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### 1AC – Racial Cartels

#### Racial cartels lock in the economic advantages of white supremacy. Antitrust intervention into the self-reinforcing anticompetitive networks is key to confront systemic inequality.

Daria **ROITHMAYR** Law @ USC **’14** *Reproducing Racism: How Everyday Choices Lock in White Advantage* p. 6-9

This book will argue that white economic advantage has become institutionally locked in, in much the same way as Microsoft’s monopoly advantage did. At the turn of the century and well into the twentieth century, whites worked to drive out their nonwhite economic competitors to gain an unfair advantage early in the game. Much like a predatory monopolist, whites formed racial cartels during slavery and Jim Crow to gain monopoly access to key markets. Homeowners’ associations worked together with real estate boards to keep blacks out of housing markets. School boards worked together with local growers to keep Mexicans out of public schools. Working-class farmers worked together with elite planters to disfranchise blacks and eliminate their political power. These racial cartels used many of the same kind of anticompetitive strategies—economic boycotts and violence, for example—to unfairly drive their competitors out of the market.

This unfair advantage, acquired early in our nation’s history, has now become self-reinforcing and cumulative. A number of institutional feedback loops parlay earlier advantage into continuing advantage. For example, a white person’s decision to refer a friend for a job can work to reproduce the anticompetitive advantage that whites had earlier gained during Jim Crow and slavery. This is because social networks work to transmit earlier advantage and disadvantage to subsequent generations. Blacks and Latinos earn lower wages than whites in large part because the people in their social networks who will refer them for jobs are people who earn lower wages. Because the existing underemployed people in a network add new people who are more likely to be underemployed, the network is self-reproducing.

Likewise, gaps in wealth persist partly because of decisions about whether to give the next generation help in paying college tuition. Black and Latino families can’t afford to send their kids to college or give them a down payment on a house. Each generation serves as the foundation for the next generation and so racial disadvantage reproduces itself, in the absence of significant class mobility. As we will see, research has traced the genesis of this self-reinforcing cycle to slavery and Jim Crow.

In the same way that disadvantage has become self-reinforcing, so too advantage has now become locked in. Whites have been able to build their wealth on the shoulders of earlier generations, who gained early wealth by driving blacks and Latinos and some Asian groups out of key markets. White families who owned slaves and unfairly profited from labor union exclusion of black workers have been able to pass down the benefit of that unfair wealth and wage advantage to their children. White families have used that wealth to pay for the next generation’s college expenses or the down payment on the purchase of a house—both activities which in turn have earned the next generation even more wealth.

Thus, past inequality has paved the way in each new generation for continuing inequality. Advantage has become self-reinforcing, and so has disadvantage. As the Billie Holliday song puts it, “Them that’s got shall get, and them that’s not shall lose.” This self-reinforcing system of distribution of resources and opportunities has been operating for hundreds of years, built on the foundations of slavery and Jim Crow. White advantage may now be impossible to overcome, absent some kind of significant government intervention to level the playing field.

The lock-in story deviates from many of the standard explanations about why racial inequality persists. As Chapter 1 describes, conven- tional theory explains persistent discrimination in three basic ways. Some scholars argue that people of color have embraced maladaptive cultures that keep them poor and jobless. Others have pointed to structural reasons—the migration of unskilled jobs overseas, the mismatch between work and residential location—to explain disparities in jobs, wealth and housing. Still others have pointed to persistent racism by whites—persistent preferences and beliefs in stereotypes, sometimes unconscious and hard to get at, other times statistical and borne out by the facts.

But the lock-in story of racial disparity highlights a number of things about racial inequality that conventional explanations obscure. First, the lock-in model highlights the profits that whites earned from racial exclusion during Jim Crow. Economics scholars have always assumed that racism would die out because discriminating was too costly. On the contrary, the lock-in model demonstrates that racism can pay off, and did so handsomely during Jim Crow. Chapters 2 and 3 describe the profit-maximizing behavior of Jim Crow “racial cartels”—homeowners’ associations, labor unions, political parties, school districts, and other groups that worked to generate monopoly profits by excluding competitors. By coordinating to keep the neighborhood pure, white homeowners’ associations were able to keep for themselves the best houses, in the best neighborhoods, with the wealthiest neighbors. By excluding black and brown children from public schools, whites monopolized the best public education for themselves. By dividing the labor market into two racially identifiable segments, white unions earned the highest wages, in the most prestigious jobs. In the South, whites had a monopoly lock on political power for decades. As these chapters illustrate, during the era of Jim Crow, discrimination paid off quite well.

Second, the lock-in model helps us to understand the dynamics that now connect the historical discrimination of Jim Crow to mod- ern racial gaps. Chapters 4 through 9 describe the key mechanism—the institutional feedback loops—that automatically translated whites’ early advantage into white continuing advantage. Chapter 4 illustrates the institutional relationships that connect the wealth that whites acquired during Jim Crow and slavery to modern wealth differences, as early wealth begets later wealth. Chapters 5, 6, and 7 explore similar dynamic loops in workplaces and neighborhoods, where structural advantages in whom you know and where you live have become automatically self- reinforcing over time.

Public financing plays a significant role in some of these feedback loops. As Chapter 8 describes, white neighborhoods are wealthier because they create concentrated pockets of people with wealth, which generates more public school funding than in neighborhoods of color. And of course, good public school funding produces in turn students who are more likely to acquire wealth and earn a high income, and move into wealthy white neighborhoods. Early unfair success breeds later unfair success.

Saying that racial inequality persists is not to say that racial arrangements have not changed. Of course those arrangements have evolved over time. But as we’ll see, even when arrangements have evolved, they’ve done so in a way that further disadvantages communities of color. Chapter 8 explores, for example, the way in which black members of the middle class have over the last several decades moved into the suburbs, and the wealthiest of the poor have moved out of the ghetto. But the flight of these groups from major metropolitan cities has left behind a hyperghetto at the city’s center with more poverty and jobless- ness than before. Mass incarceration and dramatic cuts in social assis- tance programs have speeded up this trend, and are important measures of well-being in their own right.

Chapter 9 argues that the lock-in model of racial inequality usefully reframes our understanding of persistent racial gaps. Where conventional models focus on intentional discrimination, the lock-in model focuses on self-reinforcing structural processes like social networks and family wealth distribution. The lock-in model emphasizes both the unfairness of early anticompetitive conduct and the need for significant government “antitrust” intervention to dismantle white monopoly on advantage.

#### Racial cartels are built by anticompetitive strategies of racial exclusion from economic benefits. U.S. markets are socially and legally embedded in strategies to secure long-term benefits to whites.

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I. A Theory of Racial Cartels

The argument that discrimination benefitted Whites more than it cost them runs contrary to much of conventional economic thinking. Neoclassical economics teaches us that market competition should eliminate racial discrimination because discriminating is expensive. Economist Gary Becker famously argued that people with a "taste" for discrimination will have to pay an extra cost for indulging this preference, and will thereby compete less effectively than participants without this costly preference. 13 For example, employers who want to discriminate in hiring have to pay an additional cost if they refuse to hire non-Whites, in part because hiring from a more limited labor pool will be more expensive. Ultimately, over time, firms that do not discriminate will supplant firms that do discriminate in a survival-of-the-fittest competition.

But the concept of racial cartels turns this neoclassical story on its head. The cartel story suggests that racism might actually benefit Whites - by helping them monopolize higher wages and better jobs - rather than costing them. As Gary Becker himself has acknowledged, the question of collective action poses a significant challenge to his theory about markets and discrimination. 14 To explain why, it might be helpful to first say a few words about cartels and about the role they play in market competition.

Economists typically define a cartel as a group of actors who work together to extract monopoly profits by limiting competition and restricting supply. For example, OPEC, the oil-producing cartel, restricts the output of oil by its members in order to raise prices. 15 Cartels can adopt many types of agreements, ranging from an informal gentlemen's agreement to a far more formal contractual agreement covering supply, pricing and a range of other areas. 16 Cartels can be primarily defensive, organized to gain a competitive advantage in a chronically depressed market, or they can operate more offensively to gain leverage during both good and bad economic times. Cartels can be state-sponsored, using state law to run [\*51] cartel operations, or they can use trust and other more informal means of cooperation to hold the cartel together. 17

Scholarship from a range of disciplines supports the analogy between racial discrimination and market cartel conduct. In some of his early work, economist Lester Thurow described several types of anti-competitive strategies that Whites had pursued during the era of Jim Crow to increase their income and social status. 18 Thurow included employment discrimination (which produced better jobs for Whites), occupational discrimination (which generated higher wages), and capital market discrimination (which permitted Whites to more easily borrow or invest equal amounts of funds at better rates than Blacks). 19

Like Thurow, legal scholar Robert Cooter has argued that discriminatory groups resemble cartels when the members of the group benefit from reducing competition with outsiders for business. 20 Likewise, Richard McAdams has proposed that groups exclude on the basis of race for purposes of producing social status, and that social norms are an effective way to police cartel members. 21 A number of sociologists and social psychologists have also theorized that closing group membership to outsiders often works to create competitive advantage. 22

Describing this coordinated exclusion as cartel conduct can help us to better understand the role that groups played in perpetuating discrimination. More precisely, we can define racial cartels as groups in which members agree to artificially fix wages, property values, political power and other price-like analogues, by restricting supply, dividing up markets, or colluding to achieve other commercial conditions. 23 Like market [\*52] cartels, racial cartels use standard anti-competitive strategies - harassment, boycotts, interference with contract, violence - to exclude non-group members. Most importantly, these groups engage in racial exclusion not because they have a taste for discrimination or because they are irrational, but because they derive significant economic, social and political benefits.

Consider the example of a White homeowner's association in Chicago, operating during the era of Jim Crow (a case study that is examined in more detail in the last section of this Article). 24 The typical Chicago homeowners' association looked very much like a cartel designed to keep Blacks out of the White housing market. Homeowners' associations divided up their turf on geographic lines, much as market cartels do, for purposes of efficient monitoring and enforcing. The homeowners' association also used standard, anti-competitive tactics to keep potential Black homebuyers from moving into White neighborhoods.

Physical and economic harassment and coercion were favored association tactics. Members monitored who had come into the neighborhood looking to buy housing, and whose children had begun to attend school. Group members would approach prospective buyers or actual buyers to convince them to sell their property to the association. For more persistent buyers, members coordinated as a group to harass them, often terrorizing them physically. 25

Economic coercion was particularly favored by the association. Homeowners worked together with real estate boards and banks to restrict Black access to capital. Banks targeted their loans to Whites and to White neighborhoods, where profits were more likely given higher property values. And of course, the association played a key role in persuading homeowners to adopt racially restrictive covenants to prohibit members from selling across racial lines. 26

This anti-competitive conduct, and the dual housing market it created, paid off in several ways. First, White homeowners acquired a monopoly in the best housing stock. The Black housing market contained inferior housing stock in older neighborhoods, where a White market contained bigger and newer housing on larger pieces of land. By keeping [\*53] Blacks out of White neighborhoods, White homeowners' associations kept the best housing and property for themselves. 27

Second, by creating a dual housing market, association members monopolized access to wealthier neighbors. Differences in wealth were (and are still) quite large, owing to historical discrimination. The benefits that come with wealthier neighbors - lower tax rates, higher tax revenues and well-funded public amenities among other things - were reserved for Whites alone. 28

Third, White association members acquired a monopoly on the higher property values associated with a relatively wealthier White neighborhood. To be sure, much of the property value could be traced to racial preferences for living with White neighbors, and the self-fulfilling prophecy that property values would drop with the entrance of Black neighbors. 29 But White homeowners also had a monopoly on the neighborhoods with bigger houses and parcel sizes, wealthier neighborhoods, better public goods and/or lower tax bases. Beyond intrinsic or self-fulfilling preferences, a house in a White neighborhood was materially worth more. 30

Importantly, by coordinating to exclude, buyers and sellers reduced the threat of uncertain property values that would exist if neighborhoods could not be marketed as definitively White communities. Blockbusting often caused property values in tipping neighborhoods to dramatically fall as non-Whites moved in. Cartel conduct stabilized property values and dramatically reduced blockbusting as White homeowners coordinated to sell only to White buyers. 31

It is important to note that racial cartels benefitted primarily working and middle-class Whites - the immigrant homeowner seeking to secure property values in his neighborhood, the yeoman farmer looking to consolidate political power with plantation elites, the skilled craft worker bargaining against the employer for higher wages. 32 Working and middle-class Whites looked to cartels to protect their fragile material gains as they moved to the suburbs and worked their way up the economic [\*54] ladder. In particular, they wanted to shore up their vulnerable property values and status as homeowners, their uncertain political power, their wages, and their social status as skilled workers. 33 Far from being merely psychological or status-oriented, the so-called wages of Whiteness during Jim Crow were made up of actual material wages. 34

#### We should employ the framework of stratification economics for understanding racial cartels. Economic and material benefits in inter-group competition for resources socially lock-in stereotyping and oppression. Breaking the cycle of dominant group membership benefits is key to change long-term group dynamics.

William **DARITY** Jr. Samuel DuBois Cook Professor of Public Policy, African and African American Studies, and Economics at Duke University **ET AL ‘17** (Additional Authors: Darrick Hamilton Patrick Mason, Gregory Price, Alberto Davila, Marie Mora and Sue Stockly) in *The Hidden Rules of Race: Barriers to an Inclusive Economy* p. 35-42

A THEORY OF GROUP IDENTITY AND GROUP ACTION

Research on happiness has established that, in general, human satisfaction is more strongly associated with a person’s comparative position than with the individual’s absolute position.1 The key to this view of human happiness is establishing who is in the relevant comparison group. As the old cliché would have it: Who exactly are the “Joneses” (or perhaps the Kardashians) with whom someone is trying to keep up?

Stratification economics proposes that the key relevant comparison group will be an outside racial, ethnic, gender, caste, or religious group. Individuals’ personal sense of well-being will be affected by how they feel their own social group is doing relative to another that they perceive as a rival.

In the more general case, in a world where comparative position matters, members of particular social groups will make both between- and within-group comparisons.2 Typically, both the in-group and the out-group will have their own hierarchical pattern. Individuals in the subordinate or out-group may find themselves doing poorly in comparison with the aver- age member of the in-group but doing well in comparison with members of their own (out-) group. Thus, dissatisfaction associated with a negative between-group position may be offset by satisfaction associated with a posi- tive within-group position. It depends upon the degree of importance an individual assigns to each comparison.

The evidence deployed to make these comparisons might vary across individuals, time, and space. Primary concerns usually will be some combination of perceived comparative economic status and political power. The importance given to each category of perceived relative position also may vary. For example, some persons, both black and white, might view the relative position of black Americans vis-à-vis white Americans as hav- ing improved dramatically in the fifty years since the passage of the Civil Rights Act.

They might hold this belief despite little or no change in the relative position of blacks on a number of economic indicators, such as unemployment, per-capita income, or the proportion of the group that can be identified as middle class. Indeed, on some indicators such as wealth or net worth, the relative position of blacks may have worsened significantly since the 1960s; it definitely worsened over the course of the past decade. Nevertheless, for some, the election of a black president in 2008 might have trumped all other evidence in an assessment of relative group progress.

The phenomenon of last place aversion 3 – the intense desire to avoid being at the bottom of a social ranking – reinforces the importance for members of dominant social groups to preserve their group’s comparative position. It also means that members of a subordinate group, a group with an “unsatisfactory social identity,” may seek to “leave their existing group and join some more positively distinct groups and/or to make their existing group more positively distinct.”4

If exiting from a particular group is feasible, given an individual’s personal characteristics, it could mean attempting to “pass” as a member of the dominant group or constructing newer social groups with a less stigma- tized status. Making one’s “existing group more positively distinct” could involve the development of positive group images through group nation- alism or a group pride movement, as well as efforts to reduce the gap that exists between the out-group (subordinate) and the in-group (dominant).

While placing intergroup differences front and center, stratification economics integrates insights from multiple disciplines to produce a distinctive mode of analysis of inequality across groups that are socially differentiated. It draws primarily from economics, sociology, and social psychology; it offers a frame for examining the role of relative group position and group action in determining individual life outcomes.

Stratification economics consciously rejects explanations for intergroup inequality on the grounds of collective dysfunction or self-defeating behaviors by the group experiencing comparatively negative outcomes. A substantial body of careful empirical research consistently undercuts both genetic and cultural-behavioral explanations for racial or ethnic inequality.5

In addition, stratification economics extracts the emphasis on self-interested behavior and substantive rationality from economics. It seeks the rational, material basis for group and personal identity formation, for membership in both dominant and subordinate groups. It takes the emphasis on the group, rather than the individual, as the fundamental unit of social analysis from sociology. Thus, stratification economics seeks to explore processes of identity formation, including both self and social classification with respect to group affiliation.6

At the “micro” level – that is, at the level of individual psychology – stratification economics utilizes the concepts of stereotype threat, stereotype boost, and stereotype lift from social psychology as foundational influences on individual productivity.7 Thus, stratification economics pays close attention to the impact of widely held beliefs about one’s group on an individual’s task performance, because social prejudices can alter individual productivity.

Stereotype threat refers to the adverse effect that negative beliefs about a group can have on the performance of individuals within that group – for example, the stereotype that blacks are cognitively inferior to whites.8 Socially held stereotypes affect individual productivity above and beyond an individual’s stock of human capital: when negative beliefs prevail about the ability of one’s social group, the determination not to confirm the stereotype can itself lead to reduced performance.

Steele, Spencer, and Aronson9 find that stereotype threat can lead to a 13 percent lower SAT score for a black student. This is not a trivial reduction; a black student who might otherwise have scored 1,200 on the test scores 1,040 instead because of the impact of the widely held belief that “black students don’t do well on standardized tests.” The upshot of this depressive effect is that what might appear to be a fair measure of merit, such as a standardized test score, can be distorted, when comparisons are made at the intergroup level, by the effects of prevailing stereotypes about group ability.

Stereotype boost involves the upward push on performance of an (ostensibly) positive stereotype on members of a group who are “beneficiaries” of the belief,10 such as “Asians are innately good at mathematics.”11 If an individual from such a positively stereotyped group does not have a prior history of success in that domain and lacks confidence in that domain, the existence of the “positive” stereotype might impair that person’s performance; the individual may “choke” when confronted with the task.12

Finally, stereotype lift involves the increase in performance of members of a nonstigmatized group in a domain where members of a comparison group are stigmatized negatively. For example, whites might experience enhanced performance on a test of cognitive skills simply because they know that blacks are not expected to perform well.13

The more general point is that individual productivity is not solely a matter of personal characteristics, such as education, motivation, and training. It also is affected by the social context, whether it is widely held negative attitudes about the capability of members of one’s social group or the hostility versus the receptiveness of the work environment.

Stratification economics investigates the processes that determine which group an individual sees as her own and which group (or groups) she sees as her rival.14

Significantly, it has evolved to provide a frame for understanding inter- group inequality without resort to explanations that invoke cultural differ- ences. Instead, it emphasizes the struggle over relative position and control over real resources as the cornerstone of group formation, development, and continuity.15 In stratification economics, an individual’s group identification is necessarily a complex mix of ascription by others and personal choice. Stewart has demonstrated that this struggle is manifest even within an institution as highly regimented as the U.S. military.16

THE THEORY OF PREJUDICE AND STRATIFICATION ECONOMICS

Stratification economics subscribes to a variant of real conflict theory as the basis for enduring group identity. Real conflict theory 17 proposes that competition over material resources lies at the heart of persistent group affiliation and attachment. Opposing claims to resources constitute the linchpin for the emergence of ethnocentrism or nationalistic sentiments about one’s group. The group – ranging in scale from family to tribe to clan – develops a sense of kinship, fictive or otherwise, driven by the extent to which it is in competition with other groups over relative status.

Tajfel and Turner18 have observed that “intergroup competition enhances intragroup morale, cohesiveness, and cooperation.” Further, they write, “the more intense is an intergroup conflict, the more likely it is that individuals who are members of the opposing groups will behave toward each other as a function of their respective group memberships, rather than in terms of their individual characteristics or interindividual relationships.”19

Experimental research has demonstrated that even minimal groups – groups formed on an entirely arbitrary basis in laboratory settings – quickly can develop within-group loyalties and preferences for other same-group members. But the same investigations indicate that “real groups” – those that are socially established – display greater salience and potency than minimal groups, the latter arbitrarily established de novo.20

The classic debate between social scientists Allport21 and Blumer22 over the sources of prejudicial beliefs provides another window into the theoretical foundations of stratification economics. In Allport’s famous study, The Nature of Prejudice,23 prejudice was treated as matter of individual or personal psychology. People with specific personality types – particularly those who were more likely to succumb to authoritarianism – were more susceptible to adopting and maintaining stereotypical beliefs about “the other”; this susceptibility was reinforced by sheer ignorance.

For Allport, the remedy was structured contact that could perform the therapeutic task of providing better information about “the other.” In order to have the strongest effect in reducing prejudice, he argued that the members of the two groups should interact under conditions where they had equal status; common goals; a climate conducive to intergroup cooperation; and the sanction of authorities, law, or custom. Subsequently, Stuart Cook24 said that the effectiveness of this contact would also be influenced by the proximity between the groups, the direction and strength of within-group norms about contact with “others,” the direction and strength of expecta- tions about authority figures’ attitudes toward intergroup association, and the normal conditions of group interdependence – the predominance of competition or cooperation.

