and justice that the Court hardly needed to justify it at all: the doctrine that the criminalization of interracial sexual relations was simply neutral as a matter of justice and equality, since both races were punished equally for the same offense. The Court, in the same year that it declared the Civil Rights Act of 1875 unconstitutional, issued a cursory, three-paragraph opinion in *Pace v. Alabama*[94] upholding "anti-miscegenation" laws with the conclusory statement that "[t]he punishment of each offending person, whether white or black, is the same."[95] Notably, Justice Harlan did not dissent. As Michael Klarman has observed, "Analytically, *Plessy's* endorsement of separate but equal was a straightforward application of *Pace*."[96] Indeed, the Court in *Plessy* cited the fact that laws against interracial marriage had been "universally recognized as within the police power of the State."[97] It can be argued that, once

92. Klarman, *supra* n. 1, at 17–23.

93. Mack, *supra* n. 23, at 383 (noting that "[c]ourts generally ruled that railroads could separate their passengers by gender or race without violating either their duties as common carriers under state common law or the federal Civil Rights Act of 1875"); *see also* Charles A. Lofgren, *The* Plessy *Case: A Legal-Historical Interpretation* 116–147 (Oxford U. Press 1987) (discussing history of separate-but-equal doctrine in state and federal courts in the nineteenth century). The seminal case cited as establishing the separate-but-equal doctrine is *Roberts v. City of Boston*, 59 Mass. 198 (1849), in which Chief Justice Shaw upheld a city school committee practice requiring separate schools for blacks and whites. It is often overlooked that Massachusetts was also the first state to adopt a civil rights law banning segregation. Foner, *Reconstruction, supra* n. 10, at 28.

94. 106 U.S. 583, 585 (1883).

95. *Id.* at 585.

96. Klarman, *supra* n. 1, at 21.

97. *Plessy*, 163 U.S. at 545 (1896). Oddly, the Court here cited a case from a state court rather than its own precedent of *Pace*. *Id.* (citing *State v. Gibson*, 36 Ind. 389 (1871)).

white legal society had agreed on the baseline legitimacy of a sharp legal boundary on interracial sexual relations, every other attempt to separate races followed rather logically.

To better understand *Pace* and just how easy a case *Plessy* was for the Court and white legal commentators, it also helps to consider how white legal and political society had, by the 1880s, formulated a doctrinal conception of rights as a tripartite division of civil, political, and social rights. This division, articulated by Justice Bradley in the *Civil Rights Cases*, imagined three levels of rights: civil rights, including contract, property, and court access; political rights, including voting and jury service; and social rights, including the right to equal public accommodations as well as other associational rights.[98]

According to proponents of this division, the Reconstruction Amendments were designed to protect equal access to only civil (Fourteenth Amendment) and political (Fourteenth and Fifteenth Amendments) rights; social rights were beyond the scope of federal power.[99] This distinction was based in large part on the fear of interracial sexual relations: if blacks and whites were to associate with each other socially in theaters, schools, trains, or other locations, then the fortress preventing interracial sex (and in particular sex between white women and black men) would be breached.[100] Thus, the very rights held to be outside of federal protection were those rights most likely to lead to violation of the racial–sexual ethic. In this respect, *Pace* and the *Civil Rights Cases* were symbiotic doctrinal expressions of the foundational code essential for the myth of separate-but-equal which upheld Jim Crow.

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98. I discuss this tripartite division of rights in Fox, *Defining Privileges*, *supra* n. 18, at 458–460; *see also* Foner, *Reconstruction*, *supra* n. 10, at 231 (discussing congressional Republican acceptance of these distinctions as of 1865 and 1866); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 Loy. L.A. L. Rev. 1207 (1992).

99. *E.g. Civil Rights Cases*, 109 U.S. at 22.

100. *See generally* Emily Field Van Tassel, *"Only the Law Would Rule between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights after the Civil War,* 70 Chi.-Kent L. Rev. 873 (1995) (analyzing the interrelation of social rights, antisegregation, and white supremacy). Indeed, as Van Tassel observes, congressional opponents of the Civil Rights Act of 1875 even argued that the Act would *require* white women to marry black men. *Id.* at 906–907; *see also* Mack, *supra* n. 23, at 394–395 (discussing how segregation in the public sphere was designed in part to reinforce white fears of miscegenation).

The mythical quality of the idea of equality set forth in *Pace* is clear from the fact that the criminal prohibitions were designed to preserve white supremacy, not to preserve equal sexual relations. As Emily Field Van Tassel has observed, social equality, antimiscegenation, and white supremacy were mutually reinforcing and often synonymous terms in late-Nineteenth and early-Twentieth Century discourse.[101] The point of antimiscegenation statutes was to preserve the white race and subordinate nonwhites.[102] It is hardly likely that the Justices who issued *Pace* failed to understand this purpose; the application of equality analysis to antimiscegenation laws, therefore, served as a doctrinal myth through which the Court could appear to uphold the Fourteenth Amendment equality requirement while also supporting one of the most important (politically and socially) legal mechanisms of racial subordination.

Rail travel represented one of the most complicated intersections of race, gender, and class of the late-Nineteenth Century. As a new, yet confined, public space integral to the economy, railroads became a central locus for southern society to work out postbellum race, gender, and class relations. According to legal historian Kenneth Mack, "Southerners might encounter strangers aboard the trains without fixed rules of deference and courtesy" and they "struggled to map the race, gender, and class contours of the new social space that railroad cars presented" after the Civil War and the end of slavery.[103] For a society so obsessed with controlling racial and gender relations, yet also so concerned with economic and industrial advancement, railroad coaches presented a central theater for the working out of a host of social and political tensions. It is, therefore, no surprise that the case so often viewed as epitomizing Jim Crow involved railroad travel.

Plessy was a test case put together by black activists in New Orleans, who objected in principle to racial separation and classification, and the Louisiana railroads, who did not like the added expense and administrative difficulty of enforcing a state law requiring separate accommodations for black and white passen-

101. Van Tassel, *supra* n. 100, at 904–905.
102. *Id.* at 900–906.
103. Mack, *supra* n. 23, at 381–382.

gers.[104] In order to weave the doctrinal support for Jim Crow, Justice Brown, writing for the Court, first nodded at the federalism decision in *Slaughter-House* but quickly passed on to articulate fully the separate-but-equal doctrine.[105] The refusal to make more use of *Slaughter-House* is itself noteworthy; after all, the Court could have argued that regulation of railroad travel within a state was itself exclusive to the police powers of a state. But Plessy was asserting a violation of the right not to be discriminated against based on race, and even under the narrow understanding of federal rights articulated in *Slaughter-House*, the right not to suffer racial discrimination was still plausibly a federal right.[106] Thus the Court had to shift quickly into the separate-but-equal doctrine, which it did by employing the civil–political–social equality distinction and asserting that Fourteenth Amendment equality meant legal and political equality, but not social equality. As the Court stated,

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[107]

Note here how the Court employed a series of myths to unite separate-but-equal and federalism in a way the two doctrines had

104. Thomas J. Davis, *Race, Identity, and the Law:* Plessy v. Ferguson in *Race on Trial: Law and Justice in American History* 61, 61–67 (Annette Gordon-Reed, ed., Oxford U. Press 2002); Schmidt, *Race 1*, *supra* n. 1, at 465–466.

