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RACIAL CARTELS

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This Article argues that we can better understand the dynamic of historical racial exclusion if we describe it as the anti-competitive work of “racial cartels.” We can define racial cartels to include a range of all-White groups—homeowners’ associations, school districts, trade unions, real estate boards and political parties—who gained significant social, economic and political profit from excluding on the basis of race. Far from operating on the basis of irrational animus, racial cartels actually derived significant profit from racial exclusion. By creating racially segmented housing markets, for example, exclusive White homeowners’ associations enjoyed higher property values that depended not just on the superior quality of the housing stock but also on the racial composition of the neighborhood.

Describing historical exclusion as anti-competitive cartel conduct highlights three aspects of discrimination that other descriptions obscure. First, compared to conventional theory, a racial cartel story emphasizes the material benefits—higher wages, higher property values, greater political power—that Whites derived from anti-competitive exclusion. Second, compared to individualist accounts, the cartel framework emphasizes the collective-action nature of historical discrimination. Third, calling historical exclusion cartel conduct can help to reframe anti-discrimination law as a type of antitrust legal intervention, designed to remedy persistent effects of past anti-competitive exclusion.

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INTRODUCTION

On a cold winter morning in Memphis in January 1919, a committee of four White switchmen marched into the office of one Edward Bodamer, superintendent of the Yazoo and Mississippi Valley railroad. The switchmen were there, they said, to discuss a demand by the area yard workers to get rid of the railroad's Black switchmen and yard workers. Fire all Black workers, they insisted, or the yard would stage a strike. Bodamer refused outright and warned the switchmen that any strike would be illegal. Soon after, dozens of switchmen and yard workers voted to walk off the job.¹

Over the next five days, the strike spread like wildfire to surrounding railroads and yards, crippling the region's transportation network. At its peak, the strike united over 650 switchmen in racial solidarity, shutting down operations in the countless small towns that lined the railroad in Tennessee, Mississippi and Illinois. At the end of the fifth day, the switchmen called a halt to the walkout, but only after the railroad had promised investigation by government mediators.

A year later, the White switchmen were back in Bodamer's office. This time, the committee warned, they had extra firepower—the backing of the Brotherhood of Railroad Trainmen, one of the “Big Four” railroad brotherhoods. Unable to risk another damaging strike, Bodamer and the railroad fired almost all of the company's Black workers. For good measure, the railroad adopted racially restrictive contracts that changed seniority systems and entrance requirements, and limited the number of Black workers for particular positions.²

What was behind this strike? Why had White workers so suddenly demanded that the railroad evict its Black workers? After all, Black workers had long been around the railroad, working as trainmen and switchmen since the 1870s. Although White switchmen had occasionally complained in the past, they had not taken much action against either the railroads or Black workers. What had changed?

In a word, the economy. Historian Eric Arnesen argues that post-war economic uncertainty over jobs ignited the Memphis strike and fueled other hate strikes like it. As the economy disintegrated after the war, workers faced a labor market in such disarray that labor officials could barely track the job market from week to week.³

1. The story of the Memphis hate strike is well-chronicled in Erik Arnesen's account of racial exclusion on the railroad. See ERIK ARNESEN, *BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY* 65–69 (2001).

2. The success of the hate strike in Memphis signaled a major shift for the railroad industry. After this strike, White unions across the nation began to regularly demand racially restrictive contractual clauses, and most railroad union contracts began to carry them. See *id.* at 68.

3. See *id.* at 69.

In addition, the wartime economy had cost White workers their positions of privilege. Out of necessity, the railroad had abandoned its conventional practice of awarding jobs on the basis of race. To accommodate wartime labor shortages, railroads had found it necessary to be more flexible in terms of worker allocation. Some Black workers had taken up White positions, and some Whites were slotted for historically Black positions when the occasion demanded it.⁴

As soldiers came home from the war, however, railroads were forced to choose whether to revert back to their old race-conscious ways. Some railroads switched quickly. Others resisted, and abandoned tracking race and status altogether, a move that would cost them dearly.⁵

Following standard economic theory, we could easily describe the Memphis wildcat strike and the workers' preference for racial exclusion as a source of competitive disadvantage. Under the standard story, because discriminating is more expensive than inclusion, forces of market competition will eventually drive out discriminating firms.⁶ Railroads that indulged White workers' desire to exclude would have paid a steep price to do so. After all, Whites were earning higher wages at the time. Paying Black workers, who actually were willing to work for lower wages owing to their historic discrimination, would have been much cheaper for the railroads, especially big operations like the Yazoo and Mississippi Valley. White workers were significantly more expensive, particularly if they were able to bargain for even higher wages using union power.

Unions also would have found discrimination expensive. White workers were giving up a useful ally in their labor struggles against employers. Black workers could have supplied (and did eventually supply) an important addition to the ranks of union members. Because racism cost unions and railroads dearly in terms of competitive advantage, a survival-of-the-fittest competition would have driven out discrimination in favor of inclusion. Or so the standard story goes.⁷

But we could tell another story about the hate strike, the sort of story that economic historians and labor scholars might tell.⁸ In this story, White unions acted as a market cartel to gain a competitive advantage. By segmenting the market, White railroad workers could command higher

4. See *id.* at 68.

5. See *id.* at 68–69.

6. See discussion *infra* Part I.

7. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

8. See, e.g., ROBERT HIGGS, *COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865–1914* (1977) (discrimination during Jim Crow most often took the form of stratification between skilled and unskilled); Herbert Hill, *The Problem of Race in American Labor History*, 24 REV. AM. HIST. 189 (1996) (unions excluded on the basis of race for higher wages).

wages for themselves.⁹ Of course, unions had an incentive to include Black workers in order to bolster their ranks and strengthen their power, but in many cases, unions could offset a potential loss of power from excluding Black workers by providing higher social status and higher wages for their White members. Those railroads that had acceded to White union demands could still extract profit at some level. Although those firms that put Black workers into unskilled positions had to pay White workers higher wages, a segmented market would have also been able to provide the railroads with a ready stable of strike-breakers to undercut the union's position. In contrast to the standard story, discrimination might have paid off.

This Article argues that we can better understand historical racial discrimination if we frame it as the anti-competitive work of racial cartels. The activity of a range of all-White groups, like homeowners' associations, unions, school boards, local political parties, city councils, and other racially exclusive groups can usefully be described as cartel conduct. These groups gained significant social, economic and political profit—higher wages, higher property values, greater political power—from excluding on the basis of race.

In what way do these groups' activities resemble those of market cartels? In theoretical terms, racial cartels generated profit in the same way that market cartels do—by restricting supply and manipulating price. Homeowners' associations worked to create a racially segmented housing market by limiting the pool of buyers. Unions excluded Blacks to create a dual labor market. White political parties pushed Black voters off the rolls to consolidate the power of the Democratic Party in Southern states.

Racial cartels also provided White cartel members with higher profits, if not higher prices. In housing markets, a segmented market provided Whites with higher property values.¹⁰ In labor markets, restricting the supply of skilled workers brought higher wages.¹¹ Far from costing Whites to discriminate, exclusion paid significant dividends.

Describing historical anti-competitive conduct as the work of racial cartels pays off in three distinct ways. First, the analogy helps us to under-

9. See Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547 (1972) (arguing that ethnic antagonism germinates in a labor market split along ethnic lines because of economic competition).

10. See Linda Brewster Stearns & John Logan, *The Racial Structuring of the Housing Market and Segregation in Suburban Areas*, 65 SOC. FORCES 28 (1986) (arguing that segregation created a dual housing market); Douglas S. Massey, Gretchen A. Condran & Nancy A. Denton, *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29, 37–38 (1987) (noting that median housing values and rental values, plus other features of the neighborhoods, were far lower for Black neighborhoods than for Whites).

11. See Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547 (1972) (arguing that labor markets were segmented to the benefit of Whites in terms of higher wages).

stand how Whites benefitted from exclusion socially, economically and politically. A racial cartel story emphasizes that, contrary to standard economic theory, exclusion might have paid off handsomely for Whites, in terms of property values, wages, status and political power.