While research on the effectiveness of intergroup contact as a means of reducing prejudice suggests that there is a benefit when some of Allport’s conditions are met, there is no definitive conclusion about which of his conditions are sufficient for a benefit to occur.25 Still, there are some strong conclusions that have been reached about the limitations of intergroup contact.

Ridgeway and Smith-Lovin26 have demonstrated that intergender contact does not consistently erase false beliefs about gender differences. Indeed, any observed inferior outcome on the part of the stigmatized group considered superficially can reinforce prior beliefs about the intrinsic inferiority of that group.

Ridgeway and Smith-Lovin speculate that a key reason for the failure of intergroup contact generally to reduce bias is the fact that the equal status condition is hard to meet, since individuals will carry attitudes prevailing in the wider social context into structured interactions. It is, perhaps, the inability (or failure) to produce the equal status condition that has led the greatest American “experiment” in intergroup contact, school desegregation, to have sharply inconsistent effects on students’ racial beliefs.27

Tropp and Pettigrew28 find that even in settings consistent with the optimal conditions for contact, intergroup contact is more effective in influencing affective rather than cognitive dimensions of prejudice. People can develop a liking for and friendships with members of the other group (affective); indeed, they can develop quite positive assessments about individuals from the other group. However, they will not necessarily alter their stereotypical beliefs about the group as a whole (cognitive). Their friends from the outsider group will be seen generally as exceptions.

The tenacity of prejudicial beliefs, even in the face of properly structured contact, would not have surprised Hebert Blumer. Blumer located the origins of prejudice not in the orbit of individual psychology but in a collective concern about relative group position among members of ethnic/racial groups. In Blumer’s approach to prejudice, the “feelings” of one group about the members of another are grounded in comparative group status.29

Focusing on the group in the socially dominant position, Blumer identifies four major types of shared feelings among members of the in-group that constitute prejudice: (1) a feeling of superiority; (2) a belief that the “subordinate group is intrinsically different and alien”; (3) a sense of “proprietary claim”; and (4) a “fear and suspicion that the subordinate race harbors designs on the prerogatives of the dominant race.” Blumer himself says that the third feeling, “proprietary claim,” is of “crucial” importance. He elaborates as follows:

It is the feeling the part of the dominant group of being entitled to either exclusive or prior rights in many important areas of life. The image of such exclusive or prior claims may be wide, covering the ownership of property such as choice lands and sites; the right to certain jobs, occupations or professions; the claim to certain positions of control and decision-making as in government and law; the right to exclusive membership in given institutions such as schools, churches and recreational institutions; the claim to certain positions of social prestige and to the display of the symbols and accoutrements of these positions’ and the claim to certain areas of intimacy and privacy.30

Stratification economics explicitly lines up with Blumer’s view of the sources of prejudice. A signature feature of stratification economics is the critical role assigned to relative group position as a basis for the development and maintenance of prejudicial beliefs about the “other.” The material benefits associated with group identity affect the dominant group’s attitudes toward and treatment of the out-group. While both the dominant and subordinate group typically will have their respective patterns of internal hierarchy, comparative benefits of being part of the dominant group will span their entire membership and will be understood, at least implicitly, as such.31

Coalition stability has been a long-standing issue in the literature on col- lective action, and a key route to stability is a shared distribution of the benefits, although not necessarily on a uniform or equal basis.32 In the later pages of his monumental study Black Reconstruction, W. E. B. Du Bois addressed the question of why lower-class whites stayed in the white racial coalition rather than joining blacks to challenge the white elite.33 His answer begins with the suggestion that, in the immediate aftermath of Reconstruction, lower-class whites received a sheer “psychic benefit” from their racial status: “[T]he white laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage.” But Du Bois’s discussion of the specifics of the “public and psychological wage” delineates tangible relative benefits that readily could be assigned monetary values:

They [the white laborers] were given public deference and titles of courtesy because they were white. They were admitted freely with all classes of white people to public functions, parks, and the best schools. The police were drawn from their ranks, and the courts, dependent upon their votes, treated them with such leniency as to encourage lawlessness. Their vote elected public officials, and while this had small effect upon the economic situation, it had great effect on their personal treatment and the deference shown them. White schoolhouses were the best in the commu- nity, and conspicuously placed and they cost anywhere from twice to ten times as much per capita as the colored schools. The newspapers specialized on news that flattered the poor whites and almost entirely ignored the Negro except for crime and ridicule.

On the other hand, in the same way, the Negro was subject to public insult; was afraid of mobs; was liable to the jibes of children and the unreasoning fears of white women; and was compelled almost continuously to submit to various badges of inferiority.34

Such an implicit intraracial contract – what Roithmayr refers to as a “racial cartel”35 – continues to exist among whites in the United States.36 As this book will explore in subsequent chapters, whites of all social classes and education levels have a much lower likelihood of exposure to unemployment; rarely become as asset-poor as blacks; experience better health outcomes and greater safety in encounters with the police and the criminal justice system; and, of course, are not subjected to racial microaggressions that erode emotional well-being and personal efficacy.37

Today’s intraracial contract displays the long reach of an ideal explicitly articulated in a June 27, 1848, speech by John C. Calhoun, antebellum senator from South Carolina: “With us the two great divisions of society are not the rich and poor, but white and black, and all the former, the poor as well as the rich, belong to the upper class, and are respected and treated as equals.”38

#### Racial stratification relies on restricting access to “club goods.” Subordinate groups common pool resources suffer from overuse while privileged groups fence access to potential public goods.

John **DAVIS** Economics @ Marquette **’19** “Stratification Economics as an Economics of Exclusion” *Journal of Economics, Race, and Policy* 2 p. 12-15 [Acronyms clarified – Turner 2/1/22]

5. SE as an economics of exclusion

The complex systems interpretation of SE [Stratification economics] in the last section, combined with ME’s [mainstream economics] “ideological mask,” implies that SE’s [stratification economics] distinctive research program examines the interaction between social and market processes which ME conceals. SE, then, is first and foremost an ‘economics of exclusion’ in that it constitutes a response to ME’s exclusion of social processes from economic analysis: it investigates what ME excludes from economics, namely, the influence of social processes on market processes. Yet, SE is also an economics of exclusion in that it investigates how that exclusion operates, or how ME’s “ideological mask” restricts attention to market processes at the expense of providing a full account of how the market economies work hierarchically.

I offer one way of addressing these two dimensions of exclusion by comparing how SE and ME approach the traditional taxonomy of goods. In the standard goods taxonomy, different types of goods are classified according to two characteristics: whether their consumption is rivalrous and whether it is excludable. Rivalrousness is a matter of whether one person’s consumption precludes another’s. Excludability is a matter of whether people’s access to goods can be limited. Combining these two characteristics produces four different types of goods: private goods, public goods, local public goods (or club goods5), and common pool resource goods (see Table 4).Table

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(i) What is excluded from economics: SE on club goods and common pool resource goods

I argue that SE focuses on southwest-northeast diagonal in Table 4, and sees the distinction between club goods and common pool resource goods as broadly reflective of how social processes determine market processes in hierarchical societies through a whole variety of social restrictions.

Club goods, then, are the product of membership rules extended to a limited number of people. Access to such goods is fully excludable and non-rivalrous so long as membership is limited. Once in the club, a person has unlimited, exclusive access to what the club provides, while those not in the club have no access to the goods the club provides. Indeed, for those not in the club, the opposite case is common pool resource goods. Common pool resource goods exist where secure property rights are absent and government regulation is ineffective or non-existent. Their consumption is rivalrous and access is nonexcludable, so that they are often over-used depleting their resource base in tragedy of the commons type scenarios.

For SE, society’s hierarchical organization by social groups, where some groups are socially and economically advantaged and other groups are socially and economically disadvantaged, replicates the distinction between these two types of goods. Belonging to a social group is equivalent to being a member of that group, so hierarchical social orders work according to social group membership. Advantaged social groups enjoy membership in exclusive club-like social arrangements that allow higher levels of consumption (and real income), while disadvantaged social groups are restricted from being members in those social arrangements, and accordingly are left with lower levels of consumption (and real income).

If we see the social arrangements involved as deeply rooted in social prejudice and long-standing maintenance of the rules that limit access to privileged club-like economic institutions, then this distinction provides a solid basis for explaining how “Intergenerational transmission effects load heavily on the transfer of material resources across generations” (Darity 2005, p. 144).

The club goods idea, then, can be used to explain discrimination in social terms since discrimination is central to maintaining restrictive access for some social groups. Human capital based theories of wage differentials use purported differences in skills to explain restricted access, but a club goods interpretation makes social prejudice a fundamental determinant of restricted access.

At the same time, the idea that disadvantaged social groups are left to compete over free access common pool resource goods well describes the trap-like conditions people face when excluded from club-like opportunities. For example, housing markets in poor inner urban areas place higher burdens on socially disadvantaged individuals than housing markets in better off urban areas (Desmond, 2016).

Consider now how ME avoids making social group hierarchy a part of economics.

(ii) How ME’s “ideological mask” works: Private goods and public goods

I argue, then, that ME emphasizes the northwest-southeast diagonal in Table 4, and assumes that the economy can be fully explained in market process terms alone by focusing simply on the distinction between private goods and public goods. Of course, the production and provision of private and public goods depend on social processes, respectively, private property rights and government. How, then, does ME proceed as if market processes work independently of social processes?

In principle, private property rights and government provision of public goods extend to all people in a society. Thus, the social processes they depend on do not distinguish higher ranked social groups and lower ranked social groups, whereas the social processes generating club goods clearly do so. Thus, focusing on private and public goods alone makes it appear that market processes work independently of social processes.7

At the same time, ME needs to de-emphasize the role played by club goods and common pool resource type goods in the economy. Evidence for this lies in the JEL code, where club goods fall under State and Local Government, the next-to-last sub-category (H7) under public goods (falling just before Miscellaneous Issues), implying they concern a specialized topic not central to the overall category of public goods (whose primary focus is national governments). Thus, the socially restrictive character of many local communities, where zoning and disguised red-lining practices favor socially advantaged groups in a club-like way, is represented as a minor topic. Alternatively, club goods can be investigated under Externalities and Redistributive Effects (H23).

The idea that restrictive effects of club goods are ‘externalities’ itself implies that they are side effects of market processes, and thus not central to the overall explanation of market processes. Common pool resource goods have even a lesser status in the JEL code. Their investigation generally falls under category Q: Agricultural and Natural Resource Economics; Environmental and Ecological Economics, significantly down in the JEL alphabetical order, and they are typically investigated in relation to environmental problems and not the social conditions of urban communities.

However, disadvantaged urban communities often suffer the same sort of problem investigated in environmental economics, namely, their populations’ competition for their limited resources undermines their precarious resource base. Schools, public safety, food stores, transportation, etc. are shared resources in limited supply and thus subject to over-use that further erodes them.

Despite the fact, then, that the common pool resource problem clearly affects disadvantaged communities, ME rarely generalizes the common pool resource problem to include differences in types of communities. Indeed, to do so would make obvious that resource quality systematically varies across communities, thus demonstrating that communities can be differentiated hierarchically by advantage and disadvantage, and therefore that market outcomes are determined by social processes.

The argument in this section, then, differentiates SE and ME according to the latter’s control of what economics is supposed to be about, especially as institutionally legitimated in the official JEL taxonomic classification system for economics. That system influences economists’ research priorities, economics education, and the formulation of social policy in such a way as to suppress investigation and thinking about how social group hierarchy is perpetuated and reinforced by market processes.

However, for SE, market processes are embedded in social ones, and so (as indicated by [5] in the last section) markets do not simply reproduce themselves independently of social processes; rather, social processes determine whether markets work to perpetuate social hierarchies. Thus, how social processes evolve in relation to market ones deserves discussion to fully account for the distinctive research program of SE. This is the subject of the following section.

#### Opportunity hoarding by racial cartels exposes subordinate groups to increased mortality. The Flint water crisis demonstrates the horrors that occur when essential public goods like clean water, public health, education are hoarded.

William **DARITY** Jr. Samuel DuBois Cook Professor of Public Policy, African and African American Studies, and Economics at Duke University **ET AL ‘17** (Additional Authors: Darrick Hamilton Patrick Mason, Gregory Price, Alberto Davila, Marie Mora and Sue Stockly) in *The Hidden Rules of Race: Barriers to an Inclusive Economy* p. 42-44

APPLICATION OF STRATIFICATION ECONOMICS 1: PUBLIC GOODS

Stratification economics posits that ascriptive markers such as race can serve as signals to provide privileged access to public goods/services.42 Given the nonexcludable nature of public goods, financing their provision requires some degree of cooperation and altruism among individuals. To the extent that there are at least some altruistic motives among contributors to public goods, own-group altruism among dominant groups can result in stratified public good provision. The dominant group’s returns to own- group altruism can be an increasing function of their income and wealth relative to the racially subordinate group.43

In the absence of altruism, stratified public good provision can result if racially dominant groups are not willing to pay for public goods that will be consumed by subordinate groups.44 This could occur when members of the dominant group assign positive weights to benefits only for members of their own race/ethnicity.45

While not explicitly identified as such, the theoretical model of redistribution considered by Alesina, Glaeser, and Sacerdote46 captures some core insights and predictions of stratification economics with respect to public good provision. In their model, the demand for redistribution is determined by the extent to which individuals value the utility of private consumption enjoyed by others. The more altruistic individuals are, the more they value the consumption of others, and the greater the degree of redistribution.

Alesina et al. find that one empirical determinant of the level of redistribution appears to be race, as the level of redistribution in the United States is low relative to Europe, and the U.S. population is more racially heterogeneous. As such, an implication is that the relatively low level of redistribution in the United States possibly reflects a low level of interracial altruism based on whites possibly viewing nonwhites as being “undeserving” of income transfers or “handouts.”

To the extent that public goods/services involve redistribution through the tax mechanism, the Alesina et al. model predicts that the provision of public goods/services also will be stratified, reflecting the preferences of a dominant group that views subordinate groups as being less worthy of benefiting from public goods financed by tax revenues. More sordidly, there is the possibility that relative to Europe, dominant groups in the U.S. view the misfortune of the non-white subordinate groups as being “their own fault,”47 and thus may exclude subordinate groups from public good consumption. In the extreme, this can lead to death, since many public goods (e.g., clean water, pollution abatement, public health interventions) affect human mortality.48 The provision of these goods is negotiated through voting, and voters may fail to prioritize the welfare of subordinate groups in a socially heterogeneous country.49

While stratified public good provision constitutes a departure from egalitarianism, it has particularly stark and vulgar implications for the distribution of casualties, fatalities, and recovery associated with natural disasters. Rescue and disaster relief are, if not pure public services, publicly provided services financed through taxes. In this context, stratification eco- nomics suggests that the population risks associated with natural disasters will not be distributed fairly or on a race-neutral basis.

Indeed, a violation of the egalitarian notion of equal environmental hazard risks for all individuals50 appears to have occurred in the case of Hurricane Katrina. Price found that during Hurricane Katrina, the prob- ability of dying in the city of New Orleans as a result of the hurricane increased if you were black and/or poor suggesting that the provision of publicly funded rescue services was stratified by race and class (meas- ured by income).51 Post–Hurricane Katrina, there is evidence suggesting that publicly funded relief remained racially stratified.52 Banerjee also has detected a similar pattern of group-based stratification in relief provision in the aftermath of flooding in Bangladesh.53

The presence of huge deposits of lead in the water in Flint, Michigan, also is indicative of the stratified nature of the quality of public goods provision. Dominant social groups that capture the best public goods are engaged in a specific version of a more general practice that the sociologist Charles Tilly described as “opportunity hoarding.”54

#### Remedying the wealth benefits provided by racial cartels are a pre-requisite for effective intergroup solidarity.

James **STEWART** Labor Studies & African & African American Studies @ Penn State **‘8** “Africana Studies and Economics In Search of a New Progressive Partnership” *Journal of Black Studies* 38 (5) p. 802-803

Efforts by Africana Studies specialists to understand these dynamics could be enhanced through collaboration with those economists attempting to develop the subfield of stratification economics. Within stratification economics, special attention is directed to the role of racial and caste distinctions and similar group affiliations in producing and perpetuating income and wealth inequality (Darity, 2005). Group identities are treated as produced forms of individual and collective property with both income and wealth- generating characteristics and whose supply and demand are responsive to changes in production costs and budget constraints. Cooperative economic and noneconomic behaviors are treated as normal outcomes of individuals’ propensity to engage in own-group altruism and other-group antagonism. Stratification economists argue, for example, that intergroup conflict in both economic and noneconomic settings is an endogenous characteristic of the social space rather than an exogenous contaminant of market allocation processes and individual decision making. These models predict that reductions in intergroup income and wealth differentials will not automatically lead to the erosion of traditional patterns of collective identification as long as investments in group identity generate unequal returns for different identities and also that movement toward more egalitarian intergroup distributions of wealth must be a major element in any earnest attempt to reduce intergroup conflict because inequities are institutionalized through processes that enable the transfer of material resources across generations (Darity, Mason, & Stewart, 2006; Stewart, 1997; Stewart & Coleman, 2005).

#### Thus, the plan: Citing Section Two of the Thirteenth Amendment, the United States federal government should prohibit racial cartels.

#### Using 13th amendment powers to prohibit racial cartels continues the unfinished revolution of Reconstruction.

Darrell **MILLER** Associate Professor of Law @ University of Cincinnati College of Law **’11** “Racial Cartels and the Thirteenth Amendment Enforcement Power,” *Kentucky Law Journal*, 100(1), p. 23-42

II. Thirteenth Amendment Enforcement Power and Racial Cartels

Give me the power to cut up slavery, root and branch, wherever the federal authority legitimately extends, and I will open veins enough to bleed the monster to death. Breathe into our national life a sentiment strong enough to ripen into such legislation, and the backbone of the slave power will be broken. 69

So said the Quaker and Indiana Congressman George Washington Julian in 1857. George Julian got what he wanted. As Lea VanderVelde writes, the Thirteenth Amendment presumes an "end-state"; an America in which slavery, that "agreement with hell," 70 is extirpated. 71 Radical Republicans in the nineteenth century were certain in what they wanted; they wanted slavery and everything associated with it eliminated. 72

The Thirteenth Amendment states: "1. 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. 2. Congress shall have power to enforce this article by appropriate legislation." 73 Slavery as physical compulsion is clearly contemplated by the text of the Amendment. But the Court has stated that the power of Congress under Section Two of the Thirteenth Amendment extends beyond mere personal servitude. It also empowers Congress with a power to legislate against the "badges" or "incidents," 74 or even the "relic[s]" of slavery. 75

To the extent that racial discrimination in the South can be understood as a type of cartel behavior, supported by positive law and extra-legal violence, it seems indisputable that Congress understood at least the first two supports to be legitimate targets of Thirteenth Amendment enforcement [\*36] power. In 1866, for instance, Congress passed the first Civil Rights Act. That Act provided that all citizens, of every race and color, should be able:

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. 76

With the 1866 Civil Rights Act, Congress created federal guarantees that would abrogate operation of the Black Codes, the positive law that had supported the racial cartels of whites in the South. There has been little question since the latter twentieth century that Congress possesses the authority to use the Thirteenth Amendment in this fashion. 77

In addition, passage of the 1866 Civil Rights Act laid the foundation to curtail the extra-legal violence that also supported these racialized cartels. It empowered the federal government to prosecute "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act." 78 Again, today, there is little question of Congress's authority under the Thirteenth Amendment to target extra-legal violence. 79

It is the third leg of this stool, the societal norms, the scripts and paths that were part of maintaining a slave culture, 80 that form the fundamental question about the power of Congress under the Thirteenth Amendment in the twenty-first century. Put simply, does the ability of Congress to enforce the Thirteenth Amendment's prohibition on slavery and its badges and incidents through "appropriate legislation" end at the stage in which intentionality disappears, and classical economic theory predicts that [\*37] racialized cartels will disintegrate on their own? Or does the Thirteenth Amendment also permit legislation that would prevent the creation of these cartels as well? 81 To date, the Court has consistently side-stepped the direct question of whether the Thirteenth Amendment enforcement power enables Congress to deal with disparate impacts created by private choices, rather than disparate treatment. 82

History is illuminating, although seldom definitive. As Michael Vorenberg has written, history cannot provide us with a "true" meaning of the Thirteenth Amendment, as "Americans were left to work out the origins and meanings of freedom long after the measure was adopted." 83 It is difficult to discount the observations of the generation immediately following the war, however. Those on the ground after the war quickly appreciated that the Reconstruction Congress confronted not only a political, but also a cultural challenge.