105. 163 U.S. at 543–545.

106. Justice Miller had been rather clear on this point, stating, in reference to the equal protection clause, that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." *Slaughter-House Cases*, 83 U.S. at 81. Miller also stated that this right remained one of the federal privileges under the Privileges or Immunities Clause. *Id.*

107. *Plessy*, 163 U.S. at 544.

not been connected before. First, the Court asserted its adherence to the doctrine of equal citizenship. It then used the myth, previously articulated in the *Civil Rights Cases*, that social equality was logically and legitimately distinguishable from constitutional equality, as well as the concomitant myth that interracial use of public space was an exclusively social right. It then incorporated the myth of *Pace* that laws requiring separation of races did not imply racial inferiority. As we saw above, this was a myth of which the Justices should have been, and probably were, aware (and one which Justice Harlan exposed in dissent, even though he had not done so in *Pace*).[108] Yet the Court clove closely to this assumption, even to the point of asserting the existence of a counter-myth to explain the arguments of African-American plaintiffs:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[109]

Adherence to the illusion that Jim Crow laws did not imply inferiority also required the Court to assert a belief that, contrary to the Court's statement that African Americans were deluded about the purposes of Jim Crow laws, the "commingling of the two races" would be "unsatisfactory to either";[110] that is, the Court

108. *Id.* at 557 (Harlan, J., dissenting). Justice Harlan noted that "[t]he thing to [be] accomplish[ed] [by the statute] was, under the guise of giving equal [protection] for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary." *Id.* at 562. Justice Harlan continued to suggest that "[t]he thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done." *Id.* It should be noted that Justice Harlan's opinion itself employs a rhetoric of racial superiority:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id. at 559. Justice Harlan also contrasts African Americans with "the Chinese race." *Id.* at 561. On Harlan's racist jurisprudence regarding the Chinese, see Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996).

109. 163 U.S. at 551 (majority).

110. *Id.*

had to create a myth of Africa-American support for Jim Crow. This was perhaps the baldest myth of all, coming as it did at the end of a period of radical, antidemocratic, and violent exclusion of African-American men from suffrage throughout the South, and coming as it did from a Court which supported such disenfranchisement in cases such as *Williams*[111] and *Giles*.[112] But such a myth was essential to the Court's immediately ensuing rhetorical return to federalism. Note how in the quoted passage indented above, the Court states that Jim Crow laws were "within the competency of the state legislatures in the exercise of their police power."[113] If the Court had admitted the fact of black disenfranchisement, the argument that southern state governments, ruled entirely by whites, were properly exercising police powers to implement equality would have been revealed as illegitimate. Thus did the Court find itself claiming, on the one hand, that blacks generally supported legally mandated racial separation, and on the other, that blacks were wrong to think that such separation furthered white supremacy.

The *Plessy* Court combined a series of doctrinal and factual myths, including federalism, the equality of separate facilities, and black support for Jim Crow, to prop up the regime of Jim Crow. It is important, however, to note that, in dissecting this doctrinal myth creation, we need not assume that the Court could have ruled otherwise. Michael Klarman is probably right when he argues that the Court is essentially a political and social institution and is usually incapable of acting against the current of political and social opinion.[114] With the entire political, legal, and social culture of white America largely supporting the existence of Jim Crow by 1896, it is unrealistic to expect that the Court could have bucked these dominant norms or that, had it done so, it could have actually enforced its holding.

The point, however, is not that we are expecting the Court to have ruled otherwise. Rather, in analyzing the Court's own doctrinal rhetoric, we can do two things. First, we can see how rhetoric and doctrine create realities. While the Court could not, per-

111. *Williams v. Miss.*, 170 U.S. 213 (1898).
112. *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903).
113. *Plessy*, 163 U.S. at 551.
114. Klarman, *supra* n. 1, at 5–7.

haps, have been expected to side with Justice Harlan, the choices it did make were ones of rhetoric. Justice Brown's efforts to weave together federalism with interpretations of constitutional equality itself may have encouraged the political and legal understanding that Jim Crow was a "local" issue. It certainly helped to revamp Justice Miller's federalism by extracting most racially discriminatory laws from federal protection. And the fact that Justice Brown did not explicitly require equality as part of the separate-but-equal doctrine in *Plessy* was a choice which soon had significant ramifications and would be tested and countered in subsequent years.[115]

Second, we can better understand how doctrinal myths are created and operate. To understand the rhetoric in *Plessy* may help us recognize the creation of such myths in other cases and other contexts. It also allows us to compare such rhetoric with other cases, recognizing when the Court does and does not employ this type of argument. It may also help us understand how competing doctrinal arguments, whether mythical or not, play out in later cases.

The importance of *Plessy*, therefore, lies in its rhetoric and not in its predictable holding. A case in which the holding was at least as important as *Plessy* for the full implementation of Jim Crow was decided three years later and written by the one justice who opposed *Plessy* so resoundingly. *Cumming v. Richmond County Board of Education*[116] involved a Georgia county that had stopped funding a black high school while continuing to fund the white high school.[117] African-American plaintiffs argued that the tax levied on them, as part of the county's administration of its school system, was illegitimate to the extent of taxes they were forced to pay for high school education, since no African American could attend the high school, and they sought an injunction to prevent expenditures on the white school until a black high school was reestablished.[118] The county argued that the limited funds available for black education should instead be spent on primary

115. *See* Lofgren, *supra* n. 93, at 200–201 (discussing post-*Plessy* litigation).
116. 175 U.S. at 528 (1899).
117. *Id.* at 542.
118. *Id.* at 537.

schools.[119] Here, the Court was presented with a clear situation of separate-but-unequal. Even under the doctrine it had just articulated, the decision of the school board appeared unsupportable. Yet the Court, per Justice Harlan, held that the school board's decision to use funds to educate 300 more black children at the primary-school level rather than sixty black students at the high school was reasonable.[120]