Second, a cartel story moves beyond individual, intentionalist accounts to focus on group conduct and collective action. Many theoretical accounts of discrimination focus on the individual firm or actor's actions and motivations.¹² A cartel story, which maps the collective dynamics of racial exclusion, better matches the historical accounts of group conduct.

Finally, and perhaps most importantly, the story of racial cartels focuses on the unfair, anti-competitive effects of racial exclusion. In doing so, the analogy potentially helps us to frame anti-discrimination law as a species of anti-trust law, designed to correct market failure and restore market competition.

Part I of this Article develops in more detail the theory of racial cartels, and the analogy to market cartels. Many all-White groups functioned effectively as cartels for anti-competitive purposes. These groups used many of the same anti-competitive strategies as do ordinary market cartels. These groups also monitored their members and enforced cartel rules against them in many of the same ways as ordinary market cartels.

Parts II and III take up two technical problems, both of which relate to cartel stability and the incentive of members to defect and sell across racial lines. Part II examines the collective action problem of cooperation. Why did cartel members cooperate with other members in refusing to sell across racial boundaries? This section explores the way in which a wide range of punishments—legal, social and economic—kept racial cartel members in line.

Part III investigates the related collective action problem of punishment. Why did cartel members punish those who broke cartel rules and sold across racial boundaries? This section argues that internalized norms of racial identity, and attendant feelings of guilt and shame, played an important role in solving both first and second-order problems.

Part IV investigates two case studies of racial cartels in action: homeowners' associations in Chicago and political parties in Texas. The history of these two groups suggests that viewing discrimination as the work of racial cartels more usefully describes how discrimination played out in practice.

12. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1971) (arguing that the market will drive out discrimination that is based on individual tastes for discrimination), KENNETH J. ARROW, *THE THEORY OF DISCRIMINATION IN LABOR MARKETS* (O. Ashenfelter & A. Rees eds. 1973) (arguing that individual employers discriminate on the basis of a statistical likelihood that workers of color are less productive.)

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

13. See BECKER, *supra* note 7, at 43–45. See also JOSEPH STIGLITZ, *ECONOMICS* 410 (1993). Becker actually hypothesized that market monopolies as a species of market failure would permit individuals to indulge in a “taste” for discrimination. See BECKER, *supra* note 7, at 46–47.

14. According to Becker, understanding the scope and incidence of collective action against people of color “is perhaps the most important remaining gap in the analysis of the economic position of minorities.” See BECKER, *supra* note 7, at 8.

15. See THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 206–11 (Peter Newman ed., 1998). For a much fuller discussion of cartel definitions, and proof of the existence of cartels under US and European Community law, see Maurice Guerrin & Georgios Kyriazis, *Cartels: Proof and Procedural Issues*, 16 *FORDHAM INT’L L.J.* 266 (1992/1993).

16. GEORGE W. STOCKING & MYRON W. WATKINS, *CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY* 5–10 (1946).

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

17. See *id.*

18. The era of Jim Crow, commonly understood to be from 1877–1954, was notable for the dramatic increase of racial segregation, after a brief period of relative racial progress during Reconstruction. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2001).

19. See LESTER C. THUROW, *POVERTY AND DISCRIMINATION* 118–26 (1969).

20. See ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 343–46 (2000). See also Robert Cooter, *Market Affirmative Action*, 31 *SAN DIEGO L. REV.* 133, 150 (1994).

21. See Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* 1005 (1995).

22. Frank Parkin, Randall Collins and Robert Murphy draw on and extend the work of Max Weber on closure, to argue that closure is essential to monopolizing scarce resources and opportunities. See Frank Parkin, *Strategies of Social Closure in Class Formation*, in *THE SOCIAL ANALYSIS OF CLASS STRUCTURE* 1 (Frank Parkin ed., 1974); ROBERT MURPHY, *SOCIAL CLOSURE: THE THEORY OF MONOPOLIZATION AND EXCLUSION* (1988); RANDALL COLLINS, *CONFLICT SOCIOLOGY: TOWARDS AN EXPLANATORY SCIENCE* (1975).

23. See *Freedom Holdings v. Spitzer*, 447 F. Supp. 2d 230, 251 (S.D.N.Y. 2004) (defining a cartel as a combination of producers or producers that join together to control a product's price or production). The European Commission defines a cartel as “an illegal secret agreement concluded between competitors to fix prices, restrict supply and/or divide up markets. The agreement may take a wide variety of forms but often relates to sales prices or increases in such prices, restrictions on sales or production capacities,

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

sharing out of product or geographic markets or customers, and collusion on the other commercial conditions for the sale of products or services." Eur. Comm'n, *Antitrust: Commission Action Against Cartels—Questions and Answers*, EUROPA (Jan. 28, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/32&format=HTML&aged=0&language=EN&guiLanguage=en>.

24. Please see Part III for more detail.

25. See DONALD S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 35–37 (Harvard University Press, 1993); See generally Zorita Mikva, *The Neighborhood Improvement Association: A Counter-Force to the Expansion of Chicago's Negro Population (1951)* (unpublished M.A. thesis, University of Chicago) (on file with Chicago: Library Dept. of Photographic Reproduction).

26. See MASSEY & DENTON, *supra* note 25, at 37.

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

27. See MASSEY & DENTON, *supra* note 25, at 41.

28. See *id.*

29. See generally Mary R. Jackman & Robert W. Jackman, *Racial Inequalities in Home Ownership*, 58 SOC. FORCES 1221, 1227–30 (1980) (documenting property value differences between Black and White homes).

30. See generally Michael Schill & Susan Wachter, *Housing Market Constraints and Racial Stratification by Income and Race*, 6 HOUS. POL'Y DEBATE 141 (1995) (arguing that the correlation between income and race meant Whites enjoyed higher quality housing); See also Massey, Condran and Denton, *THE EFFECT OF RESIDENTIAL SEGREGATION*, *supra* note 10.

31. See BECKER, *supra* note 7, at 19–38.

32. See, e.g., Gretchen Boger, *The Meaning of Neighborhood in the Modern City*, 35 J. URB. HIST. 236 (2009) (arguing that middle and working class Whites advocated for and benefitted from the Baltimore segregation ordinance, and that no elite Whites did so).

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

To be sure, the analogy between racial cartels and ordinary market cartels is far from perfect. This Article does not mean to suggest that homeowners' associations functioned technically as cartels. More specifically, the cartel account does not conform to the precise technical definitions of cartel conduct. Critics will point out, for example, that in housing markets, a homeowners' association cannot properly be described as a racial cartel because White homeowners will be both buyers and sellers in this market, and have no incentive to pay higher prices when they are buyers.³⁵ These critics will also point out, correctly, that the price and the restriction of supply in market cartels do not always have obvious or technically precise analogues in the context of race.

At the same time, the analogy captures far better than standard accounts the competitive advantage and collective dynamic of racial exclusion. In the housing market, at the level of the individual homeowners' association, White members of the association had an incentive to keep property values high, both as potential sellers and as potential borrowers against the value of the property.

As future homeowners, these same Whites also had a strong interest in low prices for housing in good neighborhoods. But even as future buyers, these Whites might well have preferred to buy in neighborhoods with a strong homeowners' association, in order to protect the value of their home once they had bought.³⁶ In addition, future homeowners in certain cities might not have had the option to buy outside the jurisdiction of an association. In any event, although the cartel story might not fit perfectly, describing a homeowners' association as a cartel usefully focuses on the property value payoffs and collective dynamics of exclusion, aspects that are obscured by irrational animus accounts of discrimination.

Intuitively, the cartel story of racial exclusion seems to provide additional explanatory power beyond "tastes for discrimination" or standard stories about intrinsic animus. But before signing off on the idea of racial

33. See DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (Verso rev. ed., 1999) (arguing that working-class Whites enjoyed psychological "wages" in terms of status position by excluding on the basis of race).

34. See *id.*

35. Thanks to Daniel Klerman and Matthew Spitzer for raising this point.

36. To be even more precise, in terms of incentives, the prospective homeowner should have looked to find a neighborhood with a homeowners' association that was weak on the day that she closed her purchase, and then dramatically stronger on the day after her purchase.

cartels, we first need to work through some theoretical questions about cartel stability. In the strictly neoclassical view, cartels do not exist, or if they do, they dissolve quickly because members have a strong self-interest in defecting or letting other members do all of the work. The next section explores cartel stability, and the roles that law and racial identity might have played in keeping racial cartels together.