Carl Schurz recognized this fact soon after surveying the condition of the South. Schurz wrote that the "[t]he principal cause" of the "rebellion" was "that the Southern people cherished, cultivated, idolized their peculiar interests and institutions in preference to those which they had in common with the rest of the American people." 84 This, to Schurz, explained "the importance of the negro question as an integral part of the question of union in general, and the question of reconstruction in particular." 85 Whites in the South had come to regard "blacks [as] their property by natural right" 86 and neither the war nor emancipation had loosened their "ingrained feeling that the blacks at large belong to the whites at large, and whenever opportunity serves they treat the colored people just as their profit, caprice or passion may dictate." 87 Schurz's diagnosis of the medicine needed for success was bold and it was stark: "[I]t is not only the political machinery of the States and their constitutional relations to the [\*38] General Government, but the whole organism of Southern society that must be reconstructed, or rather constructed anew, so as to bring it in harmony with the rest of American society." 88

Indeed, the Civil Rights Act of 1866 passed over the veto of President Andrew Johnson, who believed-much like classical economists-that an equilibrium between freedmen and their former masters would arise as a natural product of market forces. 89 Freedmen organizations and Black newspapers at the time of the Thirteenth Amendment's ratification also seemed wary of relying too heavily on the simple operation of the free market. 90 After all, so many gradualist antebellum thinkers had assumed that the invisible hand of the market would slowly strangle slavery and all its incidents without the necessity for war or constitutional amendments. 91

If one accepts that the project of the Thirteenth Amendment, in fact all of Reconstruction, was to get at societal conventions themselves, whether upheld by positive law, extra-legal violence, or neither, then this has important implications for congressional power. Acts of individuals and legislators that invidiously set apart African-Americans for disparate treatment in a manner that has a slavery-era analog are clearly within the scope of the Thirteenth Amendment power. But Carl Schurz recognized that something more revolutionary was required. The glue of convention, of trust, of group identity that had held together the political, economic, and social conventions of slavery in the South had to be denatured. 92 Under this reading of the Thirteenth Amendment enforcement power, [\*39] Reconstruction America equipped Congress with a powerful solvent.

III. Implications

Understanding the Thirteenth Amendment enforcement power as a power designed to destroy and to prevent racialized cartels has a number of implications for current doctrine and future legislation. First, it offers conceptual support for those cases in which the Court has extended the Civil Rights Act of 1866 and the "badge or incident" of slavery concept to non-African Americans punished for their affiliations with African-Americans. For, if one purpose of the Thirteenth Amendment enforcement power is to disrupt the mechanisms that support racialized cartels, then it seems reasonable that those persons who suffer for defection from these cartels should have some right to recover under legislation passed pursuant to the Thirteenth Amendment.

For example, retaliation claims by whites under the Civil Rights Act of 1866 and its modern equivalents present a frequently unrecognized problem of constitutional authority under Section Two of the Thirteenth Amendment. If the Civil Rights Act of 1866 operates against private conduct that Congress can rationally determine constitutes a "badge" or "incident" of slavery, then how is it that a person who is not racially discriminated against herself can have standing to sue for discrimination directed against others? That is, if a white person asserts that she has been fired because an employer or company has discriminated against an African- American, how can it be the white person has suffered a "badge" or "incident" of slavery sufficient to support congressional power? Such a construction would seem to stretch the ability of Congress to enforce the Thirteenth Amendment through "appropriate" legislation to its limits.

The constitutional implications present themselves in the 1969 case Sullivan v. Little Hunting Park, Inc. 93 In Sullivan, Paul Sullivan was the white owner of a home and a rental property in a residential community in Virginia. The residential community included a park and a playground operated by a corporation in which the community members owned shares. 94 Sullivan rented his property to an African-American named T.R. Freeman, Jr.; and, under the by-laws of the corporation, Sullivan was allowed to assign his shares to the park and playground to Freeman subject to approval by the corporation's board of directors. 95 The directors refused to approve the assignment based on Freeman's race. 96 Sullivan objected to the board's [\*40] decision and was expelled from the corporation as a consequence. 97

Absent the argument that Sullivan is asserting some kind of third-party standing of Freeman, 98 it is difficult to see how Sullivan's expulsion from the corporation was a type of injury that evinces a "badge" or "incident" of slavery. It is, after all, the private discrimination against Freeman's race that motivated the board's decision, not Sullivan's. However, if one understands the Thirteenth Amendment enforcement power as designed to break up the power of racialized cartels, then the result seems far more sensible. Congress's authority under section two empowers it to disrupt the creation and maintenance of racialized cartels. Racialized cartels use internal private norm enforcing mechanisms-like ostracism, expulsion, shame, etc.-to enforce the cartels and to maintain social and economic status. 99 Therefore, Congress has authority under section two to disrupt racialized cartels by arming defectors, like Sullivan, with a right of action against the cartel's norm enforcers. 100

Second, it suggests that there is a constitutional backdrop beyond the intentionality framework of Equal Protection that can serve as a source of legislative authority by policy makers interested in the problems of structural racism. Equal protection doctrine as it currently stands requires some evidence of disparate treatment. The Court has yet to strike down all legislation aimed at state- created disparate impacts on the grounds that such legislation is not "congruent" or "proportional" to section one of the Fourteenth Amendment, or is otherwise outside the scope of Congress' authority, 101 but the risk of invalidity is there. Further, the Court has edged ever closer to finding that some laws enacted under Congress' commerce power aimed at disparate impacts are themselves violations of Equal Protection. 102 If the Thirteenth Amendment is understood as empowering Congress to prevent racialized cartels, it offers some hope that efforts to regulate disparate impact may survive these challenges. At the very least, the Thirteenth Amendment could be used to support legislation that obliges policy makers to consider the impact that their decisions will have [\*41] on groups tied to a history of slavery. Congress already does this with respect to regulation affecting economic interests; 103 it is not a stretch to have the same considerations apply in the area of racial justice. 104

And finally, it is worth noting that the power of Congress under the Thirteenth Amendment is not without its own set of problems and temptations which must be respected and controlled. Not every form of individual preference, whether aggregated or not, can be properly identified as a "badge," an "incident," or a "relic" of slavery, nor should it. Nor does the fact that the Thirteenth Amendment contains more specific authority to stamp out racial inequality than, say, the Commerce Clause power mean that the Thirteenth Amendment power supersedes all other protections in the constitutional text. 105 What this argument about Thirteenth Amendment power says is that, as Jack Balkin notes, the Thirteenth Amendment enforcement power is both broader and more structural than the existing understandings will admit, and must be taken seriously, rather than relegated to a state of constitutional desuetude. 106

Conclusion

This essay has attempted to pull tighter the threads that link theories of structural racism, theories of cartel behavior, and theories of the remedial powers of Congress under the Thirteenth Amendment. But, as the participants in this symposium are aware, further work remains. Reconstruction is an inter-generational project, an "unfinished revolution," in the words of historian Eric Foner. The challenge of racial inequality in the twenty-first century comes not from monstrous men of evil intent, but from forgetfulness and comfortable complacency. We must be vigilant; we must be diligent. For, despite its appearances, Reconstruction is a verb, not a noun.

#### Reconstructive methods of constitutional interpretation build abolition democracy grounded in anti-subordination and non-domination.

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It is hard to pin down what prison abolition means. Activists engaged in the movement have resisted "closed definitions of prison abolitionism" 23 and have instead suggested a variety of terms to capture what prison abolitionists think and do - abolition is "a form of consciousness," 24 "a theory of change," 2 5 "a long-term political vision,"12 6 and "a spiritual journey."27 Professor Dylan Rodriguez, a founding member of Critical Resistance, 28 lyrically describes abolition as "a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present."29 Moreover, movements that refer to themselves as abolitionist are working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment (such as "the wage system, animal and earth exploitation, [and] racialized, gendered, and sexualized violence")3o and forms of oppression beyond white supremacy (such as "patriarchy, capitalism, heteronormativity, ableism, colonialism," imperialism, and militarism).31 While I recognize that all of these oppressive systems and the movements for their eradication are interconnected, 3 2 this Foreword will focus specifically on the movement to abolish the prison industrial complex, conceived of as rooted in chattel slavery in the United States, as a starting point to examine the potential for a new abolition constitutionalism.

For purposes of my analysis, I find especially useful three central tenets that are common to formulations of abolitionist philosophy. First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.3 3 Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime.34 Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems.3 5 These tenets lead to the conclusion that the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex. To date, there has been no sustained analysis of the relationship between the prison abolition movement and the U.S. Constitution. Prison abolition activists and scholars rarely seek support for their claims in constitutional law.3 6 Nor have they included an abolitionist interpretation of the Constitution in their vision of a transformed society without prisons. Some not only have eschewed constitutional law as a means to achieve prison abolition but also have argued that constitutional law serves to facilitate and legitimate state violence against black and other marginalized people.37 This oppositional approach to the Constitution is understandable given that so much of the Supreme Court's constitutional jurisprudence since its inception in the slavery era has been antiabolitionist. 38 Yet the Constitution was interpreted by past freedom activists as an abolitionist document: many antislavery activists viewed the Constitution as a foundation for their arguments and for developing an alternative reading that called for freedom and democracy. Even after the Civil War, a Radical Republican Congress amended the text explicitly to end slavery and extend citizenship to black people based on the ideas and advocacy of an abolitionist movement.3 9 At the same time, the Reconstruction Amendments contained compromises that blocked their potential for dismantling the racial capitalist structure. 40 By 19oo, a campaign of white supremacist terror, laws, and policies had effectively nullified the Amendments and replaced abolition with Jim Crow as the constitutional regime.41

Engaging the relationship between past abolition constitutionalism and the current prison abolition movement raises a number of provocative questions. Can legal scholars help to revive the abolitionist values in the Reconstruction Constitution to support contemporary abolitionist claims? Can prison abolitionists strategically use an abolitionist reading of the Constitution to defend their radical vision and implement steps toward achieving it? Might prison abolitionists craft a new abolition constitutionalism that serves as a charter for a society without prisons? In this Foreword, I make the case for an abolition constitutionalism that attends to the theorizing of prison abolitionists. Although there are many grounds for prison abolition and many venues for abolitionist advocacy, my purpose here is to examine prison abolitionist theory and organizing as it relates to the U.S. Constitution in particular. There are two paths this interrogation might take. One uses prison abolition theory to evaluate the Constitution's provisions and the jurisprudence that has interpreted them in order to rebuke their failure to abolish slaverylike systems and install a democratic society. The other goes further to propose a constitutional paradigm that supports prison abolitionists' goals, strategies, and vision. The first path is resigned to the futility of employing U.S. constitutional law to dismantle the prison industrial complex and other aspects of the carceral state. The second path finds utility in applying the abolitionist history and logic of the Reconstruction Amendments to today's political conditions in the service of prison abolition.

I believe both approaches are worthy of consideration, and considering both is essential to developing a theoretically and pragmatically useful legal framework to advance prison abolition. Neither is based on a naive faith in U.S. law or the judges who apply it to radically change carceral society. Indeed, it is the realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law that made me an abolitionist in the first place. The tension between recognizing the relentless antiblack violence of constitutional doctrine, on one hand, and demanding the legal recognition of black people's freedom and equal citizenship, on the other, animates this Foreword as it has long animated abolitionist debates on the U.S. Constitution. 4 2 Despite my disgust with the perpetual defense of oppression in the name of constitutional principles, I am inspired by the possibility of an abolition constitutionalism emerging from the struggle to demolish prisons and create a society where they are obsolete. This Foreword analyzes the potential for a new abolition constitutionalism as follows. In Part I, I provide a summary of prison abolition theory and highlight its foundational tenets that engage with the institution of slavery and its eradication. I discuss how abolition theorists view the current prison industrial complex as originating in, though distinct from, racialized chattel slavery and the racial capitalist regime that relied on and sustained it, and their movement as completing the "unfinished liberation" 4 3 sought by slavery abolitionists in the past. Part II considers whether the U.S. Constitution is an abolitionist document. I interrogate the historic abolition constitutionalism by examining antebellum abolitionists' readings of the Constitution and their partial incorporation into the Reconstruction Amendments, as well as the Supreme Court's jurisprudence obstructing the Amendments' transformative potential. I pay close attention to the Supreme Court's most recent decision interpreting the relationship between the Fourteenth Amendment and carceral punishment - Flowers v. Mississippi - to analyze the Justices' rejection of an abolitionist approach in their ruling. Finally, Part III links Parts I and II by exploring the relationship between prison abolition and the U.S. Constitution. I argue that, despite the ascendance of proslavery and anti-abolition constitutionalism, we should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future. I hope to show that the prison abolition movement can reinvigorate abolition constitutionalism. In turn, today's activists can deploy the Reconstruction Amendments instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons.

#### Non-domination requires use of state power and legal institutions to ensure positive liberty. Radical republicanism challenges liberal colorblindness.

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Quoting extensively from Bondage, Gooding-Williams argues that Douglass’s physical prowess had secured the form of freedom because, as Douglass puts it, “a man, without force, is without the essential dignity of humanity. Human nature is so constituted that it cannot honor a helpless man, although it can pity him; and even this it cannot do long, if the signs of power do not arise.”54 The young Douglass, then, wins the “honor” of his owners that stays their hands from visiting more violence on his body and enforces a limit on arbitrary interference. While Gooding-Williams does not claim that the failure to risk death and resist one’s subjugation stymies the honor of the enslaved, he accents that a diminishing sense of selfconfidence and self-respect occasions violence at the hands of an oppressor; risking death appears to be a precondition of securing “manly independence.”55 However, while republican conceptions of freedom can encompass the moral value of self-respect and self-confidence, they are not grounded in a general “sense” of “self-reliance” nor in the temerity of a people, but in publically-accepted rule of law, which the constitutional state demands that all citizens accept. Gooding-Williams argues that the altercation with Covey demonstrates that “[s]elf-reliance, then, is antithetical to dependence on laws, books, customs, and the like.”56 Following the republican conception of liberty, the “choice situation” of a slave is not to be enslaved—by law—to gain one’s freedom through the recognition of the rights of citizenship. Republican conceptions of liberty are best suited for capturing the fact of freedom or the lack thereof, rather than its form, which delineates the requisite moral psychology for resisting oppression under institutionalized conditions of extreme duress and brutalization. To be sure, Gooding-Williams is correct to emphasize Douglass’s struggle for freedom in terms of the form of freedom, but republicanism is best suited to capture the fact of freedom.

Like other existentialist interpretations of Douglass’s encounter with Covey, notably those advanced by Lewis Gordon and George Yancy, Frank Kirkland points out that there is a “resounding […] silence” on political abolitionism and slave rebellions in theorizing Douglass’s republican politics.57 Even in the case of a victorious outcome through physical combat, as detailed in Douglass’s narration, Covey’s capacity for arbitrary interference is – by definition – intact insofar as Douglass remains a slave in “fact.” Douglass just happens to subdue Covey, but the structural inequality that defines their relationship as master and slave and conditions Douglass’s dependency on the whims of his owners remains an institutional fact. It is that systematic dependency that a republican conception of liberty helpfully illuminates as oppressive.58

Although Gooding-Williams invokes republicanism to justify redirecting practices of citizenship, he does not posit the task of securing citizenship as the moral end of enslaved Africans, one that Douglass holds dear as a political abolitionist and condoner of slave rebellions that aimed to destroy the institution of chattel slavery. Indeed, the republican framework that casts freedom as non-domination appeals to the lawful representation of persons as full citizens that would sanction either kind of action – abolition or rebellion – as emancipatory political practices that capture the “fact” of the domination of black Americans in the Southern slavocracy and the nation as a whole. The model of freedom as non-domination thus posits an essential link between the rule of law and the creation of the structural conditions of undominated choice**.** The democratic institutionalization of laws, under the aegis of a fairminded people, ensures that arbitrary interference in citizens’ lives is eliminated. But for this republican view of liberty to hold water, the political ideal of citizenship must be preserved. Pettit thus rejects non-foundational views that advocate self-reliance, which Gooding-Williams prizes. To be sure, Douglass having regained a sense of self-confidence and self-respect spells a decisive break in his life as a slave. The fortification of his sense of personal power—that crucially wins him the “form,” if not the “fact” of freedom—instills in him the moral courage that spurs his escape. Yet, true to his republicanism, Gooding-Williams himself observes that Douglass subsequently dedicates his life to the struggle for the constitutional rights of black Americans, that is, to achieve the “fact” of freedom.59

ii. Douglass’s Band of Brothers: Arendt’s Action-Oriented Republicanism in Antebellum & Postbellum Black Politics

In the next section, I address the issue of how—and whether—the moral ideal of citizenship can inspire plantation politics, in addition to legitimating political abolitionism and slave rebellions. Before tackling the issue, in this subsection, I assess the dimension of Gooding- Williams’s account of plantation politics that is inspired by Arendt’s political philosophy. Drawing from Douglass’s narrative of his formative experiences as a young enslaved man, he argues that a “band of brothers” won “independence” for Douglass and his friends on slave plantations through spontaneous, secretive, rule- and ruler-free plotting. The “politics” of the band of brothers “points not only to his [Douglass’s] action-in-concert and affiliation-based conception of plantation politics, but, likewise, to his rejection of the view, later embraced by Du Bois, that politics is exclusively a practice of rule.”60 His depiction of Douglass’s republicanism—indebted to his reconstruction of Arendt’s vision of politics—advances a secretive, rule- and ruler-free politics, while rejecting Du Bois’s rule- and ruler-based politics. Yet, I argue that a critical dimension of Arendt’s philosophy of freedom is missing: political action should be normatively oriented towards the rule of law and public governance, which provide the institutional conditions of democratic agency. Indeed, these normative commitments are par for the course of republican political thought generally—yet, they are precisely the features of Du Bois’s political thought that Gooding-Williams lambasts in the name of republicanism. The politics without rule that Gooding-Williams envisions is a “politics of a few […] who pledge themselves to one another, not a politics geared to ruling the many.”61 The radical potential of republican political critique lies in theorizing the expansion of the democratic public sphere for the many—that is, for all whom are oppressed and subject to the arbitrary interference and unmitigated force by the reckless and powerful. Political abolitionism and slave rebellions tap into this radical potential of the justificatory force that fuels republican accounts of progressive change.

With respect to the affiliative bond of a band of brothers as an emancipatory practice preserving political culture on slave plantations, Gooding-Williams defends concerted action flouting governance. Enslaved persons resisted subjugation by undertaking small-scale, covert, and leaderless actions, where shared black identity mediated bonds of trust and solidarity, but underdetermined collective political purpose. He details Douglass’s formative experiences joining a band of brothers:

Thrown together on Mr. Freeland’s plantation, Douglass and his fellows find themselves working the same farmland. Soon, however, they begin to consult one another, and as Douglass suggests, […] to debate and deliberate the merits of different courses of action.

Douglass and his friends (they move together), cultivate ties of loyalty, and form themselves into a band of subversive activists […] consenting through their speech, action, and mutual commitments to resist slaveholder tyranny. Together they constitute a band of ‘brothers,’ not because they have affiliative relationships to the same parent, but because they have affiliative relationships to one another – that is, because each has agreed to adopt as his own a mutually shared sense of political purpose.

As “subversive activists,” they “resist slaveholder tyranny” through speech and action that defined their freely-forged, affiliative bonds. Together, they plotted in secret to run away, but their “sense of solidarity […] [was] predicated not on obedience to a ruler but mutual commitment and self-sacrifice.”62 In the absence of readymade familial or “spiritual” bonds, a sense of solidarity arises through the small group’s plotting. Douglass acts as the “leader-asinitiative- taker” rather than “leader-as-ruler.”63 The “band of brothers” politics functions as forerunner of the ideal of the black counter-public that encompasses heterogeneous voices without devolving into a politics of rulers- and -rules.

In developing the idea of a band of brothers as an emancipatory practice, Gooding- Williams appeals to Arendt’s defense of the public sphere, where speech and deeds skirt law, while showcasing the “boundlessness” of action.64 “Free,” spontaneous action does not reveal law-like regularity in human behavior. Occasionally, Arendt appears to be suspicious of the constitution and positive systems of laws it supports, as institutional entities that limit the “boundlessness” of political freedom.65 In response to the totalitarian government of 20th-c. Europe, she countenances that technocratic rationality in the guise of law has penetrated the democratic public sphere. Her conception of political judgment and action rejects prescribed categories for judgement and action, a rejection which must be understood in light of her critique of totalitarianism and the rise of the social sphere.66 Gooding-Williams observes: “With her reference to the frailty of human affairs, Arendt recurs here to her thesis that human action tends to transgress the limits and boundaries fixed by legal rules, institutional norms, and territorial demarcations – thus, to establish relationships that cut across those limits and boundaries – and that these rules, norms, and demarcations cannot offset action’s ‘inherent unpredictability.’”67 Nevertheless, in advancing her critique of the expansion of the bureaucratic modern state, she calls for the reconstruction of the public sphere. There is a distinction, then, between the apparent “lawlessness” of free action with respect to “the frailty of human affairs” and the public rules and laws that preserve the institutional conditions of free action in the first place, in light of the threat of totalitarianism and technocratic rationality.68

The distinction is not pronounced in Gooding-Williams’s critique of plantation politics, but it has resounding implications for his presentation of the latter. Secretive collusion that is neither embedding in, nor morally oriented towards, a constitutional republic may very well be “lawless” and “leaderless,” as well as expressing a sense of solidarity, mutual support, and collective purpose, but it is unclear in which respect it secures the independence of enslaved persons. If in order to avoid further attack and interference from their master, the young Douglass and his brothers-in-arms secretly plot to work the fields more efficiently and reach an agreement to demoralize other slaves in a display of allegiance to their owner—rather than to run away—the mere form of their actions conforms to the model Gooding-Williams describes, but it seems counterintuitive to accept that following this course of action is an emancipatory political practice.