As Linda Przybyszewski has said in her legal–historical biography of Harlan, somewhat understating the point: "For historians looking to Harlan as the prophet of the 1954 *Brown v. Board of Education* decision, *Cumming* is a disappointment."[121] Przybyszewski attributes the apparent conflict in Harlan's jurisprudence, which had him on the one hand supporting congressional desegregation of public accommodations such as trains and inns, opposing state segregation of trains, and later opposing state mandated segregation of private schools, and on the other hand supporting a state's blatantly unequal funding of secondary schooling, to several factors.[122] She sees in his opinions a general exclusion of education from the ambit of civil rights, based on Harlan's likely belief that education was not itself a public accommodation and therefore was properly grouped with social, not civil, rights (this being Harlan's version of the civil–political–social rights distinction).[123] She also highlights Harlan's belief in the importance of race awareness and "uplift."[124] Przybyszewski contends that Harlan believed that blacks should properly have separate education for the purpose of racial cohesion and self-support.[125] Finally, Przybyszewski argues that the *Cumming* facts themselves did not present a clear case of inequality or state action because black students could still attend private schools and the public schools were partially privately funded anyway.[126]

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119. *Id.* at 537–538.

120. *Id.* at 544–545.

121. Linda Przybyszewski, *The Republic According to John Marshall Harlan* 99 (U.N.C. Press 1999).

122. *Id.* at 100.

123. *Id.*

124. *Id.* at 102–104.

125. *See generally id.* at 102–106 (discussing the racialist views of the General Assembly of the Presbyterian Church, in which Harlan played an important role).

126. *Id.* at 102.

This explanation of Harlan's motivations, however, does not quite hold together. The point regarding race identity might explain why Harlan would support segregated schools, but not why he would support the absence of publicly funded high schools for blacks. Indeed, this point should counsel for just the opposite result: support for racially separate-but-equal education designed to provide the teachers, doctors, lawyers, and other professionals so central to social and economic "uplift."[127] It also seems contrary to Harlan's effusive praise for Berea College's efforts to educate both blacks and whites in an integrated private college several years later.[128] As for the argument that Harlan viewed education as a social right only, this also seems contrary to his later support for education in *Berea College*, where he identified the right to teach as a natural right "given by the Almighty for beneficent purposes" akin to traditional rights of property and liberty.[129] Finally, the argument that *Cumming* did not involve clear state action or public institutions does not square with Harlan's dissent in the *Civil Rights Cases*, in which he bent over backwards to argue that licensing and other fairly moderate state actions were sufficient to make inns and theaters state-regulated public entities in order to apply the Fourteenth Amendment.[130] Justice Harlan also made the point in *Plessy* that privately held railroads were essentially quasi-governmental public spaces, in part because railroads exercised public powers such as eminent domain.[131]

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127. Przybyszewski argues that the Presbyterian Church, of which Harlan was an active and influential member, supported a black education program more in tune with W.E.B. DuBois's ideals than with Booker T. Washington's desire to focus on industrial, working class educations. *Id.* at 103. I see *Cumming* as much more consistent with Washington than with DuBois.

128. *Berea College v. Ky.,* 211 U.S. 45, 67–69 (1908) (Harlan, J., dissenting). Perhaps the better explanation is that the state interference with private education in *Berea College* was more offensive to Harlan because it interfered with private, *religious* education and liberties, whereas in *Cumming* the private religious schools were left untouched. As Przybyszewski shows very well, religion was crucial to Harlan's jurisprudence and life generally. Przybyszewski, *supra* n. 121, at 44–72.

129. 211 U.S. at 67. Harlan's reliance on property and liberty arguments in connection with education seems in large part to be his attempt to turn the Court's own recent rhetoric of property and liberty rights against the majority. In any event, it is hard to see how Harlan could, on the one hand, believe in the centrality of *teaching* as a fundamental right but relegate *learning* to the doctrinal slag heap of social rights.

130. 109 U.S. at 41.

131. 163 U.S. at 553–554 (Harlan, J., dissenting).

At bottom, then, there remains little room to find that *Cumming* stands for anything less than support for structures that prevent black education and self-improvement in a regime of segregation. And this gets to the heart of Jim Crow. For Jim Crow was not about separate-but-equal—that was the doctrinal myth necessary to quell the dissonance of having Jim Crow society under a constitution of equal citizenship—Jim Crow was about subordination. It is no surprise that the educational system that the Court approved in *Cumming* viewed black citizens as entitled to primary education and white citizens as entitled to secondary education (at the expense of all citizens, black and white). Most southern whites opposed anything but the most remedial education for blacks, and many liberal white reformers viewed black education as synonymous with industrial education at best.[132] This was education for second-class citizenship. And this was precisely the system that the NAACP spent so many years battling, eventually winning several cases by arguing that integration of colleges was necessary because there were no equal facilities for blacks.[133] *Cumming* therefore stands as the case that most brazenly admitted the reality of Jim Crow as a structural imposition of racial supremacy, largely free of such doctrinal salves as State Action and separate-but-equal.[134]

This may also help us see why, ironically, it was so significant that Justice Harlan was the author. The fact that the member of the Court most able to articulate the Reconstruction concept of equal citizenship in the public sphere could not overcome a belief that it was proper for government to operate a system relegating blacks to second-class citizenship shows just how deeply structural racism was. Harlan could identify, better than his col-

132. Fairclough, *supra* n. 22, at 49–50; Klarman, *supra* n. 1, at 46, 47. In 1900, whites generally viewed black education as unnecessary or as properly limited to industrial education. *Id.*

133. *See e.g. McLaurin v. Okla. St. Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that a black graduate at a state-supported school "must receive the same treatment. . . as students of other races"); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (finding that a Texas law school established for blacks did not offer an equivalent education); *see generally* Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality*, 195–284 (Alfred A. Knopf 2004) (discussing NAACP efforts leading up to *Sweatt* and *McLaurin*).

134. *See* 175 U.S. at 543, 545 (stating that the issue in *Cumming* was not separate schools or State Action).

leagues, that theaters and railroads were locations where the law should not permit segregation. When segregation moved to schools, however, and was plainly an imposition of unequal, caste-based funding and education, Harlan concurred with the practice. And while one might have hoped that Harlan, at least, would have understood this as incoherent, perhaps it can at least be said that he avoided the rhetorical blandishments in *Cumming* that made Justice Brown's *Plessy* opinion a much stronger prop for Jim Crow.