II. CHEATER, CHEATER: THE PROBLEM OF THE UNSTABLE CARTEL

Over the last thirty years, neoclassical theorists have developed the theoretical case against cartels, arguing mostly that cartels are inherently unstable. In this vein, scholars make three basic claims.³⁷

First, to form a coherent group, cartel members have to coordinate carefully. Group members need to make sure they are all on the same page with regard to the rules of engagement, e.g., whether the rules require members to sell products at below cost or alternatively restrict output, in order to drive out a competitor. Economic theorists call this “the coordination problem.”³⁸

Second, in operation, cartels face “the free-rider problem.” Free-riders are group members who will cheat on cartel agreements when cheating is profitable.³⁹ As anyone who has ever joined a group knows from experience, every member of the cartel has a reason to free-ride on other members of the cartel. The work to maintain a cartel is costly, and cartels take a lot of work to maintain. Any individual member will benefit by letting the other members do all of the work while they enjoy all of the benefits.⁴⁰ Cartels have to figure out how to get members to do cartel work without free-riding on other members.⁴¹

Third and similarly, cartels must contend with “the defection problem.” Beyond shirking, cartel members often face a strong temptation to defect or abandon the cartel altogether when it pays off to do so.⁴² For example, abiding by supply restrictions to keep the price high means that a member of OPEC must give up the profits they would gain if they sold

37. See D.K. Osborne, *Cartel Problems*, 66 AM. ECON. REV. 835 (1976).

38. See AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* (1991); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (Harv. U. Press 1960).

39. Mancur Olson has famously described the free-rider problem at length. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 21–36 (1971).

40. See *id.*

41. Robert Cooter notes that the free-rider problem likely besets discriminatory groups. See COOTER, *THE STRATEGIC CONSTITUTION*, *supra* note 20, at 346.

42. See Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 524–25 (2004).

all the oil that the country could supply.⁴³ Abiding by cartel agreements often requires cartel members to forgo immediate individual profit for longer-term gain. In game theory terms, scholars view membership in a cartel as a combination of the prisoner's dilemma and a coordination game.

Notwithstanding their supposed instability, cartels have had long and fruitful lives in a wide range of markets, from sugar, rubber, and steel to electric lamps, aluminum, chemicals, and explosives. Indeed, some market cartels like DeBeers, in diamonds, and OPEC, in oil, have been around for several decades.

How then do we account for cartel stability in real life? For most theorists on the subject, the answer lies in punishment.⁴⁴ Particularly for larger groups, punishment persuades group members to cooperate, even when to do so is costly to the member. If cartel members face sufficiently high punishment that it offsets the benefits of defecting or free-riding, then members are likely to comply with cartel rules to exclude non-members.⁴⁵ While punishment cannot be the sole answer, as the next section will point out, punishment is a key part of the cartel stability story.

A review of the literature suggests that racial cartels may have used three different types of punishment strategies to stabilize themselves: (i) the use of public law; (ii) the use of private law, and in particular, contracts; and (iii) the use of moralistic group social norms connected to group identity and ideology. The following discussion suggests that much like market cartels, racial cartels deployed these strategies to keep White cartel members in line.

A. Public Law

Public law has been quite useful in helping to stabilize ordinary market cartels. In the 1930s, for example, government laws required domestic sugar production to conform to cartel-set numbers, which helped to stabilize the international sugar cartel and keep cartel members on the same strategic page.⁴⁶ Here, the government was responsible for monitor-

43. See *id.* The problem of defection is well known in the collective action literature. See, e.g., SCHELLING, *supra* note 38, at 57–58; see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 13–14 (1984).

44. The earliest game theorists noted that punishment was an effective way to solve the prisoner's dilemma. Thomas C. Schelling, *Strategy, Tactics, and Non-Zero Sum Theory*, in *THEORY OF GAMES: TECHNIQUES AND APPLICATIONS* 469, 475–79 (1964); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 33–35 (1977). Cartel theorists agreed. See Osborne, *supra* note 37, at 838–41; Leslie, *supra* note 42, at 528.

45. See Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295 (1987).

46. See Kurt Wilk, *The International Sugar Regime*, 33 AM. POL. SCI. REV. 860, 871–73 (1939).

ing cartel members' compliance and for punishing those who produced more than the cartel agreement allowed.

Just as in market monopolies, racial cartels have used public law to force members to "agree" to exclude non-group members. To take the most obvious example, White homeowners and developers worked together to enact segregation ordinances in cities like Baltimore, Winston-Salem, Atlanta,⁴⁷ and Louisville.⁴⁸ Some zoning ordinances reserved particular areas for Black and White residents, while others prohibited Blacks from moving into blocks where a greater number of Whites than Blacks resided.

At least until being outlawed by the Supreme Court,⁴⁹ segregation ordinances solved cartel stability problems quite easily. Whites did not have the choice to sell to Blacks—they were legally prohibited from doing so. Cartel members were relieved of much of the work of monitoring and enforcing—taxpayer money and law enforcement did much of the work.

Beyond enforcement, racial cartels also used public law directly to restrict competition by White planters for Black labor. White planters persuaded state legislatures to enact the Black Codes just after the Civil War.⁵⁰ The Codes strictly enforced contracts between planters and labor, and limited negotiation over labor contracts to the beginning of the agricultural year. Other statutes also prevented labor recruiters from "enticing" away labor, and pushed workers back on the plantation through vagrancy prohibitions.⁵¹

At least one scholar has argued that both the Black Codes and the longer lasting anti-enticement and anti-vagrancy statutes were basically anti-competitive agreements to hold down Black wages and to keep former slave labor on the farm.⁵² Given the uncertain labor supply at the end of the war, planters would ordinarily have had to compete for labor by paying higher wages. The statutes regulating Black labor preempted this wage war through the machinery of federal law. Without the statutes, planters would have had to compete with each other to assure adequate

47. See MASSEY & DENTON, *supra* note 25, at 41 (documenting that segregation ordinances in these cities reserved some neighborhoods for Blacks and others for Whites).

48. See *Buchanan v. Warley*, 245 U.S. 60, 70–72 (1917) (describing the Louisville ordinance, which the Court struck down as unconstitutional).

49. See *id.*

50. For a discussion of the Black Codes, see HAROLD D. WOODMAN, *NEW SOUTH—NEW LAW: THE LEGAL FOUNDATIONS OF CREDIT AND LABOR RELATIONS IN THE POSTBELLUM AGRICULTURAL SOUTH* (1995); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998). See also Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative of Competitive?*, 51 U. CHI. L. REV. 1161, 1162 (1984).

51. See Roback, *supra* note 50, at 1162.

52. See *id.*

labor at harvest time.⁵³ With the relevant statutes in place, planters avoided a strategic arms race of higher wages in which each planter would have tried to outbid the other.

B. Private Law

Private contracts can also help stabilize a cartel. With regard to cartel contracts, individuals do the cartel monitoring, but the government provides the third-party enforcement power. In regular market cartels, private contracts to divide up territory are standard procedure. In 1920, for example, explosives manufacturers DuPont (in the U.S.) and the Nobel Dynamite Trust Company (in Europe) agreed to divide territories for explosives among themselves. The parties also exchanged exclusive cross-licenses for present and future patents in order to sell each other's products on their home turf.⁵⁴ Predictably, these under-the-table agreements undermined real competition in the explosives markets.⁵⁵

Like the explosives cartel, racial cartels also used private contracts—most notably, the racially restrictive covenant—to solve cartel stability problems. During Jim Crow, White homeowners negotiated private covenants with each other to prohibit the sale of homes in White neighborhoods across racial lines to Blacks, Mexicans and Asians.⁵⁶ As part of the contract to buy a house, White homebuyers agreed not to sell their property in the future to non-White buyers.⁵⁷

Like cross-licensing, racially restrictive covenants tied neighbors to each other through private agreement. Such agreements were enforced not by the previous owner, but by the “third party beneficiary” neighbors, who presumably had relied on the all-White character of the neighborhood when deciding to buy.⁵⁸ The threat of potential litigation from neighbors served to scare homeowners who might otherwise have sold to a willing non-White buyer.⁵⁹ Part IV will address restrictive covenants more extensively.