Gooding-Williams minimizes the moral and political ideal of equal citizenship as the normative basis of republican conceptions of liberty. As a result, the normative basis of his account of emancipatory practices of slave plantation is unclear. He also unfairly criticizes Du Bois’s notion of black leadership as “dominating” black masses because he minimizes not only in Douglass, but in Du Bois too, the ideal of citizenship. The talented tenth are responsible for combatting the so-called “Negro problem.” Gooding-Williams characterizes their efforts in terms of 1) combatting white racism and 2) the general unpreparedness of the black masses to master conventions for participating in the basic structure. In “uplifting” the black masses to cultural literacy, the talented tenth integrate them into basically just institutions. On his characterization of Du Bois’s view of black enfranchisement, he argues that Du Bois champions assimilation through self-assertion: he underscores white racism, but the existent basic structure—as well as American folkways—are sound and recommendable for black mastery. However, depicting Du Bois’s account of leadership as dominating the black masses would obtain if and only if Du Bois fails to posit a critical link between black leadership and the moral ideal of civic enfranchisement, construed as collective social and political self-determination, which is not the case.69 That one accepts the moral and political ideal of citizenship does not mean that the existent normative design of the basic structure does not require revision. The talented tenth, writes Du Bois, “must be prepared to fight an army of devils” and sacrifice themselves in order to achieve the civic enfranchisement of their people.70 Du Bois describes the talented tenth as “plead[ing] for black men’s rights.”71 The first generation of the talented tenth, which includes Douglass, Du Bois identifies as political abolitionists.72 With the passage of Reconstruction Amendments that emancipated black Americans, the talented tenth [t]hrough political organization, historical and polemic writing and moral regeneration, […] strove to uplift their people. It is a fashion of today to sneer at them and to say that with freedom Negro leadership should have begun at the plow and not in the Senate—a foolish and mischievous lie; two hundred and fifty years more the half-free serf may toil at his plow, but unless he has political rights and righteously guarded civic status, he will still remain the poverty-stricken and ignorant plaything of rascals, that he now is.73

With Emancipation, in order to substantiate freedmen’s newfound moral status as legal members of the American civic community, the talented teach must “righteously guard their civic status.” Instead, Gooding-Williams equates black leadership with the domination of freedmen, whereby they are mastered and subject to their elitist arbitrary interference. He omits that leadership oriented towards participation and inclusion in the modern state is foundational to republican conceptions of liberty, which, as I have demonstrated in the previous sections, are founded on the advocacy of the political ideal of citizenship, and, consequently, are predicated on ruler- and rule-based politics.74 Moreover, Douglass himself was a Reconstruction politician who qualifies as a leader among the so-called “Talented Tenth.” Gooding-Williams instead characters a politics of rule as curating cultural authenticity, rather than encouraging contestation of the organization of the basic structure on the basis of the moral—and political—ideal of citizenship. He thus identifies Du Bois’s account of political legitimacy with the curation of authentic expressions of black cultural identity, rather than with political enfranchisement.75

To be sure, Du Bois later revisits his idea of the talented tenth and casts doubt on his earlier formulation of the concept. In Dusk of Dawn, he speculates about the political promise of college educated African Americans, whose allegiance to the wider community appears undermined by material interests. Note that he revises his position not because he believes that middle-class black Americans dominate and interfere with the poorer black masses, but that they, as an increasingly affluent group, have grown indifferent to the plight of working class African Americans. This is a concern about leadership in the black community that is still manifest today.76 The political promise and pitfalls of black leadership leave unanswered the question of how to struggle for civic enfranchisement, given the re-entrenchment of the federal neglect of the black community. The latter issue requires redress through the basic structure and norms of public governance.

Consider Keeanga-Yamahtta Taylor’s recent discussion of black leadership and electoral politics. Taylor writes

the pursuit of Black electoral power became one of the principal strategies that emerged from the Black Power era. Clearly it has been successful for some. But the continuing crises for Black people, from under-resourced schools to police murder, expose the extreme limitations of that strategy. The ascendance of Black electoral politics also dramatizes how class differences can lead to different political strategies in the fight for Black liberation.77

As I hope I have shown in here and in earlier chapters, for Du Bois, the task of civic enfranchisement is not reducible to electoral politics; yet the radical potential of the republican critique of freedom lies precisely in delineating the challenge of including black interests in public governance. On the heels of the Black Lives Matter Movement, racial gerrymandering and voter suppression are making gross inroads in contemporary American democracy. Representing an internally differentiated, class sensitive, and comprehensively inclusive conception of “black” interests in public governance remains necessary to achieve civic equality. Indeed, whether whites are inclined to represent black interests in national politics is unclear.78 What is clear is the no one can “stand aside as critical and rather pessimistic spectators; when in fact the burden [of the Negro problem] belongs to the nation, and the hands of none of us are clean if we bend not our energies to righting these great wrongs.”79

#### The use of antitrust to distribute power using stratification economics changes the organization of our economy – the aff doesn’t make competition an end in itself.

Paul ’22 [Sanjukta Paul - Assistant Professor of Law, Romano Stancroff Research Scholar, Wayne State University - J.D., Yale Law School - From the article: “A Democratic Vision for Antitrust” - From the Journal – Dissent - Published by University of Pennsylvania Press - Volume 69, Number 1, Winter 2022, pp. 56-62 (Article) – modified for language that may offend - available via Project Muse]

Last spring, prominent Big Tech critic Lina Khan became the new chair of the Federal Trade Commission (FTC)—an appointment widely ~~seen as~~ (considered) a coup for progressive reform. In her confirmation hearing, she characterized the agency’s overarching goal in terms of “fair competition.” This choice of emphasis is significant for understanding the antitrust reform project of which Khan is a leader. At its core, the project is a policy paradigm aimed at creating fair markets—markets characterized by socially beneficial competition, fair prices, and decent wages.

While both proponents and detractors of this reform project sometimes conflate competition policy with the goal of maximizing economic competition for its own sake, in reality, competition law has always assessed economic rivalry and coordination in relation to broader social ends. For a long time, that assessment has been obscured—not to mention insufficiently tethered to the original goals of federal antitrust law. The reform project aims to reorient the use of antitrust in expressly egalitarian and democratic directions.

For decades, competition law and policy have been dominated by the neoclassical law and economics paradigm, which claims that visible market design and coordination interfere with competitive dynamics that would otherwise lead to an efficient allocation of social resources, and thus to the maximization of social welfare. While recent shifts in mainstream economic thinking have led to more discussion of imperfect competition, particularly in labor markets, the “market failures” and power imbalances that justify interventions are on this view still essentially special cases. Moreover, this idealized picture of markets still obscures certain forms of background coordination—especially the often hierarchical and extractive coordination that happens within business firms—while treating other coordination mechanisms as exceptional, with the potential to distort ideal market outcomes.

Conventionally organized business firms are just one of the many means we have to coordinate economic activity; others include labor unions, producers’ cooperatives, and public price boards, to take just a few examples. Because competition law makes ground-up decisions about many forms of economic coordination, and influences the regulatory stance toward others, antitrust reforms hold the potential to affect a broad set of economic policies.

We should not act as if putatively neutral, technocratic appeals to idealized competition can replace moral and political choices about economic life. Nor, however, should we treat actual competition as inherently tainted by its association with neoclassical theory. Channeled appropriately, competition is healthy rivalry: it encourages technological and operational innovations that can have broad social benefits, and it represents an important check on arbitrary bureaucratic power by preserving outside options for workers, consumers, and businesses. Channeled inappropriately, competition can lead to the destructive undermining of rivals (in contrast to constructive outperformance), overwhelm socially valuable independent enterprises, and destroy existing market settlements characterized by fair prices and decent wages. There is no universal logic of competition for policymakers to apply, either dark or redemptive: it is legal, social, and political choices (almost) all the way down.

To move from principles to some specifics, we can ~~look at~~ (consider) the approach the reform project might take in three policy areas: policing corporate mergers and acquisitions, accommodating horizontal and bottom-up economic coordination, and re-regulating the law of vertical restraints. *These* reforms, which are mutually reinforcing, all have the power to help build a more equal and democratic legal organization of the economy.

#### The fight against stratification is a key component of larger demands for racial justice. The framework of stratification and the principle of non-domination provides a useful orientation even where there are disagreements on particular tactics.

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THE RACIAL JUSTICE MOVEMENT TODAY

The movement brings together scholars, public intellectuals, activists, and historians—symbiotically, and with rising power. A new race-forward scholarship has gained traction over the last decade, anchored and driven by Black thinkers and other scholars of color.21 Several lines of thought have emerged and coalesced, including economists focusing on **racialized wealth** and **stratification economics**, **abolitionist** thinkers focused on radical transformation and an end to the prison industrial complex, and legal scholars focused on the ways in which American law has legitimated **race-based subordination**.

A new popular history has accompanied, elevated, and amplified the new scholarship, bringing race-forward ideas to mainstream American culture. The New Jim Crow, “The Case for Reparations,” and the 1619 Project are just some of the many literary works that have catalyzed new conversations about the foundations of American history and the ongoing legacy of slavery and oppression (Alexander 2010; Coates 2014; Hannah-Jones 2019). These scholars and other popular writers are in conversation with today’s movement organizations, most prominently and powerfully the Movement for Black Lives and the immigrant justice movement. Their policy demands are bold and wide-ranging.

What all of these movement thinkers and activists share is a **structural view of change**. They do not simply want greater access to existing programs. The root of their argument is that the economic system is predicated on exclusion, and that post hoc solutions—based on redistribution after the fact—will not suffice; that today’s immigration system is based on racial terror; and that the current voting system deliberately suppresses Black and brown voices. These movement leaders call for fundamentally altering relationships of power. This has begun to shift politics, with many grassroots leaders moving beyond outsider organizing to seek and win elected office.

These ideals are not wholly new. They are rooted in a strong foundation that connects today’s movement with the radicalism and ideals of past racial justice movements throughout history: Abolitionists and the Radical Reconstruction era, the civil rights and Black Power movements, and the associated movements for justice—Mexican American/Chicano, Asian, Indigenous, and many parts of 1970s feminism.

Many of today’s scholars, organizers, and activists share common themes in their answers to the question “what does racial justice require, and for whom?”

The movement is broad. Organizers and organizations often differ in strategy, tactics, and theories of change. But they share some overarching values in their vision for a racially just future and what we must do to make that future a reality. Our review of today’s movement elevates three themes that could form the backbone of a new paradigm for racial justice.

1. Freedom and liberation:

At the core of the movement is the vision for individual and collective self- determination, free from systemic oppression. The movement’s notion of freedom is distinctly non-neoliberal, and is tied to older visions of American freedom— freedom situated outside of market exchanges, and freedom from oppressive and exclusive laws and social arrangements. This freedom is about liberation, and has deep roots in the abolitionist, civil rights, and women’s liberation movements.

2. Repair and redress:

Achieving racial justice requires an honest reckoning of America’s legacy of white supremacy and violence. It requires taking concrete, reparative action to redress the legacy of harm that continues to shape our communities today. Drawing on the new history, repair and redress makes central the idea that an understanding of the past and affirmative actions to repair past wrongs are necessary for justice.

3. Material equity:

Moving beyond the neoliberal worldview that believed increased access and opportunity to the current system was sufficient to bring economic equality, today’s movement pursues equitable material outcomes and centers racial equity. True equity means equity of **outcome**, and **not** accepting the promise of “**opportunity**” within a system that continues to systematically exclude. It demands **redistribution of resources—**especially when wealth for some has been extracted from many—**and** a redistribution of **decision-making power**.

While distinct, these themes are not mutually exclusive, and cannot be siloed. In fact, many racial justice advocates argue assiduously for all of them. They are also important as individual analytical categories and as moral values. They distinguish today’s scholarly and movement thinking from the paradigms of neoliberalism and racial liberalism.

• Where neoliberalism and racial liberalism were ahistorical, the new thinking about racial justice requires a reckoning with the past both for moral reasons and so we can understand the specific harms of past policies and make recompense.

• Where neoliberalism—and, to a lesser degree, racial liberalism—focused on market exchange, material accumulation, and economic incentives, the new thinking about racial justice focuses on social incentives and the power and pull of collective action.

• Where neoliberalism and racial liberalism were about individual accomplishment within a constrained, increasingly financialized capitalism—within which politics was thin and transactional—the new racial justice thinking focuses on a more balanced form of action and agency: democratic politics as collective action, collective governance, and collective self-governance.

The new worldview brings the themes of freedom, repair, and equity together in a story of what America can become. We can have a more equitable, multiracial economy, society, and democracy. But to get there, we must honestly reckon with the real cultural, policy, and political reasons that people of color—Black, brown, Indigenous, Asian—have been subjugated, excluded, and “othered.” Achieving a more equitable economy and inclusive democracy requires centering the experiences, the voices, and ultimately the political power of Black Americans and other people of color.

The themes we detail below play multiple roles in today’s racial justice movement. They are important in and of themselves—evocative and powerful. They are related clearly to each other; for example, material wealth inequality is the result of historical injustice, and as such requires equity policies rooted in redress.

Finally, these themes have deep roots in the racial justice movement, but they also reflect universal values. As such, they might be able to connect what movement leaders are demanding to a broad, strong, and lasting political movement that has the support of a majority of Americans.

People and communities must have power over the shape and structure of their lives, and freedom and liberation from systems of oppression.

The distance from the end of the Civil War, with the birth of Black citizenship and civil rights, to the state-sanctioned beating and torture of Freddie Gray constitutes the gap between formal equality before the law and the self- determination and self-possession inherent in actual freedom—the right to be free from oppression, the right to make determinations about your life free from duress, coercion, or threat of harm. Freedom in the United States has been elusive, contingent, and fraught with contradictions and unattainable promises—for almost everyone.

-- Keeanga-Yamahtta Taylor (2016)

We must continue to decolonize our minds, communities, and sovereign nations. The decolonization of our communities and people is directly related to our ability to prosper.

-- NDN Collective (n.d.)

At its heart, the moral core of a post-neoliberal progressive vision is also the idea of “freedom”—not the narrow individualized market freedom of conventional conservatism, though, but rather the thick moral vision of freedom as emancipation from conditions of **structural inequality and subordination.**

– K. Sabeel Rahman (2019)

Central to today’s racial justice movement is an expansive vision of freedom and liberation. Advocates for a more expansive vision of freedom vary widely, from academics to activists. However, they share three important conceptual shifts from the neoliberal view of freedom, which focused on economic liberty.

First, today’s advocates seek the liberation of people who have been collectively oppressed because of their identities.

Second, they seek for those people not just the ability to freely contract within the economic marketplace, but instead a deeper sense of agency and self-determination over many elements of human life, from family decision-making to community governance.

And third, they see freedom as part of a broader justice, based not in an individual’s right to economic choice, but instead in a necessarily social form of non-domination.

As academics like Danielle Allen, Rohini Somanathan, Elizabeth Allen, and K. Sabeel Rahman have argued, a series of interrelated conceptual shifts is necessary for this type of freedom:

• Justice must move to a focus on non-domination, away from a reliance on the difference principle of John Rawls (2001), who argued for the greatest benefits to the least advantaged, and away from the multiculturalism of Charles Taylor (1994), who argued for a recognition of difference but also, according to critics, inadvertently focused on stigma.

• Genuine representation is not just about statistical mirroring: The goal is not to have a mathematically proportionate representation of people in groups, but to use lack of representation to question the driving forces behind inequalities.

• Our understanding of identity should move from fixed to fluid: Identity is a complex concept—identities are not static; they can change throughout the course of our lifetimes. If one accepts that individual identities are fluid, then the concept of social identity groups should also be thought of as fluid. Group identities are ever-changing and should be understood as emergent from shifting social, economic, and political processes (Allen and Somanathan 2020).

Freedom need not be situated in market interactions (Konczal 2021). Instead, an older, pre-neoliberal notion of freedom and liberation is ascendant, stemming from movements against systems of oppression, including the struggle for freedom of enslaved Black people from chattel slavery before the 19th century, and from racial terrorism, state violence, penal servitude, and mass incarceration.

Of course, the idea of freedom as liberation is not only academic. Freedom and liberation are rallying cries, central to today’s Movement for Black Lives. The movement for Black liberation is storied—from abolitionists in the 19th century to the Black Power movement and the Black Panthers in the 20th century. This is about both liberation and self-determination: the freedom to live outside of the dominant (white) gaze. Black radical feminists have also long argued for an intersectional freedom. In the words of the Combahee River Collective: “If Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression” (Taylor 2020).

The rising prison abolition movement also begins with freedom.22 “The history of policing that I became most interested in did not start with cops, but with freedom. The people who suffer the most from police violence descend from people who were once free from it,” writes Derecka Purnell (2021). “Border creation and patrol in response to Indigenous and Mexicans are just one example . . . To make the slave trade possible, capitalists, the owners of companies that profited from slave labor, paid people to catch, kidnap, purchase, and kill people who were free” (Purnell 2021).

This is an expansive vision of freedom. It is about the ability to truly live free, to chart your own life path without hindrance or fear because of the color of your skin. It is about freedom from police violence, freedom from worry that the water or air in your community might be polluted, freedom to vote and to govern, and freedom to live in a neighborhood of your choosing.

#### Stratification demands repair – wealth hoarding, theft, and exclusion lie at the heart of experiences with white domination.

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Many scholars and movement leaders argue for policy and legal change that centers freedom by taking seriously both group rights and the need to curb corporate dominance. They also argue for greater community control—often in the forms of participatory budgeting of municipal funds and shared governance over grants for community improvement initiatives. Others call for policies that replace funding for police departments and carceral institutions with investments that make communities safer by disrupting the conditions that lead to crime and eliminating the need for more carceral institutions.23 This kind of agency and self-governance is central to the demands of many community, labor, and environmental justice organizations, which argue that economic benefits, like federal resources, should not be put in the hands of private corporate actors, as they often are when community development programs are designed as tax incentives.24 Instead, these resources are owed to communities and groups that have been historically underserved and underrepresented. Decision-making control of those resources should lie directly with those communities, on the grounds that those who are closest to the problem have the deepest understanding of, and are also closest to, the solution.

As Mariame Kaba argues, “I am looking to abolish what I consider to be death- making institutions, which are policing, imprisonment, sentencing, and surveillance. And what I want is to basically build up another world that is rooted in collective wellness, safety, and investment in the things that would actually bring those things about” (Taylor 2021).

Truth and justice require a reckoning with America’s legacy of slavery, white supremacy, violence, and exclusion. We must not only acknowledge this history but provide repair by addressing and redressing the harms done.

The idea of reparations is frightening not simply because we might lack the ability to pay. The idea of reparations threatens something much deeper— America’s heritage, history, and standing in the world.

-- Ta-Nehisi Coates (2014)

I am a survivor of the Tulsa race massacre. Two weeks ago, I celebrated my 107th birthday. Today, I’m visiting Washington, DC, for the first time in my life. I’m here seeking justice, and I’m asking my country to acknowledge what happened in Tulsa in 1921.

-- Viola Fletcher (2021)25

The redress campaign wasn’t just about trying to gain monetary compensation. I mean, you figure three years of imprisonment and the 30 years of guilt and shame we lived with, $20,000 wasn’t going to abrogate all of that. But the money was part of the message. The American public didn’t give a damn until the minute we started demanding compensation.

– John Tateishi (2020)26

Today’s movement demands a true reckoning with the American past. Its arguments are rooted in a historical understanding of **systemic exclusion** and stratification: the 400-plus year exclusion of Black Americans from paid labor and from wealth building; the over-incarceration and criminalization of Black people; and the broader story of historic racial exclusion in the US—the genocide of Indigenous people, the theft of tribal lands and the breaking of sovereign promises to Indigenous peoples, and the deliberate second-class non-citizenship of Black and brown immigrants from Central and Latin America, Asia, Africa, and across the world. Racial justice, in this view, requires acknowledgment, accountability, repair, and redress.

Various movement demands range from those focusing directly on the need for reparations payments to descendants of enslaved Black people, to those demanding an overhaul of the US immigration system, to those who are seeking recognition of Indigenous sovereignty or of other historic harms suffered by people of color, often at the hands of the US federal government. Many communities have begun incorporating various elements of healing in their calls for repair, seeking to build a reparative society that addresses the trauma endured within oppressed communities over the course of generations.

Reparations for Descendants of US Slavery

Reparations for past and continuing harms has long been on the policy agenda for racial justice advocates. In particular, many reparations advocates argue for direct payment from the federal government to Black American descendants of US slavery (Darity and Mullen 2020). They focus specifically on the economic calculation of wealth lost when the promise of land to emancipated people was broken in the 1860s. They also count, as part of the debt that is owed, white wealth extraction from Black Americans from the 17th century to the present: from enslavement, lynching, sharecropping, prison labor, the redlining of property in majority-Black areas, and 20th century civil rights reforms that lacked economic recompense. Further, they argue that the federal government owes that debt, because the federal government is responsible for the laws that prevented Black people from earning wages and amassing wealth, and because it benefited directly from the slave trade (as did the British and other governments worldwide). As such, they hold that reparations paid by cities, states, or individuals are insufficient.