2. Racial Animus As a Basis for the Reasonableness of Segregation

The shifting of constitutional doctrine and rhetoric to a position favoring segregation included one other underlying current which reveals just how far the law can go once it begins creating myths to resolve dissonance. By the time Jim Crow was becoming firmly established in the South and it was clear that no branch of the federal government, including the courts, was going to challenge it, Jim Crow itself began to assume an air of reasonableness precisely because segregation itself appeared to legal and political elites to be a means of preventing interracial conflict. As Michael Klarman has written,

> The Court acquiesced in railroad segregation at a time when deteriorating southern race relations convinced many southern blacks of the futility of protesting such practices, and racial violence and lynching made segregation increasingly appear to be a reasonably progressive policy. Moreover, accelerating black migration northward rendered racial segregation more acceptable to white northerners, and a growing commitment to sectional reconciliation inclined them to extend to white southerners a free rein in ordering that region's race relations. Likewise, the Court tolerated southern black disfranchisement at a time when the degeneration of southern race relations made the political exclusion of blacks seem an attractive alternative to the interracial violence and killings that characterized southern elections.[135]

By the beginning of the Twentieth Century, segregation seemed, to whites, a "reasonably progressive policy" because it

135. Michael J. Klarman, *The* Plessy *Era*, 1998 S. Ct. Rev. 303, 387 (1999).

might reduce race conflict and violence. As J. Newton Baker wrote in the *Yale Law Journal* in 1910,

> [i]n some States where the colored population is large, public sentiment demands and requires a separation of the races, to prevent the breach of the peace. . . . [S]cience teaches that it is much easier and more politic to avert serious consequences than afterwards to punish for the breach of the peace.[136]

This concern with the "breach of the peace" reflected a desire of whites, and in particular moderate, liberal, and nonsouthern whites, that the "race problem" would just go away, *for whites*. Considering that, politically and legally, the post-Reconstruction federal government had abrogated its responsibility to protect African American citizens from violence,[137] it is little wonder that the next step would be to see segregation as the reasonable means of "avoiding" violence. Of course, Jim Crow itself was propped up by a continued threat of private violence (e.g. lynchings),[138] quasi-public violence (e.g. mass white-on-black rioting in Atlanta, Georgia; Wilmington, North Carolina; and other cities)[139] and public, state-sanctioned violence (e.g. racially biased enforcement of criminal and poor laws).[140] The fact that segregation itself seemed to coincide with an increase in such white-on-black violence did not, however, influence the reasoning of legal minds like Baker. Having removed protection of the laws and law enforcement from the range of possible options, yet another myth was created—segregation satisfied, both in common law and constitutionally, legal standards of reasonableness.

Indeed, reasonableness was the standard adopted by the Court in *Plessy*, in which Justice Brown wrote that

> the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to

136. J. Newton Baker, *The Segregation of White and Colored Passengers on Interstate Trains*, 19 Yale L.J. 445, 445 (1910).

137. *See* Klarman, *supra* n. 135, 310 (stating that "relaxed outside constraints" on southern racial practices caused them to worsen).

138. *Id.* at 309.

139. *Id.* at 368.

140. *Id.* at 351–353.

> this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable . . . .[141]

The Court had also used the reasonableness standard to explain why other forms of segregation posited by Plessy's counsel as a parade of horribles—for example, racially segregated sidewalks or segregation based on hair color or alienage—would naturally be rejected by the courts.[142] Quite simply, racial segregation in places where people were most likely to interact, and where status was particularly important to maintain, was deemed reasonable in ways other segregations would not be because it was consistent with traditional customs and "good order."

This doctrinal myth of the reasonableness of segregation continued to support segregation-enforcing decisions, as seen in *Chiles v. Chesapeake and Ohio Railway*.[143] *Chiles* involved the potentially nettlesome problem of *inter*state railroad segregation.[144] The Court had, in previous cases, seemed inclined to rule that interstate rail travel was governed by federal law, under the Commerce power, so that states could not require the segregation of interstate carriers.[145] In the 1878 case of *Hall v. DeCuir*,[146] the Court struck down the Reconstruction-era Louisiana law requiring desegregation of public accommodations as an impermissible state regulation of interstate travel.[147] In 1890, the Court upheld Mississippi's initial Jim Crow statute that required railway segregation and distinguished *DeCuir* on the ground that the Missis-

141. 163 U.S. at 550–551. This language was later used, unattributed, by Baker to make his prosegregation argument discussed above. *See* Baker, *supra* n. 136, at 445 (reproducing the Court's language).

142. *Plessy*, 163 U.S. at 549–550.

143. 218 U.S. 71, 77 (1910).

144. *Id.* at 72.

145. *See* Palmore, *supra* n. 89, at 1792–1793 (arguing that the Supreme Court consistently reaffirmed that the states could not require segregation of interstate passengers).

146. 95 U.S. 485 (1878).

147. *Id.* at 488.

sippi courts had construed the law to apply only to intrastate travel.[148]

To some degree, these cases do appear to present yet another doctrinal myth—here, a myth of the intrastate regulation of the state segregation laws—but there also appears to have been real bite to the logical doctrinal conclusion that state segregation laws could not regulate interstate rail travel.[149] In any event, as of 1906 there was enough support for the proposition that the interstate rails could not be governed by state Jim Crow laws that J. Alexander Chiles, an African-American attorney who graduated from the University of Michigan Law School and who was traveling by rail from Washington, D.C., to Lexington, Kentucky,[150] could assert that (in the words of the Kentucky Court of Appeals) he "was an interstate passenger who knew his rights, and that the separate coach law of Kentucky did not apply to him" and, therefore, the conductor's effort to make him move to a Jim Crow car at the Kentucky border was illegitimate.[151]

Of course, the Supreme Court (with Harlan dissenting but without opinion) upheld the railroad's segregation of Chiles,[152] but it is *how* the Court did so that is interesting. As Joseph Palmore has observed, the railroad company opposing Chiles had itself previously tried to have the Kentucky statute declared unconstitutional as an interference with interstate commerce.[153] After all, many railroad companies found the requirement of separate facilities to be financially and administratively burdensome—hence the railroad company's efforts to assist Homer Plessy's test case.[154] Having failed in this argument, the Chesapeake & Ohio Railway had adopted company rules requiring segregation of interstate travel.[155] The Court was presented with a

148. *Louisville, New Orleans & Tex. Ry. Co. v. Miss.*, 133 U.S. 587, 592 (1890).

149. *See* Palmore, *supra* n. 89, at 1774 (discussing the view that the Supreme Court cases were disingenuous efforts to uphold Jim Crow); *see generally id.* at 1777–1804 (discussing Supreme Court cases, state court cases, and contemporary treatises to demonstrate that the Dormant Commerce Clause restriction on segregation has a real impact).