53. See LESTER C. THUROW, *GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY* 167 (1975).

54. See STOCKING & WATKINS, *supra* note 16, at 439–40.

55. See *id.*

56. *Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D. Cal. 1892), records the case of a restrictive covenant that prohibited the sale of property to Chinese residents in California. *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1949), discusses a restrictive covenant that prohibited sale to persons of “Mexican descent” in Texas. Restrictive covenants prohibiting sale to Blacks were numerous, and were only invalidated in 1948, in the case of *Shelley v. Kraemer*, 334 U.S. 1 (1948).

57. See discussion *supra* Part I.

58. See *Shelley*, 334 U.S. 1.

59. Richard Brooks has argued that, even after restrictive covenants were outlawed in *Shelley v. Kraemer*, restrictive covenants continued to produce residential segregation by signaling the racial exclusivity of White communities, and by functioning as an informal

C. Social Incentives

Beyond public and private law, market cartels over the years have also used informal social incentives to solve stability problems, by socially rewarding those who abided by the agreements, and socially punishing those who did not.⁶⁰ For example, in *American Column and Lumber v. U.S.*, a hardwood trade association used “business honor and social penalties” to enforce anti-competitive agreements among association members.⁶¹ Even more informally, market cartels have often relied on ordinary social trust to hold members to their obligations.⁶²

As in market cartels, social norms can play an important role in racial cartels as well.⁶³ Legal scholar Richard McAdams has argued that social esteem and disesteem can work to enforce a racial group’s agreement to exclude other races.⁶⁴ According to McAdams, people convey approval and good will towards other group members who comply with the group norm to exclude, and will shame or shun those who cross racial lines. Similarly, those members who serve as cartel enforcers get social approval for their hard work.⁶⁵ Even if social norms are insufficient on their own, they can supplement more formal legal regulations to create cartel stability.

Of course, whether social incentives actually work depends very much on group members’ willingness to reward each other with esteem or shame. Even the activity of esteeming and disesteeming takes work. In particular, keeping track of who has crossed racial lines and who has not takes time and energy. Often, shaming requires extra work—homeowners’ associations, for example, often published the names of defecting members in a local newsletter.⁶⁶ And of course, group members will shirk work if they can get away with it.

social norm enforced via social sanctions and incentives. See Richard R. W. Brooks, *Covenants & Conventions* (Northwestern Law & Econ. Research Research Paper No. 02-8, 2002).

60. See OLSON, *supra* note 39, at 60.

61. *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921).

62. See Leslie, *supra* note 43, at 547.

63. See Robert Boyd & Peter Richerson, *Punishment Allows the Evolution of Cooperation (or Anything Else) in Sizable Groups*, 13 *ETHNOLOGY AND SOCIOBIOLOGY* 171 (1992).

64. See McAdams, *supra* note 21, at 1044. McAdams argues that groups compete to produce relative social status, rather than material benefits like jobs, education and housing. See *id.*

65. See *id.* at 1046.

66. Phillip Pettit and Geoff Brennan, like Richard McAdams, have argued that the basic work of esteem and dis-esteem does not require any expenditure, and for that reason, social approval constitutes a cost-free mechanism to punish. See PHILLIP PETTIT & GEOFF BRENNAN, *THE ECONOMY OF ESTEEM: AN ESSAY ON CIVIL AND POLITICAL SOCIETY* (2004). However, McAdams concedes that in certain instances, group members may be asked to incur costs in monitoring norm violation (when the violation is not public or

How can cartels solve this second order problem of getting members to punish cartel cheaters? Some evolutionary psychologists and cultural anthropologists have suggested that humans have evolved a tendency to punish cheaters—a so-called “cheater mechanism” that makes people willing to punish those who violate group norms or who do not reciprocate when provided benefits.⁶⁷ A wide range of experimental literature documents that people will punish those who don’t cooperate at some significant cost to themselves, even in one-off interactions.⁶⁸

The next section explores an alternative explanation, one still at least tangentially rooted in a rational choice framework. In particular, this section explores the way in which internal rewards and punishments can help to explain both why people cooperate and why they punish.

III. SOLVING THE PUNISHMENT PROBLEM VIA INTERNAL IDENTITY NORMS

Any social norm that depends on members’ willingness to monitor and police each other will inevitably face free-rider problems. The ability to internalize social norms so that they constitute internal sources of guidance can help to solve some of these problems. Internalized norms do not rely on other members to monitor or enforce; by definition they are self-enforcing. Although internalized norms take a lot of work to put in place, much of that work tends to be spread more evenly among group members (parents, teenage cohort, schools, churches), who do the work of socializing children and young adults.

First, some preliminary theory about internalized norms. Theorists have described norms as regular cultural practices that are accompanied by a set of punishment and rewards.⁶⁹ For most theorists, internalization is a process in which norms that are enforced externally by others come to be incorporated, and enforced, from within a person’s internal psychological framework.⁷⁰ The internalization process centrally involves

obvious) and in enforcing punishment mechanisms. Conversation with Richard McAdams, March 25, 2009.

67. See Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Change*, in *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* 163, 199 (Jerome H. Barkow et al. eds., 1992); ROBERT BOYD & PETER J. RICHESON, *THE ORIGIN AND EVOLUTION OF CULTURES* 264–66 (2005) (developing a cultural group selection account in which genes and culture co-evolve to produce the tendency to punish defectors).

68. See ELINOR OSTROM, JAMES GARDNER & ROY WALKER, *RULES, GAMES AND COMMON-POOL RESOURCES* (1994); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 *NATURE* 137 (2002).

69. See ULLMAN-MARGALIT, *supra* note 43 at 12–13; Richard McAdams, *The Origins, Emergence, and Regulation of Norms*, 96 *MICH. L. REV.*, 338, 351 (1997).

70. Roy Schafer argues that internalization is a process in which external regulatory interactions in a person’s external environment become transformed into internal regulatory interactions within the self. ROY SCHAFFER, *ASPECTS OF INTERNALIZATION* 9 (1968).

both external pressure and internal transformative processes like identification.⁷¹

People are socialized to internalize norms in a myriad of ways, but three primary channels stand out. Children are socialized to adopt norms by their parents (which some experts describe as vertical transmission). Children and young adults are also socialized by other adults, both in their parents' generation (oblique transmission) and by people in their own generation (horizontal transmission, a mode particularly salient during teenage years).⁷² Importantly, the degree of socialization will depend on the number of people in a child's community who have both adopted the norm and are willing to punish or reward on the basis of the norm.

The key feature of internalized norms is that once norms are internalized, compliance no longer exclusively depends on external enforcement. When a norm has become fully internalized, a person will experience guilt, shame and anxiety for violating the norm, whether or not an external enforcement mechanism exists.⁷³ Likewise, a person will experience self-esteem and validation when she complies with the norm, regardless of whether anyone observes her. For example, a real estate broker who refuses to sell across racial lines might feel good for doing so, and might experience some degree of shame and guilt if he does sell. Internal incentives are a cheap and efficient way for cartels to operate. The group member monitors and enforces the group's rules all on his own!

Of course, it takes work for groups to socialize their members to internalize norms, but groups can delegate much of that work to institutions. For example, the National Association of Real Estate Boards and its membership in Chicago carried the laboring oar to socialize real estate brokers not to betray their White homeowner constituencies by selling across racial lines. To engage the full power of moralism in the

Moore and Fine see internalization as a process in which aspects of a person's outer world and interactions with external processes are absorbed and presented in a person's internal structure. BURNES E. MOORE & BERNARD D. FINE, *PSYCHOANALYTIC TERMS AND CONCEPTS* 102–03 (1990). Sue Walrond-Skinner defines internalization as a process in which a person transfers her relationship with an external object into her internal world. SUE WALROND-SKINNER, *A DICTIONARY OF PSYCHOTHERAPY* 186 (1986).