Centering the direct recognition of past harm to Black people is a markedly different approach to racial justice than a focus on access and opportunity, or even an approach focused on desegregation and affirmative action.

That said, one of the notable developments in the debate over reparations is the increased frequency of institutions and municipalities seeking redress and recompense for historical harms. In 2021, Congress held hearings to discuss potential redress for survivors and descendants of the 1921 Tulsa Race Massacre. Several universities, including Georgetown, Princeton, and Virginia Theological Seminary, have announced reparations funds specifically designed to recognize their own benefit from enslavement, and have focused on recompense for descendant communities (Lockhart 2019). These efforts—as well as other efforts led by cities like Evanston, Illinois, to tie housing funds to “reparations”—have been controversial among those in the larger reparations advocacy community, who say they distract from a full recognition of the debt that is owed (Darity and Mullen 2021). But these efforts do represent an important shift. Centering the direct recognition of past harm to Black people is a markedly different approach to racial justice than a focus on access and opportunity, or even an approach focused on desegregation and affirmative action.

JAPANESE AMERICANS’ FIGHT FOR REPARATIONS

Reparations campaigns, and the question of what is owed to whom, are not new in American history, and not limited to Black Americans. One of the most prominent campaigns has been the demand of the Japanese American community for recompense after the US government’s 1941–1945 incarceration of 110,000 people of Japanese descent, most of them American citizens. The campaign for reparations was hard-fought both within and outside of the Japanese American community, and in 1988, President Reagan signed the Civil Liberties Act, which offered a formal apology and $20,000 in reparations to those who had been incarcerated. Driven by activists in the 1960s and 70s, most prominently the Japanese American Citizens League (JACL), one core claim of the Japanese American reparations movement was the breaking of silence (part of the Japanese American ethos of shikataganai—“it cannot be undone”) and the public acknowledgment of internment and incarceration. Some Japanese Americans today have expressed solidarity with the Black-led reparations movement, out of the desire to be the “allies they never had themselves” (Hayman n.d.).

Indigenous Sovereignty

Indigenous movement demands for repair and redress center not just on any one policy but rather a broader call for sovereignty and a restoration of separate governance. As Professor Shaawano Chad Uran notes: “Tribal sovereignty is derived from the people, the land, and their relationships; tribal sovereignty was not a gift from any external government” (Uran 2018). Today, groups like the NDN Collective in its Landback campaign focus on dismantling the mechanisms that forcefully removed Indigenous people from their lands (NDN Collective 2020). The movement goes beyond monetary compensation for stolen land. As historian Roxanne Dunbar-Ortiz (2014) notes, “no monetary amount can compensate for lands illegally seized, particularly those sacred lands necessary for Indigenous peoples to retain social coherence.” The movement therefore connects calls for returning “Indigenous lands to Indigenous hands” to other demands for the dismantling and defunding of white supremacy, including the police, the military industrial complex, prisons, the criminal justice system, and ICE. The movement also demands the free consent of Indigenous people for all decision-making on Indigenous land stewardship and use—connecting the demand for freedom as self-determination with the demand for redress.

Reckoning with the US Immigration System

Immigrant justice activists demand a reckoning and overhaul to the US immigration system, which has grown out of a racialized system of labor categorization, especially for Asian and Latinx immigrants, that dates to the 1920s and was never fully reckoned with in the immigration overhauls of the 1960s. This is especially true for immigrants from Mexico and Central America. The numerical caps added to immigration law in 1965 meant that people from this region who had been living legally in the territorial United States for decades were suddenly, after Hart-Celler, deemed “illegal” (Hong 2015).

Immigrant rights organizations have been working for decades to challenge

the resultant US immigration system, which lacks a path to citizenship for 10.5 million undocumented people, creating deep injustices as well as distorted labor markets (Budiman 2020). The Trump administration’s deliberately heightened deportation and family separation policies shone a national spotlight on the trap that immigrants find themselves in, but it is a decades-old problem. Millions are without documentation, legal standing, or a path in any direction out of the purgatory created by policy decisions that are both ill-suited to the present and, in some cases, intentionally cruel.

This has given rise to demands that ICE be abolished. The broad criminalization of undocumented people is at the root of this part of the movement. Other movement demands for repair and redress include citizenship; refugee and asylum reforms; the right of return for deported people; clearing of the backlog in the immigration courts; and a significant increase in the numbers of immigrants, migrants, and refugees admitted legally to the United States.27

All these claims connect the present to the past: They demand broad public recognition of both past harms and present policy rooted in past racial discrimination and animus. These various policy agendas taken as a whole show clearly that systemic reform is not possible without a true historical reckoning.28

MATERIAL EQUITY

Equity goes beyond equal access and opportunity. It means equitable material outcomes, closing gaps—in wealth, income, health, criminal justice, education, and more—that have persisted for generations and worsened over the last half- century. It is about a distribution of resources and of decision-making power, with an emphasis not only on individual equity but on equity for communities that have historically been excluded.

Studying and working hard hasn’t been enough for Black Americans. Since the United States started tracking unemployment by race, the unemployment rate for Blacks has remained roughly twice as high as the white rate regardless of education . . . Wealth disparities persist with high levels of education, too . . . Black households in which the head graduated from college have less wealth than white households in which the head dropped out of high school.

-- Darrick Hamilton (2019)

When we come upon cases where the distribution of people in organizations and institutions and where allocations of social power and opportunities do not mirror population distributions, we need to identify the causes of those nonmirroring distributions and make a judgment about whether those processes reflect domination.

-- Danielle Allen and Rohini Somanathan (2020)

Equity is the superior growth model.

– Sarah Treuhaft, Angela Glover Blackwell, and Manuel Pastor (2011)

Issues of material equity—not just opportunity and access—are key to today’s demands for racial justice. This is because racial liberalism failed empirically in producing material equity—dealt a death blow by neoliberalism’s market-imposed limitations. Despite its promises, an “access and opportunity” focus yielded insufficient gains for people of color. In fact, the “race-neutral” governing logic of racial liberalism led to a rolling back of certain advances. On almost every measure (income, wealth, health, criminal justice), Black Americans have lost ground since the 1970s. In the years between 1980 and 2020, affirmative action, school desegregation, and housing desegregation were never fully enforced by law, and instead have faded both as legal and political priorities. As a result, racial wealth gaps have worsened for Black and Latinx Americans, and schools are resegregating (American Educational Research Association 2019; Chang 2018).

Low wages, weak job opportunities, and occupational segregation, combined with the divergent fortunes of so many Americans, have shown the limitations of race neutrality.29

In response, three key focuses have emerged in the agenda for material equity.

• Distributional outcomes. Scholars today are working to unmask the systemic structures of subordination, wealth extraction, and other forms of exclusion to identify the interventions needed to target systemic roots and impact outcomes.

• Wealth inequality. Advocates are focusing on the lived experience of racialized wealth inequality, helping to better illuminate the types of transformative interventions required to move beyond the older, race- neutral, meritocratic framework of “access and opportunity.”

• Community investment. Advocates are also focused on the collective, moving toward the types of deeper, structural reforms that lead to systemic investment in entire communities.

Distributional Outcomes

Material equity is about measuring well-being and the actual allocations of resources, acknowledging the shortcomings of our procedures and the necessity of structural transformation. The question is less about opportunity than outcomes. Inequality can be measured by wages, wealth, occupational and educational segregation, housing values, health access, criminal justice, and life expectancy. Scholars and movement leaders discuss the need to apply a much more critical analysis to the formulaic assumptions of institutions that directly influence policymakers’ decisions, as distributional outcomes are consistently and systematically lower for communities of color than for white Americans.

The US tax code, for example, greatly favors wealthy white people, while disproportionately burdening Black and Latinx taxpayers (Steverman 2021). Taxation of homeownership provides one clear example: Interest paid on mortgages is tax deductible, but renters do not receive similar benefits. This has a directly racialized impact; in 2017, only 41.8 percent of Black people owned a home, compared to the nearly 72 percent of white people who were homeowners (Choi 2020). Following the Tax Cuts and Jobs Act of 2017, the discrepancies between tax cuts for the wealthiest Americans and those for middle- and working-class Americans have been staggering: The average tax cut for the wealthiest 1 percent is about 50 times greater than for middle-income earners and 850 times greater than for low-income earners (Hamilton and Linden 2018). Without a greater emphasis on providing more support for those who are consistently burdened and left behind by our policy decisions, policymakers will continue to perpetuate disparities in outcomes.

Wealth Inequality

The second collective focus is on the lived experience of wealth inequality, as compared to wage inequality alone. For the past several decades, there has been a standard story about labor income inequality that focuses on growing disparities within the workplace. This is the story of the “1 percent,” the inequality between top executives and their employees. This inequality has increased dramatically since 1980, with the top 1 percent roughly doubling their share of income and returning it to the levels seen before the Great Depression (Zucman 2019).

The dispossession of previous generations cannot just be overcome by energy and talent; those who are the victims of plunder will always be working at a disadvantage.

An emerging consensus on inequality has expanded on this story and led to a closer examination of racial capitalism, and wealth itself—how, whether held in housing or land, wealth has been systematically stripped from people of color and has served as a mechanism for intergenerational transfer of power. The compounding nature of wealth surfaces an important argument: The dispossession of previous generations cannot just be overcome by energy and talent; those who are the victims of plunder will always be working at a disadvantage. The material equity policy agenda reflects this by focusing on demands for reparations and other forms of redress.30

[BEGIN FOOTNOTE 30]

30 Stratification economists argue that economies are intentionally structured to maintain the economic, social, and political power of the dominant group. Proposals by stratification economists William A. Darity, Jr. and Darrick Hamilton have found their way into mainstream policy discourse. For example, Hamilton has argued for “baby bonds,” a form of capital building for young people that would, if designed properly, especially help Black and brown Americans (Berlin 2019). Racial wealth scholars have also argued for a federal job guarantee program, which would provide jobs to those who need them, act as an automatic stabilizer to maintain levels of employment throughout economic crises, and confer a legal right to employment, thus transforming our labor market by providing a floor for wages and benefits and a different level of competition for private-sector employers (Paul, Darity, Hamilton, and Price 2017).

[END FOOTNOTE 30]

#### Reconstructionist archival method engages universal potential of black freedom struggle – DuBois’ Black Reconstruction demonstrates the importance of confronting the erasure of black agency in reconstructing American democracy.

Rebecka Rutledge **FISHER** English & Comparative Lit @ UNC **’13** “Democracy’s Remains: The Hermeneutic Historiography of Black Reconstruction” *South Atlantic Quarterly* 112:3 p. 510-513

Following Outlaw, in Souls and Black Reconstruction one encounters a philosophy of history that takes as its conceptual object black existence and black being in America. Especially as it appears in Black Reconstruction, Du Boisian philosophy holds that hegemony can never be total and that there is always space for radical thought, a space out of which dynamic new formations of thinking and praxis emerge. In Black Reconstruction such radical thought takes shape in the gap between the black actant and the discourse of democratic legal ethics—that which purports to provide cover, protection, acceptance, and significantly, qualified definitions of the human (who may be identified as a human being and who cannot, alternatively, reach the heights of such an interpellation) existing within the boundaries of the nation-state. This gap is that space that Du Bois names in chapter 1 of Souls: the space lying “between” himself as paradigmatic of those African Americans whose very humanity is persistently cast into question and even negated, and the “other world” of white existence and insufficient democratic practice. In light of Du Bois’s historicization of and inquiry into that space between, we can see that his historiography takes shape not only as a form of intellectual production but as a form of social praxis. While some4 may consider politically engaged historiography such as Black Reconstruction to be unequal to praxis, I argue that Du Bois’s 1935 “magnum opus,” as Herbert Aptheker (1973: 556) called it, embraces at once the dictum of action and “doing” to which the idea and etymology of praxis call us.

Du Bois’s philosophy of history is a hermeneutic historiography that carries out a certain ethical and moral work. It performs the sort of “critical ontology of ourselves” Michel Foucault (1984: 17) describes in “What Is Enlightenment?” such that it serves as a propaedeutic that lays a foundation, background, and foresight for a political program of effective and progressive change. Du Boisian hermeneutics is, then, placed in the service of emancipation and social liberation, tasks that would, much later in Western philosophy, be outlined and advocated in the work of Jürgen Habermas (1984), for instance. Habermas, representing the views of the Frankfurt school some decades later, would argue that hermeneutics must be complemented by a critical theory of society. Du Bois demonstrated throughout the early decades of the twentieth century that it must also, more importantly, be accompanied by a practical and pragmatic program of social activism on the ground, rather than in simply philosophizing about the need for change. In its effort to bring such change about, Black Reconstruction adopts a particular ethos vis-à-vis the annals of American history, an archival trove of testimony that, as his biographer David Levering Lewis (2000: 349–78) has made clear, stood between Du Bois and his object of study as a high and nearly impenetrable barrier. As both sign and symbol, the archive stood in clear relation to the “prison-house” (1986b: 364) of race that closed about not only the black boys and black girls of Du Bois’s youth but also the black scholars of his more advanced age. While it promised to white historians of the 1930s the testimony of the past, if only they would fairly heed it, the archive stood largely unyielding before Du Bois and his scholarly cadre.5 To take up the hermeneutic journey that black witnesses and agents from the past called them to commence, they needed necessarily to imagine alternative historical beginnings and an alternative historiographical practice. For Du Bois, American historical memory regarding Reconstruction had to be cast into doubt; up to his time, only its forgetting of, and silence on, the role of blacks as contributing agents of democracy had been assured (through, for instance, the Dunning school of Reconstruction historiography, which portrayed the Reconstruction era as a tragic one due to blacks’ active political participation in it6). In response Du Bois’s historiography proffered a genealogy of black thought and action through an archaeological historical design.

Du Bois’s fusion of these scholarly techniques exemplifies a black philosophical hermeneutics that takes shape through a “reconstructionist” methodology. I realize there may be some confusion with my use of this term, since my essay takes for its subject Du Bois’s hermeneutic historiography of the Reconstruction era. I will try to clarify by pointing out that among hermeneutic approaches to historiography is one referred to as a “reconstructionist” method. This method, which may be said to derive from Wilhelm Dilthey, seeks to interpret meaningful human actions and events through an active reconstruction of the meanings and intentions of historical actors from the historian’s point of view. Thus the reconstructionist method seeks a rapprochement of the horizons of both historian and historical actor**.** In this vein, the historicist method Du Bois developed proceeded via the fusion of his own historical horizon with that of the black reconstructionists of the late nineteenth century (e.g., Frances E. W. Harper, Frederick Douglass, and the myriad Reconstruction agents Du Bois discusses at length throughout Black Reconstruction). The term “reconstructionist” methodology thus serves us somewhat serendipitously: a reconstructionist approach to historiography compellingly resonates with Du Bois’s argument in Black Reconstruction, given that he saw the black reconstructionists of the nineteenth century as historical actors who had valiantly sought to “reconstruct” American democratic ideals. To grasp the point, we need only recall Du Bois’s original title for his “magnum opus”: Black Reconstruction of American Democracy**.**

The hermeneutic approach I describe here necessitates a reconstruction of the period’s events in order to conceptualize and characterize what indeed took place. In addition to discerning the “what happened” of the period, the historian will also aim to answer the imposing “why” questions. To provide these answers, an explanation is called for: an elucidation of the background circumstances and human choices that brought about the outcome. For Du Bois, this meant “reconstructing” a narrative of the events that framed the Reconstruction period in such a way that the consciousness of both the enslaved and the free was restored to the historical record. As Du Bois writes in the final chapter, “The Propaganda of History”: The chief witness in Reconstruction, the emancipated slave himself, has been almost barred from court. The written Reconstruction record has been largely destroyed and nearly always neglected. Only three or four states have preserved the debates in the Reconstruction conventions; there are few biographies of black leaders. The Negro is refused a hearing because he was poor and ignorant. . . . The result is that most unfair caricatures of Negroes have been carefully preserved; but serious speeches, successful administration and upright character are almost universally ignored and forgotten. . . . In other words, every effort has been made to treat the Negro’s part in Reconstruction with silence and contempt. (1992: 721)

Du Bois’s reconstructionist methodology is distinguished not only by its attention to what he himself underscores as an effort of narration and interpretation that emerges from a close and revisionist reading of the historical record. It also sheds light on Du Boisian processes of what C. L. R. James (1973: 115) referred to, in another context, as “creative universality,” since it raises the welcome conviction of possibility. It is, thus, constitutive of the ideal of universal freedom**,** which, as Du Bois makes clear in Black Reconstruction, had been stripped from the American practice of democracy. As Lewis Gordon would have it, and one finds ample grounds—especially in this instance—on which to concur, the theorist’s engagement in Africana thought constitutes “the liberation writer’s effort to contribute to the construction of new forms of life” (2000: 3–4). In Du Bois’s praxis of hermeneutic historiography, the past is reconstructed not only in a political effort to reframe the present but also to point in useful ways toward a viable future for black life.

Du Bois’s work on the postbellum period both in Souls and in Black Reconstruction emerges as both concept and theory, and advocates a specific hermeneutic methodology in his quest for a humanistic and democratic resolution to the so-called Negro problem that persisted some seven decades after the end of America’s Civil War. Though Martin Heidegger’s concept of human being and its possibilities will not figure significantly in my consideration of such existential and phenomenological tropes such as the color line and the “feeling” of “being a problem,” his and Ralph Ellison’s thoughts are important to recall in this moment for their resonance with Du Bois’s thinking on the historicity of black being. Ellison’s novel Invisible Man (1952), in tandem with his belletristic writings about literature and culture, gives rise to an insistent meditation on the notion of possibilities as a theme that defines the American principle of democracy and is central—in Ellison’s thought—to what it means to be human.7 For Du Bois, as certainly as for Heidegger and Ellison after him, the most significant possibility of human being is action and caring in the realm of the temporal—moral praxes of the utmost importance. Du Bois’s historiographic praxis makes use of conceptual metaphors that compellingly reveal the black ontological condition or situation of experience under examination in his work. In all of this, hermeneutics emerges as the most forthright historiographical method by which Du Bois undertakes an answer to the questions made manifest in his conceptual metaphors. The question that regularly emerges for the reader is not simply what historiographic method is best suited to the historiography of black folk but also what should one do in light of the new knowledge this revisionist historiography grants the reader.

# 2AC

## Case

## New Affs Bad

### 2AC – AT: New Affs Bad

#### Studies prove.

Annie Murphy **Paul 15**. Magazine journalist and book author who writes about the biological and social sciences. 8-1-2015. "Researchers Find That Frequent Tests Can Boost Learning." Scientific American. https://www.scientificamerican.com/article/researchers-find-that-frequent-tests-can-boost-learning/

According to Karpicke, retrieving is the principal way learning happens. “Recalling information we've already stored in memory is a more powerful learning event than storing that information in the first place,” he says. “Retrieval is ultimately the process that makes new memories stick.” Not only does retrieval practice help students remember the specific information they retrieved, it also improves retention for related information that was not directly tested. Researchers theorize that while sifting through our mind for the particular piece of information we are trying to recollect, we call up associated memories and in so doing strengthen them as well. Retrieval practice also helps to prevent students from confusing the material they are currently learning with material they learned previously and even appears to prepare students' minds to absorb the material still more thoroughly when they encounter it again after testing (a phenomenon researchers call “test-potentiated learning”). Hundreds of studies have demonstrated that retrieval practice is better at improving retention than just about any other method learners could use. To cite one example: in a study published in 2008 by Karpicke and his mentor, Henry Roediger III of Washington University, the authors reported that students who quizzed themselves on vocabulary terms remembered 80 percent of the words later on, whereas students who studied the words by repeatedly reading them over remembered only about a third of the words. Retrieval practice is especially powerful compared with students' most favored study strategies: highlighting and rereading their notes and textbooks, practices that a recent review found to be among the least effective. And testing does not merely enhance the recall of isolated facts. The process of pulling up information from memory also fosters what researchers call deep learning. Students engaging in deep learning are able to draw inferences from, and make connections among, the facts they know and are able to apply their knowledge in varied contexts (a process learning scientists refer to as transfer). In an article published in 2011 in the journal Science, Karpicke and his Purdue colleague Janell Blunt explicitly compared retrieval practice with a study technique known as concept mapping. An activity favored by many teachers as a way to promote deep learning, concept mapping asks students to draw a diagram that depicts the body of knowledge they are learning, with the relations among concepts represented by links among nodes, like roads linking cities on a map. In their study, Karpicke and Blunt directed groups of undergraduate volunteers—200 in all—to read a passage taken from a science textbook. One group was then asked to create a concept map while referring to the text; another group was asked to recall, from memory, as much information as they could from the text they had just read. On a test given to all the students a week later, the retrieval-practice group was better able to recall the concepts presented in the text than the concept-mapping group. More striking, the former group was also better able to draw inferences and make connections among multiple concepts contained in the text. Overall, Karpicke and Blunt concluded, retrieval practice was about 50 percent more effective at promoting both factual and deep learning.