150. Howard, *supra* n. 1, at 169; Palmore, *supra* n. 147, at 1804.

151. *Chiles*, 218 U.S. at 73 (quoting *Chiles v. Chesapeake & Ohio Ry. Co.*, 101 S.W. 386, 387 (Ky. App. 1907)).

152. *Id.* at 78.

153. Palmore, *supra* n. 89, at 1805.

154. *See id.* at 1794–1795, 1795 n. 141, 1806–1807 (explaining the railway's involvement in the segregation cases).

155. *Id.* at 1805.

defense of company regulations, not state legislation.[156] On this basis, the Court was able to graft its reasonableness rationale, which governed state segregation laws under *Plessy*, onto interstate segregation by arguing that the company regulations were, like the legislation at issue in *Plessy*, reasonably based on custom and tradition and reasonably calculated for the "'preservation of public peace and good order.'"[157] Once the railroads had shifted from opposing mandated rail segregation to becoming "willing and energetic segregators"[158] through their company policies, the Supreme Court was able to extend the reach of its reasonableness of segregation doctrine without affecting its Commerce Clause analysis.

In reviewing the Supreme Court's doctrinal movements during what Michael Klarman has described as the "*Plessy* Era,"[159] one sees a significant change in what was considered possible and legitimate under the Reconstruction Amendments. In the Court's efforts to manage the dissonance caused by the simultaneous support for the constitutional ideal of equal citizenship and the growing efforts to legally mandate segregation, the doctrines themselves changed the plausible. Under the views of the amendments adopted by Congress during Reconstruction, desegregation of public faculties, and in particular of railroads, was considered a natural means of enforcing equal citizenship.[160] And whether or not a majority in Congress at that time also supported integrated schools,[161] it is most likely that the Congresses that supported the Freedmen's Bureau in its efforts to establish schools for black citizens would have at least supported equal funding for schools (and in fact black schools during and immediately after Reconstruction did receive significant funding comparable to white schools in some southern states, largely due to African American and white Republican political participation).[162]

156. *Id.*

157. *Chiles*, 218 U.S. at 77 (quoting *Plessy*, 163 U.S. at 550).

158. Palmore, *supra* n. 89, at 1807.

159. Klarman, *supra* n. 135, at 303–307.

160. *Id.* at 307.

161. *Compare* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (arguing that it did) *with* Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995) (arguing it did not).

162. Foner, *supra* n. 10, at 364–368.

But by the turn of the century, the Court upheld state segregation of railroads, corporate segregation of interstate railroads, and local defunding of black secondary education.

This shift demonstrates the slipperiness of doctrinal myth. Once the Court was in the business of managing dissonance, and once it found ways to create myths which seemed to uphold the ideal while also fostering the unjust realities, the doctrines moved ever farther from the ideal and ever closer to an ideal that supported the injustice. After all, the federalism, separate-but-equal, and reasonableness-of-segregation ideas were all present during Reconstruction, but they were not clearly embraced by Congress. The dissonance was real in the 1860s too, but there was some potential for an articulation of the equal citizenship ideals, and legal doctrines based on them, in ways that might have reduced the extent to which law moved towards the support of segregation as a reasonable legal option.

Consider some of the possibilities. The Court might have found nondiscrimination to be a national privilege of citizenship—a point arguably consistent with Justice Miller's opinion in *Slaughter-House*.[163] If so, it might have upheld the Civil Rights Act of 1875, and even if enforcement of the Act had been minimal, and even if a Congress controlled by the Democrats had later repealed the Act, at least some litigants would have prevailed, at least African-American lawyers, teachers, and citizens generally would have seen reflected in law a promise and a hope for improvement, and at least there would have been a stronger legal–rhetorical countercurrent confronting whites, moderates, and liberals when Jim Crow legislation was proposed, challenged, and supported.

Or perhaps the Court could still have decided that, for matters within the ambit of state control—theaters, schools, and most other public facilities—this privilege of nondiscrimination was not subject to federal regulation, but for activity clearly within federal control, the privilege was central to citizenship and essential to ending the badges and incidents of slavery in such a way that quasi-public entities, such as railroads, could not deny the privilege to United States citizens. Indeed, the Court did just this in

163. *See generally* 83 U.S. at 71, 81 (emphasizing the protection of former slaves from oppression and discrimination).

the area of voting, where, in *Ex parte Yarbrough*,[164] it (per Justice Miller) upheld the federal government's power to punish individuals who interfered with black citizens trying to vote in federal elections, primarily because federal elections were part of the federal powers of Congress.[165] This is, of course, fanciful, counterfactual history and probably proves little. But it may indicate that the choices actually made by the justices, even at the level of legal rhetoric and constitutional doctrine, matter.

III. LOCHNER*'S INVERTED SHADOW:* BUCHANAN v. WARLEY *AND THE WHITE COURT'S "CIVIL RIGHTS" DECISIONS*

The question of whether ideals expressed in doctrine matter takes on additional complexity when we turn to one of the more perplexing periods in the Supreme Court's encounter with Jim Crow: the White Court's series of decisions in favor of black claimants. During this period, the Court used the equality prong of the separate-but-equal doctrine to require equal accommodations on a railway,[166] ruled unconstitutional an ordinance that sought to require residential segregation by controlling property sales,[167] ruled unconstitutional criminal laws punishing breaches of labor contracts in an effort to control African-American labor,[168] and struck down grandfather clauses that sought to enable poor whites to vote while continuing to disenfranchise black voters.[169]

The problem for scholars of this period has been how to explain these seemingly anti-segregation decisions. Had the Court, with a veteran of the Confederate Army as its Chief Justice,[170] become suddenly sympathetic to black claimants? A number of answers have been proposed. Benno Schmidt, in an extensive analysis of this period, argued that there is strong evidence that

164. 110 U.S. 651 (1884).

165. *Id.* at 662, 667.

166. *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 161–162 (1914).

167. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

168. *U.S. v. Reynolds*, 235 U.S. 133, 150 (1914); *Bailey v. Ala.*, 219 U.S. 219, 244–245 (1911).

169. *Myers v. Anderson*, 238 U.S. 368, 380 (1915); *Guinn v. U.S.*, 238 U.S. 347, 356–357, 368 (1915).