71. See SCHAFER, *supra* note 68, at 9 (internal); WILLIAM W. MEISSNER, *INTERNALIZATION IN PSYCHOANALYSIS* (1981) (external). For an extensive and detailed treatment about the processes of internalization, see KENNETH C. WALLIS & JAMES L. PULTON, *INTERNALIZATION* (2001). See also JOAN GRUSEC & PAUL HASTINGS, *HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH* (2007).

72. See LUIGI LUCA CAVALLI-SFORZA & MARCUS FELDMAN, *CULTURAL TRANSMISSION AND EVOLUTION: A QUANTITATIVE APPROACH* (1981).

73. See Nancy Eisenberg, *Emotion, Regulation and Moral Development*, 51 ANN. REV. PSYCH. 665, 667 (2000). Sheldon Stryker has laid out many of these key concepts in his book *SYMBOLIC INTERACTIONISM: A SOCIAL STRUCTURAL VERSION* (1980). Robert Cooter has relied on the concept of norm internalization in discussing the law and economics of informal norms. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

socialization process, the group adopted as part of its ethics code a prohibition against selling across racial lines.⁷⁴

Norms about group identity and outsider exclusion appear to be particularly easy to socialize. Experimental work in social psychology suggests that in contests over scarce resources, group identity norms, particularly norms to exclude, quickly become salient.⁷⁵ In a now-famous experiment by Muzafer Sherif, a group of boys in a summer camp mobilized norms of exclusion (based on the camp-designated group memberships) when competing for prizes in camp activities.⁷⁶ Sherif's work shows that group members' identities can be quickly mobilized to generate norms of in-group favoritism and out-group hostility, even when membership designations are arbitrary and not salient in other settings.

The relationship between anti-competitive conduct and internalized identity norms finds some support in earlier work by law and economics scholars. Janet Landa has proposed that internalized norms about Chinese identity improve the competitiveness of Chinese middlemen in various countries. Landa argues that homogenous ethnic identity improves the trust and information dissemination in a group organized for economic activity.⁷⁷

Likewise, Richard Posner has alluded to the role that identity might play in the operation of a hypothetical medieval craft guild.⁷⁸ Posner's hypothetical weaver's guild restricts the supply of cloth by forbidding members to make cloth at night or on holidays, or to hire beyond the minimum number of apprentices necessary to replace existing members. The guild also requires its members to use only those tools that would facilitate cloth production by hand. Members who violate such restrictions are shunned and expelled from the guild.

To promote compliance with these restrictions, and to keep supply artificially low, Posner's guild deploys some very specific racialized norms about the identity of "craftsmen" and the need to exclude non-craftsmen from production, because of the inferior quality of cloth that would be

74. See *infra* notes 139–141 and accompanying text for a discussion about the ethics code.

75. For an excellent discussion about this work, which is called "realistic group conflict theory," see J.W. Jackson, *Realistic Group Conflict Theory: An Evaluation of the Theoretical and Empirical Literature*, 43 *Psychological Record* 395 (1993).

76. See MUZAFER SHERIF, *THE ROBBERS' CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION* (1988). Sherif also found that the boys' group structure and their conflict with another group in camp were very much influenced by their perception of competitive threat. He also found that creating superordinate goals, requiring that competing groups work together on some common goal, lessened group conflict substantially and affected group norms and group structure. See *id.*

77. See Janet T. Landa, *A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law*, 10 *J. LEGAL STUD.* 349 (1981).

78. See Richard Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* 1, 10 (1993).

produced by non-craftsmen.⁷⁹ Accordingly, the guild bars membership of Jews and other “aliens” because, in the members’ view, these groups will not “share [with existing members] a common core of basic tastes and values for quality.”⁸⁰ The guild protects racial identity boundaries by encouraging members to form a strong web of social relationships, with frequent intermarriage and the hiring of apprentices from guild member families.⁸¹

Much like Posner’s exclusive guild and Landa’s Chinese middlemen, White racial cartels may well have used internalized social norms around identity to create anti-competitive barriers to entry in key markets like labor, housing and education. Keeping non-Whites out of the market became easier once the cartel had promoted internalized social norms about why exclusion should be maintained.

Sociologist Rose Helper’s brilliant 1969 study of Chicago real estate brokers provides evidence that internal norms played an important role in supplementing external sanctions for real estate boards.⁸² Helper interviewed hundreds of segregation-era real estate brokers in Chicago about their policies regarding sales to Black homebuyers. Most respondents said they would not sell to Blacks, although a few gave a qualified yes. Moreover, brokers reported a variable set of rules about when property could be sold to Blacks—for a considerable number of brokers, selling was permitted when it appeared that racial succession was inevitable.

Many Chicago brokers reported a fear of economic retaliation—loss of clients, sources of mortgage funds, insurance, and property listings. An even larger number of brokers feared social retaliation, including the wrath of immediate neighbors, loss of social status with colleagues and the community. As one broker described it, “you become a social outcast among other real estate brokers.”⁸³

But internal incentives did just as much work to police the real estate broker community in Chicago. Many brokers believed that it was morally wrong to “hurt” White homeowners, or cause them emotional upheaval, property loss and other harm. A significant number of respondents characterized cross-border selling as unethical, or as a betrayal of trust. Several said their conscience would not allow them to sell, and others spoke of the need to respect neighbors and other property owners.⁸⁴

Consistent with the notion that identity helps to hold cartels together, a number of brokers explicitly spoke about their identity as a White person. As one broker put it, “[w]hether I’m a priest, a rabbi or a

79. *See id.*

80. *Id.*

81. *Id.*

82. *See* ROSE HELPER, RACIAL POLICIES AND THE PRACTICES OF REAL ESTATE BROKERS (1969).

83. *See id.* at 137.

84. *See id.* at 116–17.

real estate man, I'm still a member of a race."⁸⁵ Other brokers spoke of their obligations as White real estate brokers:

"No [r]ealtor objects to dealing with Negroes but *we have that certain obligation to White people*. The value of their property goes down. You want their faith, their good will. You have an obligation to your client, loyalty to your client. You have a moral obligation to your client not to break a block. It's an unwritten law."⁸⁶

Not all brokers held the line, however. Economic temptation proved to be too much for some. Knowing that the community would retaliate, the defectors created separate professional networks and sources of capital to allow them to do business.⁸⁷

Once the defector brokers had sold a critical mass of houses in a neighborhood (often three or more) to Black buyers, "respectable" brokers followed.⁸⁸ Remarkably, according to Helper's survey, brokers found it permissible according to their informal codes of conduct to sell in a neighborhood that was already tipping.⁸⁹

The story of internalized norms itself presents important questions. Why will group members (or the institutions to which they delegate) engage in the time-consuming work of socializing other members to internalize norms? One answer might lie in cultural group selection—the notion that those groups (homeowners' associations, unions, etc.) who socialize their members fare much better in terms of competitive advantage (wages, housing) than out-group members or other non-socializing groups.⁹⁰ Another answer might point to the ideological dimension of socialization, which becomes self-reinforcing when people internalize norms about what it means to be good parents or good members of the group.⁹¹

This Article does not follow these threads of inquiry to their ultimate conclusion, and the account is for that reason necessarily

85. See *id.* at 123.

86. *Id.* at 119. (emphasis added).

87. See *id.* See also Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145 (1998) (arguing that blockbusting required brokers to maintain separate networks of support).

88. See Helper, *supra* note 79, at 109–12.

89. See *id.*

90. See ROBERT BOYD & PETER J. RICHESON, *THE ORIGIN AND EVOLUTION OF CULTURES* (2005). For an excellent introduction to the idea of cultural group selection, see ELLIOT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1999).

91. For arguments with regard to parenting, see FRANCES CHAPUT WAKSLER, *STUDYING THE SOCIAL WORLDS OF CHILDREN: SOCIOLOGICAL READINGS* (2007) (suggesting that much of socialization of children within parenting is motivated by ideological commitments to what constitutes good parenting).

incomplete. At the same time, even a partial understanding about the role that law, informal norms and internal identity-based norms play in cartel stability may help to shed light on the dynamics of historical racial exclusion.