## Aymara CP

### 2AC – AT: Aymara CP

1. The political is a discursive assembly – circulating accessible ideas among students is effective and necessary.

Henrik Paul **BANG** University of Canberra · IGPA Institute for Governance and Policy Analysis **’15** *Foucault’s Political Challenge: From Hegemony to Truth* p. 27-31

Reconfiguring the topography of the common

Agamben is the one who best describes how the conversion of political authority into a superpower is brought about by those who see the problem of political power from the vantage point of an opposition between law and bare life. He makes use of Foucault’s early distinction between sovereignty and biopower, turning what Foucault describes – first as an opposition in Abnormal (A: 2003), and later on in Security, Territory, Population (STP: 2007) as a difference between sovereignty and security – into an identity, correlating the exceptionality of sovereignty with the exception of bare life. Hence, Agamben can translate the radical suspension of politics in the exception of bare life into the law of modern democracy, as defined by both Arendt and Kant. Biopolitics becomes democracy’s accomplice as a bare life between life and death. Hegemony becomes a mediation of Foucault’s notion of biopower as control over life and Schmitt’s notion of sovereignty as the power to decide on the state in which normal legality is suspended. The signature of hegemony shifts to one which positively intervenes between human and natural life as a new, more liberating form of domination for governing, neither the subject nor the enemy, but the sacred life of the people as a population. Or, as Rancière synthesizes Agamben’s attempt to overcome the opposition between absolute power and human rights (2010: 65–66), Democracy’s secret – the secret of modern power – can then emerge into full view. State power, now, is concretely concerned with bare life, itself no longer the life of the subject that the power wants to repress, nor the life of the enemy that it has to kill, but, Agamben says, a ‘sacred’ life – a life taken within a state of exception, a life ‘beyond oppression’. This signature of hegemony ‘beyond oppression’ presents itself as a command from above to show duty to otherness in political communities. Democracy as obedience to the rights of the Other in the res publica sweeps aside the heterogeneity of political dissensus in the name of a more radical heterogeneity. According to Rancière, this is to neglect how ‘dissensus is not a conflict of interests, opinions or values; it is a division inserted in “common sense” ’ (2010: 69). Dissensus is an ongoing dispute over what is given, and the frames in which we perceive and understand things as given. This is also how Foucault interprets politeia : democracy is not a matter of human rights; it is about the capability and knowledgeability of political subjects to place the scenes of dissensus in time and space. Rancière illustrates this point with the political struggles of women in Western history (2010: 69, emphasis in original): Women, as political subjects, set out to make a twofold statement. They demonstrated that they were deprived of the rights that theyhad thanks to the Declaration of Rights and that through their public action that they had the rights denied to them by the constitution, that they could enact those rights. They acted as subjects of the Rights of Man in the precise sense that I have mentioned. They acted as subjects that did not have the rights that they had and that had the rights they had not. This is what I call a dissensus: the putting of two worlds in one and the same world. Expressing political subjectivity in a political community is not a matter of being liberated from something or someone by something or someone. It is to reject, in one’s actual practice of freedom, being subjected to any political institution or human being. It is to deny that there is a superpower living in a sphere not only different from but also superior to the political community of free and equal subjects. It is to dismiss any categorizing of political actors by a Herrschaft making distinctions between superiors and subordinates, rulers and ruled, strong and weak, and so on. In a way, Foucault is pursuing exactly the same dual tactics as does Rancière above when he states that ‘nowadays, the struggles are against the forms of subjection – against the submission of subjectivity – is becoming more and more important’ (EW3: 351). He denies that mechanisms of subjection ‘merely constitute the “terminal” of more fundamental relations’ (EW3: 352), such as ideological or economic structures. Furthermore, like Rancière, Foucault is skeptical toward those who reduce subjectivation to a matter of ‘unfolding’ the program for a universal reason freed from domination in history, as if it were ‘possible to say that one thing is of the order of “deliberation” and another is of the order of “oppression” ’ (EW3: 354, emphasis in original): I do not think that there is anything that is functionally – by its very nature – absolutely liberating. Liberty is a practice . So there may, in fact, always be a certain number of projects whose aim is to modify some constraints, to loosen, or even to break them, but none of these projects can simply by its nature, assure that people will have freedom automatically, that it will be established by the project itself. Finally, like Rancière, Foucault denies that the exercise of hegemony in, and through, discursively structured and institutionalized asymmetries of power and signification is at the core of politics (FL: 444): It is within the field of the obligation of truth that it is possible to move about in one way or another, sometimes against effects of domination that may be linked to structures of truth or institutions entrusted with truth. It is a shame Rancière never sees this affinity between Foucault and himself when it comes to identifying how a political subject combines power, self-governance and knowledge as one who ‘can’, ‘will’ and ‘understands how to’ practice her freedoms inside a political community. Rather, he believes that ‘Foucault ... was never interested in this question, not at a theoretical level in any case. He was concerned with power’ (2010: 93). But he was interested. Unlike Mouffe and Rancière, Foucault does not analyze agonistic democracy in the shadow of antagonism and dissensus; nor does he reduce it to a manifestation of either hegemony or the popular will (EW3 1994c : 342): Rather than speaking of an essential antagonism, it would be better to speak of an ‘agonism’ – of a relationship that is at the same time mutual incitement and struggle; less of a face-to-face confrontation that paralyzes both sides than a permanent provocation. To Foucault, agonistic democracy does not derive from any exception but from the unceasing tension between freedom and truth, politeia and parrhesia in ongoing processes of authorization and normalization. Problematization is at the core of these processes as chronic two-way contestations of the discursive practices of authority and community inside political systems: the problematization of how people are governed (govermentality) depends on the ethical elaborations of the subject (knowledge) for making a difference (power), whether acting as an incumbent of political authority or as a lay member of a political community. Therefore, rather than speaking of authorization and normalization as opposed to practices of subjectivation and intersubjectivation in political communities, and vice versa, we should consider their mutual autonomy and dependence (EW3: 343): The analysis, elaboration, and bringing into question of power relations and the ‘agonism’ between power relations and the intransitivity of freedom is an increasingly political task – even, the political task that is inherent in all social existence. The relation of political authority as power-knowledge to governing, subjectivation and the practice of freedom is the basis of recurrently problematizing and criticizing any claim to political primacy in history. If Rancière had delved deeper into Foucault’s analyses of government by truth, he would surely have seen that Foucault’s critique of the sovereign state and the security state grows out of his conception of the political as an ensemble of discursive practices of power and freedom. 11 The state is not identical with the political, but one of its emergent properties. The duality of political authority and community It is easy to understand how Foucault could become identified with both the state of exception and the political community of exception. If one, for example, reads only Foucault’s early work on madness and discipline, the power/resistance dichotomy is the first that leaps out at one, as an indication of ‘the necessity of combat and the rules of strategy’ (DP: 308). The same holds good for his later lectures in STP (204), in which he speaks of ‘the coup d’Etat [as] the irruptive assertionof raison d’Etat ’. Statements like these cannot but leave the impression that Foucault’s politics is about sovereignty vs. law, power vs. resistance, hierarchy vs. anarchy, police vs. laypeople and so on. However, when Foucault focuses so much on statism and power/resistance in modernity, it is not because he thinks that hegemony and antagonism are at the core of the political, but precisely in order to problematize them both. To him, problematizing conflict means showing how things could be different (PK: 64): If one is interested in doing historical work that has political meaning, utility and effectiveness, then this is possible only if one has some kind of involvement with the struggles taking place in the area in question. I tried first to do a genealogy of psychiatry because I had had a certain amount of practical experience in psychiatric hospitals and was aware of the combats, the lines of force, tensions and points of collision which existed there. My historical work was undertaken only as a function of those conflicts. Foucault was from his young days actively engaged, practically as well as analytically, in problematizing how modern science and society continuously and systematically seek to cover up their exclusions behind a veil of rationality and legitimacy. To him, critique is not primarily to ‘scrutinise and restrain arbitrary power’ (Keane 2013: 245). It is, more than anything else, to problematize how, the more undistorted and thickly legitimated political decisions and actions appear and are believed to be, the better, more smoothly and unproblematically hierarchization, disciplinary subjection and policing function. In presupposing that political domination presents no special problems to democracy when first proved to be effective and legitimate for protecting and serving ‘We, the People’, modern reason turns a blind eye to its exclusions of otherness as ‘anomalies’ in or ‘deviations’ from the existing order. Authentic otherness is excluded from view a priori by reference to the necessity for removing any temporal or arbitrary disorder from society’s underlying general or necessary order. This is also Agamben’s and Rancière’s critique of modernity and the very reason why they both argue that the political is prior to law, just as dissensus is prior to consensus. But to Foucault it is the existence of the political authority relationship between political authorities and laypeople in their political communities that makes it all possible. It is not the state, whether as a sovereign state or as a security state, that identifies the political. Nor is it the democratic political community, which, as Rancière puts it (2010: 213, emphasis in original), breaks with consensus [in its] abolition of every form of arkhe , of every way of producing a correspondence between the places of governing and a ‘disposition’ to occupy these places. The politics of hegemony and dissensus are but two examples of the selftransforming capacity of political authority as a relationship involving freedom and power in both directions which could be balanced through the good parrhesia of freedom and truth. Foucault illustrates the fundamental duality of political authority and political community in his lectures from 1977 until he dies in 1984. He sets out by problematizing the conception of sovereignty as a unified entity, making up the space of the political as a coercive superpower over subjects within the prince’s or king’s territory. He shows how the original dilemma of sovereignty is its neglect of the facts that: ● one cannot govern a population as one governs a territory; ● g overning the construction of space is not the same as protecting and serving a home or place; ● t he functional delimitation of the political from all other necessary aspects of group life is a condition of demarcating the political territorially. The political is a general societal condition like those of the economic, the cultural and the religious; it is a constitutive aspect of all social and human relations, from the local to the global. Furthermore, its generality lies in its transformative capacity to do what could not be done without it: authorizing and normalizing the way policies are articulated, performed, delivered and evaluated**.** The fulfilment of these tasks does not depend on the maintenance of a centralized form of legitimate domination for acquiring effective control over subjects and society. It is necessary to accomplish them, however small the actual degree and extent of control the political authority may possess in relation to other political and nonpolitical forces, such as an informal ruling elite or an economic class. In this way, it is the notions of function, space, population and, most of all, the power-knowledge of subjectivation that show why Foucault wants to ‘decapitate the king’ and connect the politics of exception to the policy of cooperation for handling or solving common concerns. The analysis of political authority and democracy as revealing the identity of opposites does not only block a problematization of the juridical–statist identification of the political with an overarching norm that needs a hegemonic superpower to assert itself in the validation, rather than in the suspension, of this norm (Agamben 2005: 86). It also hinders the recoding of the political as a complex or ensemble of discursive practices for deciding on and doing policies in an acceptable manner, which is distinctly open to the possibility of self-governance and co-governance from below. Finally, to make the quest for social control within one’s territory the primary task of democratic government is not merely to reduce the common interest to a superpower’s national interest; it is also to disregard how a central political authority, in the long run, can only become stronger by enabling and empowering the population to get better at governing and taking care of itself as a community of equal subjects. Beyond opposition to difference Inside the political, democracy and parrhesia could be made to work together as the simultaneous manifestation of contingency and necessity; but only if we can transcend the mal adjustment of the democracy of equals and the ascendancy of parrhesia that the politics of exception expresses. This either turns the citizens into a superpower of dissensus and rupture or includes the parrhesiast as one more alterity in the community of equals ‘constituted through polemicizing over the common’ (Rancière 2010: 104). In any case, the result is that ‘the game of democracy and of truth-telling, do not manage to combine and suitably adjust to each other in a way which will enable this democracy to survive’ (GSO: 181). Rather, it insulates the political authorities from the political community with which they are endogenously connected as parties to a political authority relationship that requires the commons’ acceptance and recognition in order for it to continue in, and through, history. Political authority is constitutively open to exception made by political authorities or laypeople in their political communities. However, a minimal degree of cooperation between them is required for their continuous restructuring of their political regime and their relevant nonpolitical contexts – sometimes in the face of violent ruptures, difficult struggles and high-consequence risks (Bang 2009a, b, 2014). Obviously, if self-governance and co-governance are to become the basis of political community, then parrhesiast political authorities are required who can see the truth, are capable of telling it, are devoted to the pursuit of common concerns, and are generally reliable, honest and incorruptible. However, this is not the signature of hegemony, but the sign of a political authority with integrity that decides and acts (GSO: 178) on the basis of a democratic structure, a legitimate ascendancy exercised through a true discourse, and [as someone] with the courage to assert this true discourse. Thus, Foucault’s political analysis of government by truth is not founded on any claim to the primacy of either conflict or consensus, and does not give priority to either the political authority or the political community. In fact, the conception of the good political parrhesia moves political analysis beyond all rulers–ruled oppositions. It compels political researchers to conduct their analysis in light of the possibility that a good cooperative circle of political communication and interaction between political authorities and laypeople could be made to occur, if only both parties to the authority relationship would accept and recognize the real and necessary political difference between the interdependent logics of politeia and parrhesia . Hence, to critique modernity in Foucault’s manner is not equivalent to identifying the political with an extraordinary decision, which then is coercively imposed on people. Nor does it compel us to conclude that the circle of political authority and political community merely expresses the political construction of ‘a paradoxical world that puts together two separable worlds’ (Rancière 2010: 39). That only becomes the case if acceptance and recognition of political authority is equated with a forced compliance induced through disciplinary subjection and policing. Then, evidently, the ethical life among equals inside political communities will appear as always and intrinsically opposed to political authorities’ world of lived necessity. The virtue of being a political lay actor in a democratic political community is not just that one can act without a command, ‘ as if a command was not needed’ (Bauman 1995: 59, my italics). It is, rather, to know that a command/obedience relation is not necessary for cooperating with political authorities in the articulation and performance of common concerns. What is needed is merely the acceptance and recognition of the difference between being a political authority and a lay member of a political community. Placing political cooperation before consensus and dissensus The duality of political authority and political community comes out clearly in Foucault’s specification of the difference between parrhesia and democracy (GSO: 183–184): Not everybody can tell the truth just because everybody may speak. True discourse introduces a difference or rather is linked, both in its conditions and its effects, to a difference: only a few can tell the truth. And once only a few can tell the truth, once this truth-telling has emerged into the field of democracy, a difference is produced which is that of the ascendancy exercised by some over others. True discourse and the emergence of true discourse underpins the process of governmentality. If democracy can be governed, it is because there is a true discourse. Does this signify that Foucault, after all, is speaking of parrhesia as power over others? Well, some would probably say he is, but I think he is not, at least not in the normal sense of domination as class power or symbolic violence, manifesting a conflict of interest or meaning in which resistance is repressed and wills are subdued by the stronger class or superior will to knowledge (Bourdieu 1992, Devine and Savage 2005, Lukes 2005, Poulantzas 1975). We must remember that the good parrhesia grows out of democracy in the authority relationship, and, therefore, that the authority relationship between authorities and laypeople, in the ‘original position’, must be functional before it can, for example, take shape as a command/obedience relationship. To stress the importance of ascendancy for the good political parrhesia is not the same as claiming that politics will always be dominated by circulating power elites or classes. As distinct from elitists like Michels, Mosca and Pareto, Foucault does not classify people inside the political according to the power and control they actually hold. He merely wishes to point out the difference between those few who are the occupants of the political authority roles and the many ‘ordinary’ members who are not. This may also be why he himself, in the end, felt compelled to make an explicit distinction between power and domination, as in this interview from 1982 (FL 1996 : 417): Domination is a particular case within the different possibility of power relations. You can have a power relation without this type of domination. But what makes me uncomfortable with these analyses – at least those by Habermas – is the fact that when he speaks about power, he always understands it as domination. And he translates ‘power’ by ‘domination.’ To exercise political ascendancy is not the same as exercising command and control over others. Political authorities need not be coextensive with the politically relevant members; nor do they have to be driven by the goal of appropriating power above all else (cf. Easton 1965b: 214–215). Furthermore, however little actual control laypeople may possess under given circumstances, it is still necessary for them to systematically articulate and perform policies that most people will accept and recognize as binding, at least most of the time. However, the point is that some basic faculties are required to be in a position to exercise good political parrhesia . You cannot just walk in from the street and do so. Special political competences are required, developed from day-to-day experiences with the risks, problems and challenges that have to be dealt with in, and through, systematic political decision and action. Political authorities may sometimes function as puppets for certain dominant socioeconomic interests or identities. Yet, no matter how little actual control they possess, they are still directly and immediately responsible for how policies are authoritatively formulated, programmed, ‘packaged’ and carried out for society and the population in day-to-day political life. Likewise, laypeople in their political communities may be downtrodden by a totalitarian or authoritarian regime and hindered in all ways from exercising their creative political capacity to affect the production of political outcomes. Nevertheless, not even the most totalitarian regime can afford to ignore the political fact that it could not exist for a moment if laypeople suddenly refused to accept and recognize themselves as bound by authority, for whatever combination of reasons. The Eastern European and Chinese revolutions should at least have taught us that much. What we should emphasize much more today is the possibility of introducing the model of good parrhesia as an alternative to the models of the extraordinary decision-maker and the ordinary exception. What laypeople do in their political communities is not reducible to a matter of repoliticizing what has been depoliticized by the police. It is not merely this notion of democracy as dispute and struggle that is intrinsic to understanding what political community is all about. It is, more than anything else, the ability of laypeople to continuously problematize how policies are articulated and performed in time-space. Whereas politicization is tied to the logic of dissensus and consensus, problematization is connected with the logic of accepting and rejecting. Where problematization is continuous, politicization is discontinuous. Thus, problematization provides ‘ordinary people’ inside their political communities with a much more long-lasting and general political significance and relevance than is possible in politicization. It makes the never-ceasing spontaneity and creativity of ordinary citizens the ground for developing the politics of truth of the parrhesiast, by igniting and keeping the political authority responsive to conducting the circle of the good parrhesia.

#### Their infatuation with the liberatory politic of Indigenous languages is a idealization of pre-colonization that defines Native people via White rule. This singular point creates isolationist politics that erase indigenous agency.