170. Justice Edward Douglass White had both opposed Reconstruction and fought for the Confederacy. Schmidt, *supra* n. 11, at 444.

there was "an important change in the receptivity of the Supreme Court to black claims," but that this change was accompanied by an ambivalence because the decisions did not "attack[ ] the basic structure of legalized racism in any fundamental way, and none had much practical consequence" in remedying the legal or political racism faced by black citizens.[171]

Michael Klarman has recently argued that, in each of the areas and cases cited above, the Court changed only forms and appearances in order to avoid clear constitutional nullifications, but that in substance and in practice, the "rulings displayed no significant change in judicial racial attitudes" and "nothing significant changed for blacks."[172] In an even more critical appraisal, Randall Kennedy observed that the decisions of the White Court were in fact consistent with the Chief Justice's likely white supremacist background.[173] As Kennedy stated, "[w]ithout disturbing the Court's core policy of deference to the states in the area of race relations, Chief Justice White and his colleagues merely intervened in isolated circumstances in which a particular scheme of exclusion or disfranchisement of forced labor was too obviously in conflict with the reconstruction amendments to countenance comfortably."[174]

Other scholars see the era more hopefully. David Bernstein has argued that these cases demonstrated the important contribution Lochnerian ideas of rights played in civil rights and reveal the weaknesses of Progressive, sociological jurisprudence which generally supports dominant, and often racist, political, and legal views.[175] And John Howard has written that, while the holdings of the White Court did not have immediate practical benefit for black citizens, "they did slow the engine [of segregation]. The[y] created the sense on the part of blacks and their few white allies that a strategy might be found to redeem the promise of the past."[176]

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171. *Id.* at 460.

172. Klarman, *supra* n. 1, at 96.

173. Kennedy, *supra* n. 1, at 1635–1639 (discussing evidence of White's background in white supremacist organizations).

174. *Id.* at 1638.

175. David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 Vand. L. Rev. 797, 872–877 (1998).

176. Howard, *supra* n. 1, at 194.

There is probably a bit of truth to each of these views (although perhaps more truth in some than in others). Just about all commentators agree that the cases in fact made little or no improvement in the lives and outcomes of black citizens and did not erode the privileges attained by whites through legal, political, and social racism. By the time of the decision in *Guinn*, for instance, the southern grandfather clauses had largely achieved their exclusionary purposes and had already ended by their own sunset provisions. Moreover, with the Court's approval, literacy tests, poll taxes, and other legal mechanisms remained fully available for local white officials to use to keep blacks out of the polls.[177] Given this reality, the scholarly disputes involve mainly questions about the Justices' motivations, the meaning and relative importance of doctrine, and the perspectives of the different audiences of the decisions. For present purposes, however, these cases are important for clues as to how doctrinal myths operate. Professor Kennedy observes that the antisegregation decisions of the 1910s only challenged segregation when the particular legal means of oppression "was too obviously in conflict with the reconstruction amendments to countenance comfortably."[178] But the question of why these particular means were so "obvious" and caused discomfort to the White Court's Justices requires further explanation.

To begin this explanation, we should first recognize that, contrary to what Professor Schmidt sometimes argued, the White Court did not implement or develop the principles of Reconstruction.[179] Kennedy correctly identifies a central principle of Reconstruction as the elimination of racial hierarchy.[180] The ideal of Reconstruction and the Reconstruction Amendments can, as we have seen, properly be described as the elimination of racial caste and the creation of equal citizenship across racial boundaries, with government, including the federal government, playing an

177. Klarman, *supra* n. 1, at 85–86.

178. Kennedy, *supra* n. 1, at 1638.

179. *See e.g.* Benno C. Schmidt, Jr.*, The Judiciary and Responsible Government: 1910–21*, Part 2, in *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* vol. 9, 719, 727 (Paul A. Freund & Stanley N. Katz eds., Macmillan Publg. Co. 1984) (noting that the Court "breathed life into Reconstruction principles that had been left for dead").

180. Kennedy, *supra* n. 1, at 1629.

active role in implementing these principles. As David Bernstein helps us see, the ideals implemented by the White Court were those of Lochnerism: a strongly antistatist vision of the protection of individual property, contract, and liberty rights.[181] While one can identify the basic rights of property, contract, and liberty in the Reconstruction period, the Republican drafters of Reconstruction believed in the importance of the active role of the state in implementing and protecting these ideals. And, arguably, many of them also saw these rights as existing in a context of equal citizenship and civil society, which required a broader concept of social rights than is considered standard for the *Lochner* era.[182]

For example, in *Buchanan v. Warley*, the Court overturned a city ordinance prohibiting the occupancy of residential property by members of a race different from the race of the majority of residents in the neighborhood.[183] This meant that, in the test case set up by the NAACP, the black prospective purchaser of property in a predominantly white neighborhood could not occupy the property he proposed to buy. This ordinance reflected a larger movement in border and southern states to implement a hardened, legally mandated residential segregation regime, which is why the NAACP had chosen to challenge the ordinance in one of its first major litigation strategies.[184] The Court approached the problem largely as an imposition on the right of the white seller to dispose of property unencumbered by unreasonable regulation. Admittedly the Court cited the Amendments, the Civil Rights Act of 1866, and language from earlier cases, including *Slaughter-House*, but it did so in a way that emphasized the property and liberty interests of the Fourteenth Amendment generally rather than the anticaste aspects.[185] "These enactments [the Civil Rights Act of 1866 and its 1870 reenactment] did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens

181. *See generally* Bernstein, *supra* n. 175 (exploring the principles reflected in the White Court's opinions).

182. Fox, *Defining Privileges*, *supra* n. 18, at 458–481.

183. In this Article, I focus mainly on *Buchanan*. I do so because it seems to me to most clearly focus the doctrinal aspects of segregation and Lochnerian Fourteenth Amendment jurisprudence. Similar analyses are possible with the other cases cited above.

184. Howard, *supra* n. 1, at 184–185.

185. *Buchanan*, 245 U.S. at 75–79.

of every race and color."[186] Such an approach differs from the anticaste principles of Reconstruction, which would have more readily identified that the law reflected a more wide-spread imposition of caste and unequal citizenship.

It is also important to notice how the Court handled the very justifications that had been so compelling in *Plessy* and *Chiles*. The Court noted that the ordinance could be justified on the same grounds as other segregation measures: "It is said such legislation tends to promote the public peace by preventing racial conflicts [and] that it tends to maintain racial purity . . . ."[187] It is certainly not too much of a step to conclude that if segregation of public accommodations was a reasonable means of preventing racial violence, then segregation of residential districts would be as well. Those scholars who see the ordinances at issue in *Buchanan* as so patently unconstitutional overlook how closely connected the ordinances were to the general form and substance of segregation laws already approved by the Court and lower courts. Moreover, the Court had previously not been receptive to claims that private property was being interfered with by segregation laws.[188] So, it is not at all clear why this particular means of implementing Jim Crow was so obviously wrong that even a racist White Court would overturn it.