The following section pursues the same goal by taking a much more detailed look at the history of two racial cartels during the Jim Crow era: White political parties in Texas and White homeowners' associations and real estate boards in Chicago.

IV. CASE STUDIES: TWO CARTELS IN ACTION

To more fully understand the dynamics of racial cartel conduct operation, this section explores two case studies of cartels in action. First, this section looks at a couple of all-White factions of the Democratic Party in Fort Bend County, Texas. As the following discussion will describe at length, these factions conspired in a mutual disarmament pact to disfranchise Black voters, largely to eliminate them as the potential swing vote that could tip the party towards one faction or the other. Second, this section examines Chicago homeowners' associations. These groups collaborated to exclude Black residents from White neighborhoods, to prop up property values and to monopolize access to wealthy neighbors and well-funded public goods associated with wealthy neighbors.

As we will see in both of these case studies, racial identity and the law both played central roles in cartel operation. In addition, the cartels in both studies used violence and coercion to overcome members' temptation to cheat or defect from the organization.

But the cartels also differed significantly, particularly in the role that the law played in cartel operations. For example, the law played a more formal role in keeping together homeowners' associations in Chicago than it did for Texas political parties.⁹² In reading the following two sections, we should keep in mind that racial cartels varied significantly across geography and time, and that historically specific events very much influenced the operation of each kind of cartel.

A. *The South: Disfranchising Voters in Political Markets*

The story of disfranchisement in Texas looks very much like a textbook case of racial cartel conduct. This is a story of Whites who managed to unite across major class divides in order to keep Black voters off the rolls. Their anti-competitive payoff: to disarm their most dangerous

92. Compare *infra* note 109 and accompanying text (noting that renegade violence controlled Texas political cartel stability) with *infra* notes 137–139 and accompanying text (pointing to the racially restrictive covenant and its role in homeowner association efforts to prevent defection).

political competition, the “swing” Black vote. A closer look at Texas political history adds the all-important details.

Historians long have argued about what spurred Whites in the South to disfranchise Blacks.⁹³ Some have claimed that conservative Democrats from the Black belt initiated the move to keep independent parties from winning with the Black vote, for both political and status-related reasons.⁹⁴ Others find it less important which groups initiated the move, and more important that they did so to neutralize new Black voters. According to V.O. Key, “the sounder generalization is that the groups on top at the moment, whatever their political orientation, feared that their opponents might recruit Negro [sic] support.”⁹⁵

Once back in power after the end of the war, Democrats had faced a new and emerging split between elites and working class farmers in the 1880s and early 1890s.⁹⁶ Small farmers, who were having trouble holding onto their land and keeping up their crop prices, increasingly began to pit their interests squarely against elite planters, along with financiers in the east and the increasingly pro-industrialist leadership of the Democratic Party.⁹⁷ Yeoman farmers formed the Southern Farmers’ Alliance and the Populist Party in the late 80s, and by 1889, the working-class farmer had some form of representation in every state in the South.⁹⁸

93. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* 6–8 (1974).

94. See C. VANN WOODWARD, *A HISTORY OF THE SOUTH, VOLUME IX: ORIGINS OF THE NEW SOUTH, 1817–1913* 222, 229 (1951); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS*, *supra* note 90, at 16–17.

95. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (A.A. Knopf ed., 1977). Similarly, Michael Perman has suggested that the conservative Black-belt Democrats did not lead the movement in every state—in some states, like South Carolina and Mississippi, independent dissenters spearheaded the push for disfranchisement, and Black-belt Democrats opposed the move or were slow to join it. See MICHAEL PERMAN, *STRUGGLE FOR MASTERY, DISFRANCHISEMENT IN THE SOUTH 1888–1908* (2001).

96. See WOODWARD, *THE STRANGE CAREER OF JIM CROW*, *supra* note 18, at 77; JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., *FROM SLAVERY TO FREEDOM* 283 (8th ed. 2000).

97. See FRANKLIN, *FROM SLAVERY TO FREEDOM*, *supra* note 93, at 281; WOODWARD, *ORIGINS OF THE NEW SOUTH*, *supra* note 91 at 192–93. The Southern Alliance joined with the Western Farmer’s Alliance to form the National Farmers’ Alliance, and much like the southerners, the national organization united small farm land owners with hired hands to promote radical agrarian interests. See FRANKLIN, *FROM SLAVERY TO FREEDOM*, *supra* note 93, at 284; WOODWARD, *ORIGINS OF THE NEW SOUTH*, *supra* note 91, at 193, 246. A range of other economic programs produced independent movements as well. Morgan Kousser chronicles the rise of the Readjusters in Virginia, the Greenbacks in a number of southern states, the anti-prohibitionists in North Carolina, in Florida, those opposed to land giveaways, and the Agricultural Wheel in Arkansas (which eventually became part of the Farmers’ Alliance). See KOUSSER, *SHAPING OF SOUTHERN POLITICS*, *supra* note 90 at 25; See also WOODWARD, *THE STRANGE CAREER OF JIM CROW*, *supra* note 18, at 60.

98. See FRANKLIN, *FROM SLAVERY TO FREEDOM*, *supra* note 93, at 284

Once in place, these two Democratic factions—working-class farmer and elite planter/industrialist—began to openly compete for political power by aggressively going after the newly-emancipated Black vote. The Populist Party tried to unite with Black voters in Georgia, Texas and Arkansas, despite the loss of prestige the party risked by crossing racial lines.⁹⁹ Not to be outdone, Conservative Democrats also went after the Black vote, sometimes secretly, sometimes openly.¹⁰⁰ Even at this early stage, some conservatives contemplated disfranchisement. But even though they saw the potential advantage to exclusion, they feared more the force of the newly enacted Fourteenth and Fifteenth Amendments.¹⁰¹

In 1890, the period of open competition formally began to give way. Mississippi was the first to amend its Constitution to impose poll taxes and literacy tests to keep Blacks from voting. Over the next two decades, the rest of the South followed suit, including Texas, a state in which anti-competitive efforts came to a head just after the turn of the century.¹⁰²

The rest of our cartel story picks up in the Lone Star state. At the dawn of the era of exclusion in Texas, the split between small White farmer and elite White producer had become ungovernable. In the 1896 election, these two Democratic factions went to war with each other, using violence and intimidation, among other anti-competitive tactics, to try to consolidate an advantage.¹⁰³ At the same time, Black voters were beginning to wield significant power, or at least enough to be dangerous. Black Republicans already provided a constant but small opposition to White elite Democrats. Black voters posed an even greater threat to elite interests when they supported third-parties like the Greenbacks-Independents, the Farmers' Alliance and Populists.

In response to this threat, Texas Democrats in 1902 passed legislation setting up a poll tax and a secret ballot for general elections and primaries. Soon after, Democrats unleashed an even more potent weapon: the White primary. Taking many different forms, the White primary essentially restricted primary elections (or pre-primary nominations) to White voters only. By essentially guaranteeing White victory in elections, the White

99. See WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 91, at 236, 256; WOODWARD, STRANGE CAREER OF JIM CROW, *supra* note 18, at 60.

100. See *id.*

101. See FRANKLIN, FROM SLAVERY TO FREEDOM, *supra* note 94, at 281

102. See KOUSSER, SHAPING OF SOUTHERN POLITICS, *supra* note 90, at 196. To be sure, Texas was the least "Southern" of the southern states, and had internalized far less of the fixed racial attitude and the hierarchical elitist power structure, having had a relatively shorter experience with slavery. But competition among Whites was, as a result, far more open and a Democratic victory less assured than in other states. White democrats struggled repeatedly against a coalition of poor Whites and Blacks (and in some cases Mexicans) for power and office, and the third-party movement was stronger in Texas than anywhere else in the South. *Id.* at 97.