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Here, I hope, is an apt analogy. Moorish rule in the Iberian Peninsula and much of present-day France lasted for over 700 years. Does anyone periodize the history of Spain or Portugal according to that long history of colonial rule? Or do we wish to deny that it was an instance of colonialism? Meanwhile, nowhere in Africa, except South Africa, did European colonialism last for up to 100 years. Yet, we periodize African history with colonialism as its singular pole. That cannot be right. I do not need multiple examples. But it is instructive that South Korea, instead of using Japanese colonialism as a significant or defining element in its history, treats it as a mere unfortunate interlude and maintains a periodization regime that is indigenous to its dynastic history, religious, and intellectual movements. Neither does India periodize its history by prioritizing British colonialism even though it lasted longer there and had a much more lasting impact— chieftaincy is no longer part of India’s governance, for instance—on Indian life and thought. I would like to suggest that our preoccupation with decolonizing is inseparable from our placing colonialism as the singular pole for plotting the grids of understanding and narrating African life and thought. Our past— designated “precolonial”—is understood in terms determined by it and our future—postcolonial—is tied to our obsession with leaving it behind. How we expect to do the latter while privileging it in periodizing our history and characterizing our discourses beats me. Now, our relationship with colonialism is necessarily and justifiably negative. That is as it should be. But European colonialism was not the sole alien movement that played a significant role in Africa’s evolution. We also have Christianity from its very origins, Islam soon after its founding, and motley other alien interactions shaping African phenomena. And while we are fixated on modern European colonialism, we neglect that much of North Africa was victim of Roman, Byzantine, and Ottoman colonialisms before the modern European; and Arab colonialism was present on the East African littoral. If there never was a time when any parts of Africa were hermetically sealed from the rest of the global circuit of traffic in human discourses and ideas, then to suppose that much of what needs to be changed or made sense of in our current experience is best traced to modern European colonialism is, minimally, implausible and possibly wrong. Those who take this route owe us a case for privileging modern European colonialism in our philosophy of history in Africa.25 They must make clear the causal lines between the phenomena they wish to decolonize and this specific colonialism. This does not seem to the be case, for the most part. We must separate, and do so meticulously, what pertains to colonialism from other influences that we all too often lump together with it. For, given our justifiable hostility to colonialism, if we also see it as the herald of other phenomena that we believe to be part of the constitution of our “colonial mentality,” as Fela Anikulapo Kuti would put it, it stands to reason that we would also be dubious of those bequeathals, too. This is why modernity continues to evoke negative responses from African scholars. Yet, again, as I have argued in How Colonialism Preempted Modernity in Africa, at least in West Africa, contrary to accepted wisdom, modernity came there before colonialism, and the imposition of formal colonialism was what preempted the transitions to modernity that were afoot in the region through the agency and under the direction of African converts to post-Reformation Christianity at the beginning of the nineteenth century. Because neither Ngũgĩ nor Wiredu considered these possibilities, many scholars of decolonization influenced by them are unable or unwilling to consider that a lot that they associate with colonialism and, therefore, deserving of being shunned, can actually be fruitfully considered, for good or ill, independently of colonialism. I come back to this point presently. Both insist that we should deploy African languages in writing a truly African literature (Ngũgĩ), and we should think philosophical concepts through our original languages (Wiredu). Leopold Sédar Senghor’s love of the French language was at the base of Ngũgĩ’s brutal takedown of him as a stooge of European cultural imperialism.26 He was no less scathing towards Chinua Achebe’s pragmatic embrace of English as the language for his writing. He insists that only those works written in African languages can be properly designated “African novels.” He avers: But some are coming round to the inescapable conclusion articulated by Obi Wali with such polemical vigour twenty years ago: African literature can only be written in African languages, that is, the languages of the African peasantry and working class, the major alliance of classes in each of our nationalities and the agency for the coming inevitable revolutionary break with neo-colonialism.27 A few consequences follow from not separating colonialism from other causative agents in the evolution of African phenomena.28 In addition to the problems that we earlier identified respecting language, there must be something about the syntax of the colonial languages that makes them impervious to domestication by African thinkers. As a result, no matter what idioms Africans introduce to those languages, they would remain unmistakably, irredeemably alien in the African context. Simultaneously, there can never be a time that we can say that their African users have sufficiently domesticated them such that we can talk of African versions of the relevant languages. None of these outcomes is plausible. Hence, my question: Have Africans the capacity to domesticate borrowings, from language to cuisine, from religion to politics, from music to literature, sufficiently to make them unrecognizable to those from whom they were borrowed? Or, at least, to make the original owners see, possibly even acknowledge, that African users have brought some creative genius to them to make the end products distinctive? This will be a signal of agency and creativity that will set such artifacts apart from being products of mere mimicry. Many protagonists of decolonization seem to assume that it is never possible to domesticate an alien language in any domestic space sufficiently to make its users express fundamental and recondite thought in them. This assumption is possibly false. Outside of an unhealthy preoccupation with pedigree or a not so helpful attachment to authenticity, while we do not make light of the ravages of colonialism in Africa, there is no reason to excoriate Africans for attaining native fluency in a colonial language. What is more, in much of West Africa, as a part of modernity, English came with Christianity and its embrace by Africans was not a product of colonial imposition.29 We may quarrel with the choices Africans back then made but we should respect the historical evidence. Those writers are all the more to be celebrated for writing a literature of the universal from their particular necks of the human woods—an outcome that is not contingent on the medium of expression. I do not see how anyone who is adequately informed would think there is no difference between the idiom in Senghor’s writings and that of Montagne, even though they both work within the same syntax. Nor would anyone mistake Soyinka’s drama for that of Harold Pinter, even though they both write in English. Indeed, one of the signal failures of decolonization discourse is to ignore the overwhelming evidence of the idiomatization of the respective colonial languages by colonized users, from the emergence of Indian English to a Nigerian variant. The only difference is that Indians approach this issue with more assertiveness while African scholars are being nudged to disown any creativity and ownership of the same when it comes to their deployment of the colonial languages.30 No, Ngũgĩ is wrong. African literature cannot be coeval with African-language-inflected literature. If what we said earlier respecting the impact of the colonial languages on the script created for African languages holds, we must question the wisdom of claiming that “African” comes in only one flavor. So much did Yorùbá usages impact the translation of the Bible into Yorùbá that latter-day culturally illiterate Pentecostalists have resorted to revising the original translation that they thought contained too many “fetish” [i.e., borrowings from Òrìsà, the Yorùbá religion] references. Finally, on this point, if I were to choose between the humanism and sophistication of Soyinka’s, Achebe’s, and Senghor’s articulations and their Africanness, I am perfectly content to yield the label and keep the works. Wiredu, too, argues that because African philosophers do not think their concepts in their original languages, “we constantly stand the danger of involuntary mental de-Africanization unless we consciously and deliberately resort to our own languages (and culture).”32 This specific strand of Wiredu’s argument raises different conundrums when it comes to political philosophy. One area where this “involuntary mental de-Africanization” is evidenced, according to Wiredu, is in the sphere of politics. There, “many contemporary African leaders of opinion” have suspended “belief in African political traditions.” “Many African intellectuals and politicians” evince a “visible enthusiasm” “for multiparty democracy. Indeed, to many, democracy seems to be synonymous with the multiparty system.” What is wrong with this enthusiasm is that it is driven by “foreign pressures” and there is “little indication, in African intellectual circles, of a critical evaluation of the particular doctrine of democracy involved in the multiparty approach to government. Yet that political doctrine seems clearly antithetical to the philosophy of government underlying traditional statecraft.”33 This is not the place for a deep critical engagement with the claims involved in this passage. What is of moment is that, for Wiredu, “thinking through the concept of democracy in our own African language” yields an awareness that multiparty democracy “seems clearly antithetical to the philosophy of government underlying traditional statecraft.” Here are some questions for Wiredu and other decolonizers. What informed the conclusion that “there is little indication, in African intellectual circles, of a critical evaluation” of the sort that he does? It definitely did not come from any awareness of, much less engagement with, the robust debates that are available in African political thought going back, to limit ourselves to the modern period, to the mid-nineteenth century in West Africa before formal colonialism was imposed and continuing into the period in which Wiredu wrote. From the Fanti Confederates to the Egba United Board of Management, to individual intellectuals like John Mensah Sarbah and Joseph Ephraim Casely Hayford to Kwame Nkrumah, Julius Nyerere, Sekou Toure, Nnamdi Azikiwe, and Obafemi Awolowo, closer to Wiredu’s own time, a critical evaluation of the doctrine of democracy condemned by Wiredu did not lead them to embrace “traditional African statecraft.” Each one of these individuals and movements, at certain periods in their respective evolution, embraced variants of liberalism, a fact that is often unacknowledged in African discourse. Ironically, Wiredu’s evidence for his preference derived not from some of those I just mentioned but from the same foreign pressures he admonishes us to critically evaluate: colonialism-inflected anthropology from Meyer Fortes and E. E. Evans-Pritchard and, in later works, Kofi Busia.

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#### Stratification economics s compatible with the alternative. Examples prove – a) Chinese Exclusion Act – our evidence connects stratification, abolition, and the immigration system. Movement demands like Abolish ICE draw on the historical injustices of exclusion. The stratification frame diagnoses the effects of the inability to own or retain property as was the case in California for many early Chinese and Japanese immigrants b) Internment – generational wealth was destroyed by the forced removal of families who were forced to quickly liquidate their homes and other assets generating serious wealth inequality. Restructuring markets goes hand in hand with democratizing the economy and building countervailing power. Purity of the alternative cedes anti-neoliberal position to authoritarian populists.

Felicia **WONG** President of the Roosevelt Institute PhD Poli Sci **’20** “THE EMERGING WORLDVIEW: How New Progressivism Is Moving Beyond Neoliberalism A Landscape Analysis” p. 46-47

We live in perilous times, but this report, a review of the landscape, suggests a way forward. A coherent post-neoliberal progressive worldview is taking shape. By affirmatively and creatively utilizing various powers of government—guardrails, direct provisioning, investor and catalyst capabilities—we can envision not just a suite of solutions but also a way of thinking about problem-solving that can begin to confront the scope of our interlocking crises: climate, economic, and democratic.

The path will not be easy. The tensions within a new progressivism—on questions of centralization versus decentralization, and technocracy versus democracy—highlight some unresolved debates about the political side of the political economy. Questions of what and whom we value are more important than ever. Perhaps the most difficult challenge is whether a new progressive worldview can effectively embrace, in practical everyday life, a multiracial “demos,” and one that includes all genders in our economic life.

Ultimately, these observations about the path ahead for post-neoliberalism take us back to an observation we made at the outset of this report: The weakness of neoliberalism is not just economic—it is also clearly democratic and political. Neoliberalism’s false “small state, small government” promise paradoxically has allowed very large private actors to control government and capture our democracy.

A cohesive and effective new progressive worldview can unite progressive thought and thinkers from all of the schools we surveyed here. Many of them fall into more than one, if not all, camps. **Structuring markets** for private and public actors; **ensuring greater provision** of important goods and services; setting and meeting important economic and societal goals; and doing all of these in ways that are truly democratic: These concerns and ways of thinking are all of a piece.

In policy and policymaking debates, the **focus** is too often on our **disagreements**. In this case, agreement on the **need for concerted, affirmative**, **countervailing power** does, and **should**, **outweigh our remaining tensions**.

The stakes are high. Worldviews matter. As the Hewlett Foundation’s Larry Kramer reminds us, “structure arguments tilt the playing field for or against competing claims” (Kramer 2018). **Perfect consistency is neither possible nor necessary,** but in the absence of a cohesive set of ideas that proponents actively recognize as such, **progressives risk ceding the stage.**

Both a new conservatism and a “return to normalcy” are **in the wings and could very well prevail.** A right-leaning anti-corporate, pro-worker set of ideas is being developed and readied. The nascent new conservatism is not just a few thinkers. It includes younger politicians like Sen. Josh Hawley (R-MO), who is proudly leading an anti-monopoly, anti-Big Tech fight from the right, and Sen. Marco Rubio (R-FL), who hearkens back to Catholic common good traditions in his call for an economy based on human obligations. Additionally, neoliberal-light politicians on both sides of the aisle promise a return to normalcy in times of political tumult and polarization. But these competing worldviews are troubling. Some new conservatives are pro-worker but anti-immigrant and racially exclusionary.14 And a “return to normalcy” would presage modest policy changes. These would be insufficient to meet the scale of the climate crisis and would continue the basic, broken market fundamentalist economics that have brought us to the brink today.

A new progressivism—one that measures freedom not by human capital but by human thriving—is possible. The data, the research, and the policy proposals show a path toward a healthier, more balanced economy and democracy. Whether and how progressives get there will depend on the politics and on their ability to develop a **common language** and **make** **common** **cause** across a wealth of thinking that believes, most of all, in the **public good**.

#### Stratification economics is necessary to an intersectional, non-totalizing understanding of racial discrimination.

Lefebrve ’19 (Stephen, American University, Department of Economics, “Toward a Latinx Stratification Economics”, <https://edspace.american.edu/stephanlefebvre/wp-content/uploads/sites/1299/2019/10/Stephan-Lefebvre-JMP-Toward-a-Latinx-Stratification-Economics.pdf>, 10/31/2019)

The Latinx stratification economics approach redirects attention away from race and ethnicity as categories of illusory stability and meaning, and towards processes of racialization as a means of producing, maintaining, or transforming social stratification. Racialization happens at multiple levels. Individuals may be racialized by other individuals, but there are also group-level manifestations. The state regularly racializes Latinxs, whether through legitimizing terms such as “Hispanic” or investing in the economic adjustment of some Latinx immigrant groups while legally sanctioning others. Based on the most common formulation of race and ethnicity questions today, it is understood that “Hispanics” can be of any social race. That is, race and Hispanic identity are separable in the most current data sets. This has some benefits. Latinxs are indeed racialized as white, black, Asian, etc., often depending on phenotype and other factors. Life experience and research both show that racialization affects brown to dark-skinned Hispanics (L´opez et al., 2017). The concept of “street race” helps us understand this. Street race is the characteristic of an individual captured in the question, “if you were walking down the street, what race would strangers automatically assume you were?” Street race is what race you look like based on various characteristics including skin color and facial features. It is usually a more important determinant of a person’s experiences with discrimination in the labor market, employment and other institutions than their ethnicity (cultural heritage) or ancestry (distant familial or genetic ancestry) (L´opez, 2013, 2014; L´opez et al., 2017). Data needs to reflect this by collecting information about “visible minority” status or asking about “street race” directly. It is also important for economics to embrace intersectional analysis, that is, recognizing that social identities are always additive. As Crenshaw (1989) shows, the experiences of black women are not captured in either white womens’ lives or black mens’ lives. In economics, Paul, Zaw, Hamilton, and Darity Jr. (2018) that shows that the “unexplained” portion of a Oaxaca wage decomposition between black women and white men is more than the sum of the unexplained portion from a gender (black men compared with black women) and race (black women compared with white women). Finally, moving toward a Latinx stratification economics involves attention to the sociohistorical context and the at-times bold and transformative demands of social movements. This means identifying the linkages and participation of Latinxs struggling for social justice alongside other subaltern groups, especially the African American community; from immigration policy, the Chicanx movement, the feminist, queer, and trans movement, to Civil Rights and the Black freedom struggle writ large. Latinx Stratification Economics requires a knowledge of and participation in this history Stewart (2008). One such example stems from the coalition politics involved in passing the HumphreyHawkins Act (1978). The centerpiece of this legislation was a federal jobs program, which was a response to rising unemployment that had a disproportionate effect on black, Latinx and other communities of color. But the job guarantee never came to fruition. Over 40 years later, both communities (and intersecting groups, like Afro-Latinxs) continue to face both unemployment and underemployment due to labor market discrimination and structural barriers racism. The job guarantee has re-emerged recently as an popular policy that would simultaneously address economic growth and racial inequality (A. Aja, Bustillo, Darity Jr., & Hamilton, 2014; Hamilton & Darity Jr., 2010; Tcherneva, 2018). There are other examples of transformative policies that would default take a Latinx stratification economics lens, including federal young adult trust accounts–that can begin to address the racial wealth gap, public banking, federalizing credit scores, single-payer health care (and others) (Hamilton & Darity Jr., 2010). All of these, as stratification economics sets out to do, places intervention directly on institutional-level practices that perpetuate the intersectional racism at the center of inter-group disparities.

#### Wealth equality won’t be used to target Asian Americans. Higher median incomes than many other people of color contribute to the model minority myth. However, wealth gaps within and between Asians and whites in the U.S. are growing rapidly.

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<https://www.americanprogress.org/article/wealth-inequality-among-asian-americans-greater-than-among-whites/>

One particularly understudied aspect of wealth inequality is the distribution of wealth between and among whites and Asian Americans,1 the fastest growing racial group in the United States. In 2013, the last year for which complete data are available, Asian Americans represented a little more than 5 percent of the nation’s population and have grown faster than any other population group between 2000 and 2013.2 Compared with other ethnic groups, Asian Americans tend to have higher incomes than other communities of color.3 These higher incomes among Asian Americans have occasionally led to the popular view of Asian Americans as economically more advantaged than other groups.4 This notion, however, ignores the high degree of economic inequality of Asian Americans—inequality that is reflected in the data on wealth. Wealth among Asian Americans is highly concentrated, and many Asian Americans, especially Asian American seniors who need to live off of their savings, live in an economically precarious situation.5 Consequently, too many Asian Americans are far away from a secure retirement and ill-prepared to weather an emergency.

This report contributes to the growing number of studies of the economic well-being of Asian Americans, showing that wealth inequality among Asian Americans is far greater than the already high wealth inequality among whites.6 Although many Asian Americans have wealth comparable to that of whites, a large share of Asian Americans have little or no wealth. Focusing only on average or median wealth of Asian Americans can thus be misleading because doing so ignores a large share of Asian Americans who continue to struggle economically.

Wealth, after all, is a key indicator of people’s economic security. Wealth or savings allow people to weather unexpected events such as a layoff or illness and plan for the future—for example, sending children to college, starting a business, taking on a new job, and retiring. Put differently, those without wealth or with only little savings are in an economically precarious situation with respect to their future.

If the past few decades are any indication, the economic future remains uncertain and people need more savings. As economic risks such as unemployment, income drops, and unexpected caregiving demands have increased, more short-term savings help people make it through.7

People also need to save more to pay for education and retirement. College tuitions have regularly outpaced inflation, driving students deeper into debt absent their own or their families’ savings.8 And the costs of retirement keep going up as well. The normal retirement age to receive full Social Security benefits is rising from age 65 to age 67. Defined benefit pensions continue to disappear. Health insurance costs generally outpace incomes, and many people are simply living longer than those in previous generations. People today need to have more savings available to them just to maintain the same standard of living.9

Yet many people have only some or even no wealth, while others have amassed substantial amounts. Wealth inequality is typically much larger than income inequality.10 As a rule, those who struggle economically today also tend to face uncertain futures. Moreover, the gap between those who have a lot of wealth and face a secure future and those who do not keeps growing.11

Increasing wealth inequality, however, is not just about numbers. An unequal wealth distribution means that many people face economic uncertainties on a day-to-day basis because they cannot cover an emergency such as a layoff. It also means that many people cannot, for example, send their kids to the college of their choice, start and grow a business, or move to a new job and/or career.

Differences in wealth are especially stark by race. African Americans and Latinos tend to have a lot less wealth than whites.12 This wealth gap has persisted as economic mobility and the ability to save has gone down for many people, especially African Americans and Latinos.

Asian Americans, in comparison, are often heralded as the exception.13 Their wealth on average and at the median tends to be comparable to that of whites—at least in the years since the Great Recession ended in 2009. This view, though, is somewhat narrow as it overlooks the fact that the economic experience of Asian Americans tends to be more varied than that of whites.14 For instance, Asian Americans have higher family incomes than is the case for whites—$76,761 compared to $62,950 in 2015—but their poverty rate is also higher, at 11.4 percent compared to 9.1 percent in 2015. Asian Americans are not only the fastest growing racial group in the United States, they are also economically one of the most diverse groups, with a substantial share of Asian Americans struggling day to day.

Considering that this pattern of economic disparity in Asian American communities is not new, it is also no surprise to find substantial wealth inequality among Asian Americans. The data in this report specifically show that:

Asian American average and median wealth has become comparable to white wealth.

Asian Americans at the bottom of the income distribution have less wealth than whites at the bottom of the income distribution.

Wealthy Asian Americans have more wealth than wealthy whites.

Wealth inequality among Asian Americans is greater than among whites.

Wealth inequality among Asian Americans has widened over time.

Asian Americans have fewer retirement benefits than whites.

Asian Americans have lower homeownership rates than whites.

Asian Americans owe more debt than whites.

The data on Asian American wealth are a mix of good news and bad news. Asian American wealth has been trending up, catching up to wealth levels for whites on average. But many Asian Americans are left behind with no or very little wealth. Although the data in this report do not allow for a further disaggregation by subpopulations, other data on employment and wages, for instance, suggest that some subpopulations such as Vietnamese-Americans are economically more vulnerable than other groups of Asian Americans.15 It is thus reasonable to assume that these same subpopulations make up a disproportionate share of Asian Americans with little wealth. Moreover, the gap between wealthy and nonwealthy Asian Americans has widened. Asian Americans also have fewer retirement benefits than whites and are more indebted than whites, creating a potentially precarious situation when stock and housing prices fall. The bottom line is that wealth inequality across American families deserves policy attention. This is especially true for Asian Americans in the bottom half of the income distribution.

#### The aff is a positive vision for economic freedom.

K Sabeel **RAHMAN** Law @ Brooklyn **’18** “Constructing and Contesting Structural Inequality” *Critical Analysis of Law* 5:1 p. 101-109

This paper draws on several areas of contemporary and historical legal scholarship to draw out some common methodological elements to clarify, first, the ways in which we might conceptualize and diagnose structural inequalities, and second, how we might counteract these inequalities. Law features prominently in both parts of this framework. As this paper will suggest below, structural inequality operates in large part by concentrating economic, social, and political power through softened legal constraints on the one hand, and imbalanced background legal rules on the other. Furthermore, legal rules often operate to fragment and diminish the capacity of affected constituencies— such as workers, consumers, urban residents, and minority groups, to name a few—from effectively wielding the kinds of countervailing political and economic power needed to counteract such disparities of power. Historically, there is a long tradition going back through scholarship in law and public policy, critical race and gender studies, critical legal studies, and more, back to the rise of legal realism and political economy critiques during the Progressive Era around the turn of the twentieth century. This paper returns to this early history of Progressive-Era political economy to draw out a theory of systemic and structural inequality, how to diagnose it, and how to remedy it. The paper then helps develop and refine this approach with reference to contemporary legal scholarship. The goal, I hope, is to provide some greater clarity on these questions of methodology: how we should define, identify, and then seek to remedy structural inequalities—and the role of law in shaping both analysis and response.

II. Theorizing Structural Inequality and its Remedies

A. “Natural” versus Human-Made Structures

The challenge of conceptualization structural inequality reveals a central philosophical and conceptual divide, one that often goes beyond conventional accounts of left and right. The central question is not so much the role of government; rather, it is about the degree to which we view background systems and structures as “natural” or human-made. This divide also manifests in the ways in which different thinkers seek to address such structural inequalities.

Consider for example the thought of Friedrich Hayek, one of the intellectual leaders of twentieth century libertarianism and a key figure in the revival of the emphasis on self-correcting markets and skepticism of governmental action that characterizes “neoliberal” political economic thought. The term “neoliberalism” is often contested and can at times imply a higher degree of hegemony or ideological coherence and coordination than is often the case. For our present purposes, we can use the term “neoliberalism” to refer to a configuration of conceptual approaches that include three elements in particular: a view of markets as self-correcting and epistemically superior; a skepticism about governmental action as prone to capture; and a disposition towards more classic liberal views of negative liberty as freedom from governmental interference.10 Hayek’s central dispute with thinkers advocating for more expansive approaches to social and economic justice did not necessarily turn on a rejection of the moral aspiration for greater equality of economic opportunity. Indeed, Hayek (and other libertarians following in his mold, like Milton Freidman) at times articulated a surprisingly expansive view of economic opportunity with support for extensive social insurance programs or even a basic income in the form of negative earned income tax credits. But what is especially telling is that Hayek framed his philosophical disagreement in terms of a vastly different view of structure and political possibility.