The explanation lies, I think, in the fact that the Court was indeed becoming more enamored with property and liberty ideals, as Bernstein suggests. The doctrinal dissonance between the well-established Jim Crow doctrines and the well-established Lochnerian doctrines was handled in a different way, this time in favor of the ideals at the time associated with the Fourteenth Amendment.

But notice also what this did not mean. The Court, in the 1910s, was not being called on by Justice Harlan to implement a general anticaste principle—indeed it is not insignificant that these decisions do not start to appear until after Harlan's death—

186. *Id.* at 79. The Court here cites the *Civil Rights Cases* for this social rights distinction.

187. *Id.* at 73–74.

188. *See e.g. Berea College*, 211 U.S. at 45 (approving of a Kentucky law requiring the private college to segregate its classes even over arguments by Justice Harlan that forced integration constituted an infringement upon the property and liberty interests of the college).

and the Court certainly was not doing so. It was only implementing the principles which had already been used to prevent worker protection laws. No larger Reconstruction Era principle of racial equality could be divined from the rhetoric of *Buchanan*. In fact, the Court carefully protected against such a reading and, near the end of the opinion, revealed its general support for a regime of second-class citizenship:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.[189]

The Court was thus weaving a doctrine that supported the principles of the rights to property and liberty (not coincidentally including the right of the white seller in the case) while also signaling its continued approval of the reasonableness of segregation as a means of maintaining public order, which, as we have seen, was the doctrinal myth or code for maintaining white supremacy.

Buchanan, therefore, reveals both how doctrinal myths can be challenged successfully by invoking the constitutional ideals which create one part of the dissonance—or how it is occasionally possible to stop the slippage of doctrinal myth toward the inequality side of the dissonance—and how the very manner in which this challenge takes place may itself reinforce the underlying inequality. And it is the latter point that is so crucial to understanding how scholars such as Bernstein and to a lesser extent, Schmidt and Howard, misread these cases. For even though the Court did, in *Buchanan* as well as in the other cases from this period, implement some basic constitutional ideals in favor of African Americans, the very fact that the Court did so in cases which had little practical impact, and did so while simultaneously holding to the basic principles upholding segregation *as a system and an ideal*, may also make these cases themselves dangerous reinforcers of second-class citizenship with a new doctrinal myth.

189. *Buchanan*, 245 U.S. at 81.

Recall that one of the core points of doctrinal myth creation achieved by the Court in earlier cases was to simultaneously assert a protection of the Fourteenth Amendment principles while also refusing to implement them. The White Court achieved this as well, for although it implemented the ideals in the particular cases (and arguably, it did not even do that in some cases),[190] the fact of doing so, without actually challenging the doctrinal underpinnings of Jim Crow and without effecting practical change, serves primarily to salve the conscience of whites for whom the dissonance between ideal and reality produced some lingering guilt. Thus, white legal and political actors could point to these cases as showing progress on racial matters while ignoring that the basic structure of white supremacy was, if anything, becoming firmer during this same period.[191] As Professor Kennedy observed in his critique of Benno Schmidt's work, the occasional and relatively ineffective pro-civil rights case enabled some commentators falsely to see the history of the pre-World War II Supreme Court as a "'progress toward justice.'"[192]

Yet in the fine tradition of dialectic, we cannot fully negate the possibilities of the decisions and rhetoric of the White Court. For one thing, the NAACP—which brought the *Buchanan* case and which Professor Kennedy identifies as representing the better and truer expositors of the anticaste ideals of Reconstruction[193]—itself praised the decision and arguably benefited from it in terms of expanding its organization and capacity to continue its project.[194] Several African-American newspapers at the time also praised the decision.[195] And, as John Howard notes, although the desire of whites to impose residential apartheid continued, when several cities passed and attempted to enforce ordinances like Louisville's between 1920 and 1940, lower courts almost uni-

190. *See* Kennedy, *supra* n. 1, at 1644–1646 (discussing *McCabe* and *Topeka & Santa Fe Railway*).

191. Klarman, *supra* n. 1, at 63–69 (discussing the deteriorating situation for African Americans from 1900 to 1920).

192. Kennedy, *supra* n. 1, at 1627 (quoting Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219, 221 (1946).

193. *Id.* at 1653–1654.

194. Howard, *supra* n. 1, at 193–194; *cf.* Klarman, *supra* n. 1, at 104 (citing the return of black servicemen from World War I and the general increase in black militancy as reasons for increases in the membership of the NAACP during this period).

195. Howard, *supra* n. 1, at 191–192 (quoting newspapers).

formly defeated these ordinances, relying on *Buchanan* as precedent.[196] Even if *Buchanan* was largely ineffectual in remedying structural segregation, we cannot ignore how it supported other parties, from activists to litigants to lower courts, who did try to make some inroads in the area.

IV. IMPLICATIONS FOR READING BROWN v. BOARD OF EDUCATION

Because the other contributions to this Symposium address *Brown* more directly and far better than I could, I will here only suggest a few ways in which the above analysis of the Jim Crow Era and the Court might affect our understandings of *Brown*. Perhaps the best way to see some of the possible threads of analysis is to consider *Brown* in light of the discussion of the White Court. In the end, the White Court cases were probably a little bit of everything: an affirmation of constitutional ideals in the support of civil rights; an inconsequential blip in the steady and certain regime of segregation; a reinforcement of segregation by salving liberal guilt; and a mildly hopeful inspiration for people working for real racial justice. Ultimately, the same might be said about *Brown v. Board of Education*, but, given *Brown*'s enormous stature, both at the time it was issued and afterwards, each of these effects is probably that much greater.

At one level, *Brown* reflected a bold embrace of Reconstruction principles which rejected the doctrinal underpinnings of segregation—segregation was arguably no longer a reasonable means of preserving the peace after *Brown*. Coming as it did after the Court's repudiation of Lochnerism,[197] the *Brown* Court could do what the White Court could not: accept the underlying principle of anticaste and antisubordination. Whereas *Buchanan* reflected a Lochnerian constitutional idealism which held a rather limited potential for minorities, *Brown's* antisubordination ideal held real promise for real societal change. As Jack Balkin has recently suggested, the rejection of racial caste is certainly one of

196. *Id.* at 192; Klarman, *supra* n. 1, at 143 (noting that "[w]ith just one exception, lower courts invalidated [residential segregation ordinances] on the basis of *Buchanan*").