103. *Id.*

primary neutralized the growing power of the Black vote. Neutralizing the Black vote soon became the centerpiece of White strategy in Democratic politics for all factions.¹⁰⁴

In 1923, an all-White Texas legislature passed a law that unambiguously prohibited Black participation in a Democratic Party primary election held in the state.¹⁰⁵ The Supreme Court quickly stepped in to block this move, ruling in *Nixon v. Herndon* that the primary law violated the equal protection clause of Fourteenth Amendment.¹⁰⁶

The legislature and the Court went at each other for several more rounds before Texans were able to craft a White primary that the Supreme Court found to be constitutional.¹⁰⁷ But a short time later, the Court reversed itself, finding that the state had so pervasively controlled the primary process that even ostensibly private action constituted illegal state action that violated the equal protection clause.¹⁰⁸

Thwarted by the Supreme Court's rulings, Whites now turned to more local versions of the White primary. In Fort Bend County, Texas, for example, local Whites formed two groups, which were divided along class lines. The more numerous faction, the Jaybirds, consisted of four hundred or so of the county's wealthier property owners. Almost all were Democrats and all were White, as required by the organization's membership rules.¹⁰⁹ From the beginning, the Jaybird party looked just like an ordinary political party, with an executive committee, a regular primary, and ex-

104. Competition for Black votes first became a real issue during the election of 1892, and some Black officials were voted in during this election. *Id.* at 198.

105. For a detailed review of the history of the White primary, see DARLENE CLARK HINE, *BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS* (KTO Press 1979) (2003).

106. *Nixon v. Herndon*, 273 U.S. 536 (1927).

107. Not to be deterred, the legislature immediately passed new legislation delegating to parties complete control of their membership rules. In connection with this legislation, the Executive Committee of the Democratic Party then promptly passed a rule limiting its membership to Whites. In *Nixon v. Condon*, 286 U.S. 73 (1932), the Court struck down a Texas statute that empowered parties to choose the qualifications of primary voters this second round restriction, again on Fourteenth Amendment grounds. Determined to get past the Supreme Court's objections, the Democratic State Convention (a much larger group with far more direct participation than the Executive Committee) adopted a resolution restricting membership on the basis of race, without an accompanying statute. This time, the Supreme Court in *Grovey v. Townsend*, 295 U.S. 45 (1935) approved the convention's restrictions, finding on the basis of the party's "private" status that Texas had not taken any state action to violate the Fourteenth Amendment.

108. In *Smith v. Allwright*, 321 US 649 (1944), the Court reversed its decision in *Grovey*, finding that state law so extensively pervaded the party's participation in elections that the Convention constituted illegal state action. For an extended discussion of these historical events, see HINE, *supra* note 102.

109. See HINE, *supra* note 102, at 78, 245–46.

penses paid via an assessment from candidates who ran in the party primary.¹¹⁰

Much smaller in number, the renegade Woodpeckers represented the county's less affluent Whites and yeoman farmers, and included a number of political officials elected with the support of Black voters.¹¹¹ In shootouts that evoked the violence of the Wild West, the Woodpeckers and Jaybirds fought bitterly over who would eventually determine the agenda for the organization. Ultimately, the Jaybirds claimed victory, and dominated local politics for decades afterward.¹¹²

Seeking to keep the Woodpeckers (or other upstart splinter groups) from gaining power via the Black vote, the Jaybirds adopted a privatized local version of the White primary. The all-White group held a separate pre-primary election, to determine the party's nominee for the Democratic primary, which took place a few months later.¹¹³ Not surprisingly, given the Jaybirds' prominence, the Jaybird candidate almost always ran without opposition and then went on to win in both the Democratic primaries and the general election.¹¹⁴ In effect, the Jaybird pre-primary functioned as the equivalent of the general election, and White candidates were always elected.¹¹⁵

In 1953, in *Terry v. Adams*,¹¹⁶ the Supreme Court struck down the Jaybird all-White primary as unconstitutional, finding that the Fifteenth Amendment prohibited a state from permitting any organization, public or private, to replicate the state's election process for the purpose of disfranchising Blacks. But Whites had already effectively excluded Blacks from the franchise in Fort Bend County for most of the century.¹¹⁷

Some commentators have argued that Whites were motivated by irrational animus to exclude Blacks from the rolls.¹¹⁸ But most historians tell the story of Texas disfranchisement politics as a story of the consolidation of White political power, a story consistent with the cartel framework.¹¹⁹ In their view, kicking Blacks off of the rolls wasn't irrational at all. Indeed,

110. See *id.* at 245–46.

111. See *id.* at 78.

112. See *id.* at 78.

113. See *id.* at 245–46.

114. See *id.* at 246.

115. See *id.* at 247 (referring to case law summary).

116. *Terry v. Adams*, 345 U.S. 461 (1953).

117. See HINE, *supra* note 102, at 245–46.

118. See, e.g., GLENN FELDMAN, *THE DISENFRANCHISEMENT MYTH: POOR WHITES AND SUFFRAGE RESTRICTION IN ALABAMA* (2004) (arguing that invidious animus by poor Whites motivated much of the push for disfranchisement).

119. For an extended discussion of the history of voter disfranchisement for the purpose of consolidating political power, see STEVEN HAHN, *THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UP-COUNTRY, 1850–1890* (updated ed. 2006); EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* (15th anniversary ed. 2007).

legal scholars Samuel Issacharoff and Richard Pildes have argued that White primaries were unconstitutional precisely because they reduced the competitiveness of political elections.¹²⁰ White factions understood that newly emancipated Blacks would have had the power to control Democratic politics if they had voted as a bloc. Taking matters into their own hands, racial cartels used the White primary to push Blacks out of the market and out of political power.

Of course, this White racial cartel operated with significant risk of defection by either Populists or Conservative Democrats. But the cartel worked as it did precisely because it functioned as a mutual disarmament pact. In uniting under the banner of the White primary, the warring White factions in the Democratic Party agreed that “no matter how acute the divisions or how acrimonious the debates, neither faction would seek to prevail through making common cause with Black voters.”¹²¹

White political parties in Texas benefitted greatly from their monopoly on political power. They controlled the legislature and pushed for more rent-seeking legislation to cement their political, economic and social control. Economic benefits to White Conservative Democrats coincided with benefits to populists as well, who enjoyed more economic prosperity than their Black counterparts during the era of White monopoly. By focusing on these economic benefits, and on the anti-competitive efforts of political parties to control political parties, we can understand Jim Crow legislation less as an irrational act motivated by racial animus and more as an anti-competitive move designed to reap very material benefits for Whites.

B. *The North: Excluding Blacks in Housing Markets*

An even better example of racial cartels in action emerges in the history of residential housing segregation in Chicago: the homeowners' association. Like Texas political groups, this cartel also united Whites across social and class differences to restrict access to housing on the basis of race.

Even before the Civil War, Whites in the great cities of the North and Midwest had excluded Blacks from housing, labor, education and political markets¹²². Exclusionary sentiment in these regions was already quite strong. In fact, some scholars have argued that those states that abolished slavery before the Civil War did so in large part because slave labor

120. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

121. *Id.* at 663.

122. See generally DAVID M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005).

undercut White wages.¹²³ Having freed the slaves, Whites moved quickly to restrict their potential as competitors by excluding them from key areas of social, economic and political life.¹²⁴

Of course, politics among Whites themselves were already pretty complicated. At the turn of the century, the influx of European immigrants had challenged “native” Whites to absorb the newcomers. Between 1830 and 1860, European immigrants, Irish, German and Scandinavian in particular, came by the millions to cities like Chicago. Existing immigrant groups had exhibited hostility to the newcomers.¹²⁵ When Blacks began to migrate northward, these newest immigrants closed ranks against Blacks as a way of preserving their fragile gains.¹²⁶

Racial hostility varied with the immigrant group’s position in the pecking order. Those groups who enjoyed a relatively better economic position and competed less with Blacks in labor markets—e.g., Germans—exhibited less racism against Blacks, at least initially.¹²⁷ Groups like the Irish who competed more directly with Blacks (and against whom Blacks were often used as strikebreakers) exhibited more racism, in large part because they feared the competition that might come from emancipation of slaves in the South.¹²⁸

A closer look at Chicago history provides the backdrop against which to understand the homeowners’ association as a form of cartel. In 1860, relatively few Blacks lived in Chicago, and those who did were evenly spread throughout the city. The Chicago segregation index (which measures the even spread of Whites and Blacks in a city) was a moderate 50.0.¹²⁹ Immigrant Whites had settled throughout the city, in small pockets, and then increasingly throughout the city more evenly.