In a classic 1976 essay, Hayek argued that individual income shares in a market economy were the outcome of the market’s “spontaneous ordering,” rather than being the product of a singular will or intention. As a result, claims of social justice amounted, in his view, to a “naïve” “anthropomorphism,” attributing intentionality and responsibility for outcomes to a system that could not have any intention or will to begin with.11 “Those shares are the outcome of a process the effect of which was neither intended nor foreseen by anyone,” Hayek continues. “To demand justice from such a process is clearly absurd.”12 The market was not an individual entity with a will, and thus conventional notions of moral obligation, responsibility, or redress “has no application” to an “impersonal” and self-ordering system such as a market economy.13 Moreover, imposing distributive outcomes on market-ordering would destroy the critical social value of markets as efficient, decentralized systems for synthesizing information and optimally ordering the allocation of goods and services through the price mechanism.

Hayek’s critique of social justice was largely motivated by a desire to avoid the specter of totalitarian control of the economy associated with statist communism and socialism. But it is also revealing about a central conceptual shift required to diagnose— and remedy—inequality. Hayek writes off much of social justice because economic systems—diffuse, mindless, unintentional—cannot be the subjects of concepts like justice. This unease with treating “natural” market orderings as if they were blameworthy opened up the door to omnipresent regulatory and redistributive efforts that would inevitably escalate until all domains of economic and social activity were subject to public control. This view of the dangers and ineffectiveness of systemic regulation, and the view that systemic patterns of inequality are themselves more like forces of nature than they are like intentional, human-produced discrimination, echoes the asystemic view of markets and politics articulated by Roberts in Parents Involved and Shelby County.

Yet, while Hayek is correct that economic systems are indeed diffuse and lack a single coherent will, they are not “natural” systems beyond human agency, or neutral systems operating in intrinsically fair and equitable ways. Markets are themselves products of law and politics, and the aggregate dynamics of market systems are similarly the result of background legal and political choices that structure markets in one way or another. Indeed, a key conceptual shift in understanding the broader dynamics of inequality and subordination in the modern economy requires an appreciation for the very inequitable and human-made nature of economic systems as a whole.14 As Iris Young argues, economic and social structures while often creating constraints that are experienced by individuals as objective and exogenous are in fact the product of hidden and accumulated decisions, policies, and actions. These accumulated human choices congeal into a larger structure, which places individuals in subordinate positions. Thus racial minorities, women, and poorer individuals might lack for meaningful opportunities to experience upward mobility not because of their merit, not because of luck, and not even because of the nefarious intent on the part of their employer, their landlord, or another individual actor. Rather, their social and economic subordination arises as a result of their position in a larger socioeconomic structure in which they lack the power, resources, and opportunities to better their condition.15

The structures that in the aggregate create these uneven landscapes of social and economic position can be themselves viewed as a systemic form of unequal power and domination. Where conventionally we might view power disparities and domination in terms of specific actors that can act arbitrarily, asserting his or her will against another, diffuse systems in the aggregate can create similar disparities, even without a single consolidated intentionality, arising instead from the aggregation of many individual decisions and background policies, each of which operates within the bounds of conventional legal rules and norms. As Young argues, structural domination arises “when social processes put large groups of persons under systemic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them.”16 The structure of, say, the labor market, or the physical geography of the city, thus can seem voluntary and natural, and can be the product of many independent policies and decisions, and still be a causal driver of inequality, and a legitimate target of public policy.17

B. Meliorist Versus Structural Remedies

Economic equity then is not just a result of securing an equitable distribution of income. Rather it fundamentally turns on a deeper construction and reform of what Joseph Fishkin calls the “opportunity structure.”18 But even if the structural dimensions of inequality are taken as given, there is a further fault line that arises in how to conceptualize the appropriate remedy to structural inequality. Some policies would in fact help individuals facing structural inequalities, but they would do so by helping an individual move within a given structure to a higher social or economic position. But they would not alter the structure that creates the hierarchies of subordination, of position, in the first place. Thus, in a given labor market, increased education and individual skill- building might help some individuals secure higher employment. But such policies, even at scale, are unlikely to alter the background rules and disparities that make, for example, low-skill and low-wage work so precarious and insecure and unrewarding. Similarly, individual-level enforcement of anti-discrimination provisions might make it easier for some individuals to gain redress for instances of racial or gender discrimination, but more would need to be done to systematically uproot systemic patterns racial and gender discrimination. Fishkin makes a similar distinction in his account, using the metaphor of the bottleneck. There are social and economic gateways that can help launch an individual from a lower socioeconomic position to a higher one: for example, admission to college, or moving to a high-growth and high-opportunity neighborhood. Some interventions can improve an individual’’ condition by moving her through the bottleneck, such as affirmative action admissions procedures or targeted educational interventions, or housing voucher programs. But these are distinct from interventions that would dismantle or at least loosen the bottleneck

itself. Think of this as the distinction between meliorist approaches to tackling structural inequality, and structural approaches.

This distinction is not always a sharp one, but rather it sketches out a spectrum of policy responses to structural inequality. Consider for example, the conventional meritocratic and competitive view of “equal opportunity.” On this view, the central question for social policy is to ensure a fair competition for (scarce) goods and opportunities such that the most meritorious can secure access regardless of their starting point in life. But this standard approach narrows our focus too much by zeroing in on making competitive entry to key opportunities fairer—such as through access to quality schools and college admissions. This narrow focus leaves out broader questions such as what “merit” means, or why such opportunities are structurally so scarce and critical for success in the first place. It also means implicitly prioritizing a single pathway for economic well-being rather than looking to make possible a plurality of life plans and pathways.19 Furthermore, this “fair competition” view of equal opportunity implicitly codifies a distinction between the “deserving” and the “undeserving” poor: only those poor individuals who have “merit” can and should benefit from social policies meant to expand economic opportunity. This may seem unobjectionable, but the notion of an undeserving poor has long played a pernicious role in making our social contract and welfare systems unduly punitive and restrictive.20 The focus on merit thus leaves in place an underclass, rather than seeking to remedy the problem of poverty and insecurity for all in the first place.21 To put it another way, this bifurcation of those who benefit and those who do not may at best diversify the economic elite, but leaves the disparity between elite and non-elite in place; it is effectively the “equal opportunity to be unequal.”22

Another common way of thinking about equal opportunity and the role of social policy focuses not on fair competition but on the problem of risk mitigation. Much of the American social policy regime can be understood as mechanisms to insure individuals, families, and communities against various kinds of risks and economic shocks.23 This view of opportunity and social policy fares better than the fair competition view, in that it lacks the implicit value judgments about deservingness, and suggests a more universalized approach to policy. We are all vulnerable to risks, and social policy should serve to protect each of us from the most severe social and economic repercussions of such risks. The language of risk highlights the important shift that social policy is not about identifying the most deserving of impoverished or insecure individuals to grant them more opportunities; rather it is about enabling all of us to live more secure and stable lives—a security and stability which in turn can make it possible for each of us to pursue our own social, economic, and personal aspirations. But many of the inequalities we face in today’s economy are not just a product of increased risk faced by poor families, contingent workers, and the like; rather they are products of deeper structural disparities in access to opportunities.

But equal opportunity, in the end, is not about fair competition or risk mitigation; rather, it is fundamentally about freedom—the freedom “to do and become things we otherwise could not.”24 The risks, vulnerabilities, and insecurities that families and individuals face in the market economy are not the product of forces of nature; rather, they arise from the ways in which we structure the market economy through policy—and represent the aggregation of disparities of bargaining power and positional power between, for example, landlords and tenants, managers and workers.25 Equality of opportunity, then, must also be understood as a project of expanding freedom from relations of domination, exploitation, exclusion—particularly the kinds of domination that can arise from diffuse systems and structures as described above.26 Achieving equality understood as economic freedom thus requires something more than a narrow focus on opportunity, desert, risk, or even raw redistribution. Instead, it requires asking hard—and empirically-rich—questions about the ways in which our current economic structures work to include or exclude, to empower or subordinate. It requires responding to these structural inequities by, on the one hand, better protecting vulnerable communities and constituencies from such structural subordination, and on the other, affirmatively expanding their capabilities and functionings, expanding their agency and ability to live lives they value.27 Mitigating risk and investing in the education and capabilities of individuals are of course potential elements of a larger freedom-enhancing, structural inequality-reducing policy framework. But by themselves they can often be approached in an overly narrow way.

Indeed, it is this structural quality of economic freedom and justice that is often so difficult to identify and pursue. For libertarian and conservative thinkers like Hayek, structure is actively rejected as a cause of inequality. Instead, inequalities are cast as the product of poor individual decisions taking place in an otherwise naturally-occurring and neutral background structure.28 For meliorist policy thinkers, structure may be part of the diagnosis, but changing structure is under-emphasized as part of the solution. By contrast, contesting structural inequality is a central theme in the many social movements today. The attempt to first politicize, and second transform, these political economic structures is a key focal point for feminist critiques of capitalism, revived literatures on racial capitalism, and the labor movement’s historical and more recent attention to how background structures produce worker precarity and lack of power. This is also a central concern in the history of legal political economic thought—a history that is worth remembering and recovering, for it can help provide a framework through which contemporary scholarship and policy debates can address modern-day questions of structural inequality.

C. Progressive Political Economy and the Contestation of Structure

This conceptual discussion of structural inequality suggests that neither the neoliberal acceptance of structural inequities nor meliorist solutions are adequate. But what would a more granular approach to diagnosing and remedying structural inequalities look like? The move to structure is one of the central developments of Progressive era political economy, including (and perhaps especially in) legal thought. Recovering this intellectual history and method can help provide greater clarity to conceptualizing and addressing structural inequalities today.

The social and economic upheaval of the industrial revolution generated tremendous anxiety, inequality, and intellectual ferment, leading to what some scholars have rightly described as the “first law and economics movement.”29 A wave of legal scholars and thinkers began to explore these questions of power, economic structure, and inequality. A central thread among these thinkers was a common focus on the problem of economic structure—and in particular, a focus on the ways in which economic structure magnified disparities of power. Thus, the legal realist movement argued that the state, through the operation of background legal rules of property, contract, and tort law, constructed the realities of economic markets, including their disparities of outcomes, opportunities, and bargaining power. This reality suggested that these background rules should be subjected to the same standards of public welfare and public justification that accompanied the exercise of state power.30 Similarly, this legal realist critique helped inform a wider movement of legal scholars and reformers who focused not just on the systemic background rules of industrial capitalism, but also on the ways in which these rules enabled the concentration of private power among newly powerful firms: monopolists like Standard Oil and employers and managers governing industrial labor. Thus, the antitrust movement emerged during this time and labor organizers took on greater importance in addressing the needs of workers in the new power dynamics of the economy.

As I have suggested elsewhere,31 theorists of Progressive Era political economy saw the problem of economic power as a particular threat to ideas of democracy. The challenge of private power and structural inequality required substantively different social and economic policies. But more importantly perhaps was that they required new forms of democratic action that would enable the public at large to contest, constrain, and respond to these forms of power. Thus, it should be no surprise that thinkers of this period were also emphatically interested in new forms of civil society organizing such as through the labor movement. They were also interested in institutional reforms that would enhance democratic governance, from creating new administrative agencies to establishing the direct election of senators and ballot referenda procedures. For Progressive Era thinkers like Louis Brandeis, these institutions of democracy were needed to counteract systemic inequalities. Policies like antitrust law would restrain concentrations of private power and create more fair background rules of economic competition and opportunity. Public policy would be made more responsive and adaptive to the modern economy through the creation of new expert-based regulatory bodies, and through greater policymaking by local-level democratic institutions like states and cities. Labor organizers saw the problem of industrial capitalism as one of concentrated private power, enabled by skewed background rules of market ordering and the workplace itself. The remedy required new forms of movement organizing and action aimed at creating a different system of workplace relations. These efforts to enable democratic agency exemplify what John Dewey theorized as the central problem of democracy in industrial capitalism. For Dewey the modern economy created forms of inequality and upheaval so diffuse and systemic that it would appear outside the scope of human agency. Only by creating new forms of democratic communication, action, and institutional structures, could Americans gain the ability to restructure these background rules to create a more equitable—and more free—economic order.32

So what happened to this progressive political economic vision? Over the course of the twentieth century, two key changes defused this approach to contesting structural inequalities.33 First, the more substantive accounts of economic freedom envisioned by thinkers like Brandeis and Dewey gradually eroded into a thinner vision of economic policy that emphasized the optimization of growth and markets with the mitigation of the most extreme forms of inequality. Second, the resurgence of Hayekian critiques of progressive political economy prompted a further change. On the one hand, these critiques defused the sense of threat that Progressive Era thinkers saw from private power and economic systems, by presenting markets as self-correcting, and welfare-optimizing. At the same time, the corporations that so threatened early labor organizers and antitrusters came to be viewed as themselves checked by the expansion of financial markets that created more shareholder ownership and power over firms, and the checks and balances of market competition itself. On the other hand, these thinkers also viewed governmental regulation as increasingly likely to give way to interest group capture, corruption, and inefficiency.

Yet this earlier approach to political economy offers an important set of methodological and policy implications for contemporary debates over structural inequality. First, it suggests the value of using law as a way to map and diagnose new concentrations of power lying beneath a changing economic system. Second, it suggests the importance of law in shaping the capacity (or lack of capacity) to hold such economic power accountable. The rest of the paper will explore each of these implications in the context of contemporary inequality debates.

III. Inequality as a Product of Power and Structure

A structural lens on inequality helps uncover the ways in which background legal rules facilitate disparities in economic income, opportunity, and wealth. Furthermore, this approach helps diagnose the ways in which law helps concentrate economic power, which is often obscured behind, and operating through, layers of background legal regimes. Law facilitates these dynamics, and makes regulation difficult because new forms of twenty- first-century private power operate by exploiting legal structures and forms effectively. Thus, much of today’s inequality crisis is not just the product of technological change or natural evolution of modern-day capitalism; rather, it is the product of legal systems that are themselves subject to change and potential reform. Furthermore, diagnosing these structural inequalities highlights the degree to which reform efforts will have to take a structural, rather than meliorist, orientation.

#### Legal scholars have an obligation to develop strategies for confronting legal injustices faced by Asian Americans.

SAITO 09 (Natsu Taylor, Professor Law at Georgia State University College of Law, “INTERNMENTS, THEN AND NOW: CONSTITUTIONAL ACCOUNTABILITY IN POST-9/11 AMERICA” https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1011&context=dflsc)

The American-Arab Anti-Discrimination Committee called for the removal of Civil Rights Commissioner Kirsanow following his defense of internment in 2002.210 He was not removed, although apparently he did apologize, insisting that his remarks had been taken out of context.211 In January 2006, while Congress was in recess, President Bush appointed Kirsanow to the National Labor Relations Board.212 Congressman Coble expressed his “regret” that “many Japanese and Arab Americans found my choice of words offensive,” but ignored calls for his resignation as chair of the subcommittee on terrorism.213

CIA Director “Leon Panetta announced at his confirmation hearing that CIA agents that engaged in torture, including waterboarding, in the early phases of the war against terrorism, would not be criminally prosecuted.”214 In fact, attorneys in the Obama administration have continued to rely “on the state secret doctrine and thus seem prepared to confer de facto immunity on the CIA for constitutional wrongs as gross as those entailed in extraordinary rendition.”215 According to Attorney General Eric Holder, “It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.”216

It appears unlikely that those who sanctioned the illegal or unconstitutional programs will be prosecuted. As Jordon Paust observed in 2007, the administration of George W. Bush had “furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.”217 Shortly after Jay Bybee issued his torture memorandum in August 2002, President Bush appointed him to the Ninth Circuit Court of Appeals, and he was confirmed in March 2003.218 John Yoo, who drafted the torture memos, has returned to his law professorship at Boalt Hall.219 The Obama Justice Department has rejected recommendations of ethics investigators concerning violations of professional standards by Bybee and Yoo.220 Although President Obama’s January 22 Executive Order “prohibits reliance on any Department of Justice or other legal advice concerning interrogation that was issued between September 11, 2001 and January 20, 2009,”221 when questioned about possible prosecutions for torture, he has only emphasized the importance of looking forward, not backward.222 As things stand, then, there is no reasonable prospect of legal remedies for any of the wrongs associated with the so-called War on Terror.

I believe we, as lawyers and legal scholars, have responsibilities distinct from those of documentary historians or moral theorists. It is a central tenet of the rule of law that legal rights without remedies are meaningless.223 If the legal system has permitted or facilitated legal wrongs, we have an obligation to ensure that effective remedies are implemented. In other words, it is necessary to address the question of accountability for injustice and, where there are consistent patterns replicating injustices, we must acknowledge that the remedies thus far employed have been inadequate. Otherwise, we are engaging not in legal analysis but alchemy.

The injustices of the Japanese American internment were belatedly acknowledged and partial redress provided to some of its victims, but even these measures were couched in terms which exonerated the institutional and individual actors responsible for the wrongs at issue. This left the door open for the dangers posed by the internment to be replicated in the current War on Terror, and our failure to hold those accountable for contemporaneous wrongs will ensure that they, too, will be repeated in the future.

#### Radical Reconstruction’s vision for constitutional struggle to abolish the social badges of slavery and accountability toward racial injustices is compatible with Asian-American struggle for justice.

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National Security Law” Villanova Law Review, Vol. 50, Iss. 4 [2005], Art. 20 p. 1131-1133

V. CONCLUSION: THE SECURITIZATION OF RACE "The tradition of the oppressed teaches us that the 'emergency situation' in which we live is the rule."298 The Japanese **internment** constitutes a thematic **common denominator** in practically all post-September 11 legal analyses of state security powers. This is actually somewhat surprising since the internment jurisprudence had not been viewed as a precedential centerpiece in the sub-discipline of national security and foreign affairs prior to September 11.299 The internment, however, has become important for the ways it symbolizes a trauma or an evil that the nation as a whole somehow acknowledges (as past), survives and transcends. 300 Viewing the internment as symbolic of a **nationally transcended** **evil** parallels the **dominant constitutional** "**survivor story**" that **legal** **liberalism** in the United States tells with regard to slavery.3

01 Such survivor stories, according to which everyone within the nation is equally a "victim" and survivor of the past evil, along with related regimes of "survivor justice," assume a strategic role in moving the "nation" forward in the aftermath of systemic evil, while also in purging the state of accountability. Unsurprisingly, the winners under conditions of survivor justice are not the real victims of the past or present evils, but rather those who benefit under the hegemonic conditions of such systemic injustice. 30 2 Under the logic of survivor justice, equal protection principles can be interpreted as being void of **anti-subordinationist** **commitments** such that would legitimate robust substantive and effects-based "victim justice."3 03 Indeed, just as Lincoln viewed demonization of the defeated South as an evil in itself, attempts to rectify injustices at the expense of "innocent" beneficiaries-cum-victims of that injustice can be viewed as evil under survivor justice. 3 0 4 In the immediate context of the war on terrorism, treating the internment as transcended/survived has the effect of de-historicizing the current repression of Muslims, Arabs and South Asians, disconnecting it from the ongoing related national traumas of racist psychologization of security and threat, reactionary assertions of white national identity and the attendant subjection of liberal democratic values to the paranoidic closures of the **security state.** 305 When the internment is instead taken to **symbolize** an **imperative** of **political accountability** toward **racial injustices**, it underwrites a model of **constitutional justice** as a continuation of the various justice struggles that Japanese Americans and their supporters have waged, from the "no-no" movement and other resistance efforts in the internment camps themselves, to the reparations and redress campaign of the 1980s and 90s. 306 Viewing the "**internment this time**" as **rooted** in these **ongoing traumas** puts into play strategies and models of constitutional justice that form part of an **unbroken** **chain**-call it a **constitutional** **solidarity**-with **anti-internment justice struggles**. Under such models of justice the state in distinction from the security state with its racialized friend-enemy logic, overweening assurance imperative, legitimation issues, etc.-links the present with the past, in Benjamin's terms, messianically. Accountability is insured in a present that is "shot through" with the traumatic past. Contemporary institutions and actions are rooted in a-temporal solidarity with anti-subordinationist struggle. There can be no easy redemption through "transcendence" of past evil, a notion premised on a positivist view of history that Benjamin rejects. Past and present form a constellation, and grasping that constellation is a redemptive act that itself necessarily transcends positivist management of the past. As ambitious as such an anti-subordinationist vision may sound under current conditions, it seems entirely in sync with the spirit of Justice William Brennan's pragmatic security jurisprudence, summed up in a speech he gave at the Law School of Hebrew University in 1987: A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat.30 7 Though framed literally in the familiar terms of individual civil liberties, Brennan's jurisprudence entails a substantive and processual pre-commitment to combat security-induced injustices, especially in light of "overblown" national security claims. Brennan also incorporates a critical understanding of the constructedness of security threats themselves and an awareness of the complex linkages between the realm of national security and threat construction and the realm of social freedom. Brennan's vision, then, comprises substantive and processual commitments as well as conceptual complexity in a way that appears wholly in accord with the primacy afforded here to group-based dimensions of state security overreach. The record from the new war on terror makes it abundandy clear that in order to be effective now our venerated liberal democratic tradition of resisting and containing state security overreach must be nurtured by our "long-lasting experience" and "intimate familiarity" with the subordinationist, group-based effects of national security law. Otherwise, we will fail to engage the central crisis of the time, involving at once the various devils the state tells us it knows and the sort of subordinationism that our society knows all too well.