197. The rejection of Lochnerism is commonly identified with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Laurence H. Tribe, *American Constitutional Law* vol. 1, 1361 (3d ed., Found. Press 2000).

the plausible readings of *Brown*.[198] This is so, in part, because the Court emphasized the centrality of education to good citizenship and overall membership and participation in civil and political society.[199] This is also evident in the Court's rejection of *Plessy*'s myth that segregation was not designed to impose caste and treat black citizens as inferiors.[200] By recognizing that the myth of segregation as equality masked the reality of segregation as subordination, the Court opened the door to the creation of doctrines, and legal principles generally, which could address subordination head on.

Yet, at another level, *Brown*, by opening the path to doctrinal reification of Justice Harlan's metaphor of the law being colorblind, also created another doctrinal myth through which racial caste—both de jure and de facto—would remain and be deemed consistent with Reconstruction ideals. Under this view, *Brown* stands for the racially "neutral" doctrinal principles of anticlassification rather than the racially aware principles of antisubordination.[201] Here, the work of modern scholars of race and the law, who have probed extensively the mythical qualities of the modern doctrine of colorblindness, is especially incisive.[202] As Professor Powell wrote,

198. Jack M. Balkin, Brown v. Board of Education*: A Critical Introduction*, in *What* Brown v. Board of Education *Should Have Said*, 11 (Jack M. Balkin, ed. N.Y.U. Press 2001); *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470 (2004) (discussing *Brown*'s holding and its potential antisubordination and anticlassification goals).

199. 347 U.S. at 493.

200. *Id.* at 494–495.

201. *See* Balkin, *supra* n. 198, at 11 (highlighting the scholarly embrace of a colorblind view); Siegel, *supra* n. 198, at 1513–1532 (discussing how *Brown* played such an instrumental role in moving the law away from antisubordination principles); *but see* Andrew Kull, *The Color-Blind Constitution* (Harv. U. Press 1992) (arguing in favor of the anticlassification, colorblind reading).

202. *See e.g.* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 Ala. L. Rev. 483 (2003); Culp, *supra* n. 2; Fair, *supra* n. 2; Gotanda, *supra* n. 2; Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. Miami L. Rev. 191 (1997); David Strauss, *The Myth of Colorblindness*, 1986 S. Ct. Rev. 99 (1986). Derrick Bell has gone a step further and argued that even a race-conscious policy such as affirmative action can be employed by the dominant group to perpetuate racial subordination of the very group it supposedly benefits, and so functions like a myth in the way I describe in this article. Derrick Bell, *And We Are Not Saved* 140–161 (Basic Books 1987).

> [t]he jurisprudence of colorblindness functions on three levels: (i) as a historical myth advancing the counterintuitive notion that the Civil War Amendments, the accompanying civil rights enforcement statutes, and the legislative history of these enactments are devoid of any conception of race; (ii) as a definitional myth advancing the fallacy that racism is not systemic, but merely a series of unconnected individual responses beyond the reach of the ameliorative powers of the courts and legislatures; and (iii) as a rhetorical myth focusing the affirmative action debate not on the victims of systemic racism and caste, but on a generalized class of "innocents" who are arbitrarily punished.[203]

According to this reading, even though *Brown* arguably changed the old doctrines of Jim Crow segregation, its replacement doctrines and the mythology of colorblindness supporting those doctrines perpetuate structural subordination almost as strongly as Jim Crow; and they do so through use of doctrinal myth similar to those employed during segregation.

On yet another level, the very facts that, as Ted Shaw observes, *Brown* was one of the only cases in which the victorious plaintiffs were denied relief, and the implementation of *Brown* was so halting and sporadic, indicate that it was more promise than reality.[204] According to this view, even if *Brown* held the promise of a doctrinal ideal which avoided the worst doctrinal myths of segregation (that is, even if the antisubordination reading has some truth), its failed implementation renders it little better than *Buchanan*. On this view, *Brown* stands more directly in the tradition of doctrinal myth seen throughout Jim Crow: It is far more similar to the idealistic and ineffectual cases of the White Court than many commentators like to admit, and it certainly does not mark a break in the history of the Supreme Court's approach to racial justice.

And on yet one more level, even if we recognize the critiques of *Brown* evident in the above readings, we can still agree that *Brown* had a decisive impact on the Civil Rights Movement as a whole. As many people have pointed out during the recent anni-

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203. Powell, *supra* n. 202, at 200 (footnotes omitted).

204. Theodore M. Shaw, *Dividing History:* Brown *as Catalyst for Civil Rights in America*, 34 Stet. L. Rev. 473 (2005).

versary reflections, it would be wrong to say that *Brown* started the Movement. Yet, it just as surely would be wrong to divorce *Brown* from the Movement. By establishing legal and constitutional support for an active principle of racial justice, both in its holding and it its rejection of prior doctrinal myth and rhetoric, *Brown* provided activists with incentive and hope, provided lower court judges with precedent,[205] challenged moderates and liberals to reject a complacency with established segregation principles, and otherwise helped support, even if it did not create, a social and political movement that was able to achieve some successes. As the late Jerome Culp wrote several years ago, *Brown* "helped to feed a growing protest movement and struggle for equality that dated back to the abolitionist era," and it "significantly altered blacks' understanding of where they were and where they could be in society and provided a bulwark for future struggles."[206] According to this reading, *Brown*, by changing rhetoric and doctrine, played an important role in an ongoing civil rights movement.

Ultimately, it is very hard to evaluate these multiple effects and readings of *Brown.* Yet precisely because it is hard to think in multiplicity, it is even more important that we do so. Each of the pieces in this symposium grapples, to some extent, with these divergent problems surrounding *Brown,* and each raises and expands on others.[207] But in the end, the ways in which we read these histories of Reconstruction, Jim Crow, and desegregation reflect on how we are able to address the difficult problems of race in the twenty-first century. The ways in which we read the doctrinal myths and rhetoric of past cases affect the ways in which we create and accept our own doctrinal myths, whether we allow our own myths to cover up the continued dissonance between the ideal and the real, and whether we can ever avoid myth-creation and see ideals—old and new—made real.

205. *See generally* Jack Bass, *Unlikely Heroes* (Simon & Schuster 1981) (discussing the implementation of *Brown* and its progeny in the Fifth Circuit United States Court of Appeals).

206. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 Duke L.J. 39, 64–65 (1991) (footnote omitted).

207. *See also* Siegel, *supra* n. 198, at 1478–1547 (exploring the contested understandings of *Brown* that arose after the decision and throughout its implementation).