The end of the Civil War had triggered a second wave of Black immigrants into Chicago. Beginning in earnest in 1860, Blacks began to

123. See JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND “RACE” IN NEW ENGLAND, 1780–1860* (1998); BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* (1985); LESLIE M. HARRIS, *IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863* (2003).

124. See LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES* 75–77 (labor market), 114–20 (education), 156–57 (labor market) (1965).

125. *Id.* at 166.

126. *Id.*

127. *Id.* at 166–67.

128. *Id.* at 164–67.

129. See MASSEY & DENTON, *supra* note 25, at 21. The segregation index ranges from 0, which reflects a thoroughly mixed population, to 100, which reflects a completely segregated population. An index of fifty means that 50 percent of Blacks would have had to move to a neighborhood where the Black percentage is lower to shift the city toward evenness. *Id.* at 20. According to Stanley Lieberson, in 1890, on the average, Blacks lived in Chicago neighborhoods that were 8 percent Black. STANLEY LIEBERSON, *A PIECE OF THE PIE: BLACK AND WHITE IMMIGRANTS SINCE 1880* 266, 288 (U.C. Press 1980).

migrate in the thousands, and then in the hundreds of thousands, to a newly industrializing city.¹³⁰ Pulled from the North by the lure of industrial jobs and pushed from the South by boll weevil infestation and the drive to modernize farms, Blacks migrated to find a new way of life.

World War I set the stage for open competition between Black and White workers. Demand for Black labor skyrocketed around the war, fueled by newly enacted immigrant labor restrictions. Even as the flow of immigrants was slowing to a trickle, the influx of Blacks accelerated. From 1890 to 1915, the number of Black Chicago residents grew from fifteen thousand to over fifty thousand, and subsequent waves of Black migration during and after World War I were double and triple that size.¹³¹

Northern Whites reacted with alarm to Blacks' entry into White economic territory. Working-class Whites feared labor competition and social displacement.¹³² Immigrant Whites, now becoming homeowners and business owners, saw Black entry into White housing markets as a threat to their new status. Accordingly, these groups joined forces to restrict Black entry to certain parts of the city.

By 1900, Whites had cordoned off Black migrants to three main areas, including the narrow finger of land called the Black Belt on the South Side, and two satellite districts, one on the West Side and the other in Englewood.¹³³ By the turn of the century, these primary boundaries for residential segregation in Chicago had solidified.¹³⁴ Thereafter, residential segregation grew dramatically, in the period between 1910 and 1920, and by 1940, racial separation achieved an almost perfect segregation index of .95.¹³⁵ Racial cartels were a big part of this transition.

1. The National Real Estate Board

Two organizations formed the front line of residential exclusion in Chicago—the city's real estate board and the neighborhood homeowners' association. The Chicago Real Estate Board, made up of hundreds of individual real estate businesses, operated primarily as a trade organization

130. For a good overview of the contours of Black migration to the North, see MASSEY & DENTON, *supra* note 25; THOMAS LEE PHILPOTT, *THE SLUM AND THE GHETTO: IMMIGRANTS, BLACKS AND REFORMERS IN CHICAGO, 1880–1930* (Wadsworth 1991).

131. JAMES R. GROSSMAN, *LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION* (U.Ch. Press 1989); ALLAN H. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890–1920* 11 (U.Ch. Press 1967).

132. See MASSEY & DENTON, *supra* note 25, at 29. In 1850, 77% of Chicago residents were of foreign origin, and over 400,000 had arrived during the wave of immigration that occurred during 1880. PHILPOTT, *supra* note 127, at 118.

133. See PHILPOTT, *supra* note 127, at 147.

134. See *id.* at 121.

135. See MASSEY & DENTON, *supra* note 25, at 36–37; see also PHILPOTT, *supra* note 127, at 113; SPEAR, *supra* note 128, at 20.

to lobby on behalf of real estate interests locally and nationally.¹³⁶ In 1917, the Board adopted a formal policy asking brokers to keep Blacks out of White residential areas. In 1919, the Board unsuccessfully petitioned the city council to prohibit further Black migration into the city until such time as the city could work out lease or sales restrictions against Blacks.¹³⁷ Shortly thereafter, the Board voted officially to expel any broker who leased or sold property in these new White neighborhoods to Black residents.¹³⁸

The Board also moved to adopt another, even more potent legal restriction—the restrictive covenant. The restrictive covenant was a private contract that obligated homeowners (and their heirs) not to sell, lease or allow occupancy of property by Blacks.¹³⁹ Typically, this agreement was negotiated between existing neighbors and was a covenant that “runs with the land,” meaning the agreement attached to the property and obligated all buyers of the property and their successors.

In addition, the Board adopted institutional rules and practices that were designed to keep Blacks out of White neighborhoods. Early on, the Board had lobbied for explicit residential segregation by race. When the Supreme Court ruled racial zoning unconstitutional, the Board then adopted an Ethics Code provision prohibiting brokers from selling to buyers who threatened to disrupt the racial composition of the neighborhood.¹⁴⁰

In a crucial historical moment that would chart the path for the rest of the country, the National Association of Real Estate Boards adopted a version of the Chicago Board’s ethics code.¹⁴¹ In response to a nationwide wave of racial violence, including the Chicago riot of 1919, the national association (which was located in Chicago) drafted a code provision, which prohibited realtors from selling to people of color whose presence would “damage property values.” State commissions were authorized by state law to revoke the state licenses of those brokers who violated this provision.¹⁴²

Beyond the ethics code, the national association also accelerated the spread of racially restrictive covenants all over the country. In 1927, NAREB drafted a standardized restrictive covenant to be shared with its nationwide membership, and the association encouraged members to

136. See HELPER, *supra* note 80, at 187–91.

137. See PHILPOTT, *supra* note 125, at 185.

138. See *id.*

139. See generally *Shelley v. Kramer*, 334 U.S. 1, 4–8 (1948) (describing racially restrictive covenants); see also MASSEY & DENTON, *supra* note 25.

140. See MASSEY & DENTON, *supra* note 25, at 192.

141. See Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 563–64 (2000).

142. See *id.* Chicago community leader Nathan MacChesney drafted the code provision. *Id.*

enlist the help of homeowners' associations in propagating these covenants throughout the members' home region.¹⁴³

Bringing up the rear, the federal government then moved to consolidate and institutionalize the advantage that the local organizations had generated. Together with the Federal Housing Authority and the Veterans Administration, the federal Homeowners' Loan Corporation codified red-lining as a national practice. Federal programs issued government-backed low-cost mortgages only to White homebuyers and as a matter of policy, refused such assistance to Black buyers or buyers in Black neighborhoods.¹⁴⁴

In addition, FHA and VA loan programs financed the selective out-migration of middle-class Whites to the suburbs.¹⁴⁵ In the late 1940s, the FHA endorsed racially restrictive covenants, and even after the Court struck covenants down in 1948, the FHA did not change its recommendation until 1950.¹⁴⁶

2. The Homeowners' Association

The neighborhood homeowners' association formed the key centerpiece of White efforts to organize residential segregation. Chicago homeowners and property improvement organizations counted many White ethnic immigrants who had only recently become first-time homeowners among their members. Chicago associations typically claimed between 50 and 2000 members. Not surprisingly, a large proportion of the city's associations located themselves at the southern edge of the Black Belt and west of the Black community in Morgan Park.¹⁴⁷

White homeowners' associations deployed many strategies to keep Blacks out of White Chicago housing. For example, they worked to restrict access to credit for Blacks by pressuring banks and other lenders. Of course, Blacks had little capital of their own to work with, owing to historic discrimination, and so capital market discrimination worked to restrict access effectively.

Associations also excluded by putting pressure on Black employment. Along the North Shore they targeted Black domestic workers. For example, a White homeowners' committee requested neighborhood families unable to house domestic workers on their own premises to fire those workers.¹⁴⁸

143. *Id.* at 564–65.

144. *See* MASSEY & DENTON, *supra* note 25, at 51–52.

145. *See id.* at 53.

146. *See id.* at 54.

147. *See id.*

148. *See* PHILPOTT, *supra* note 125, at 155.

At the more violent end of the spectrum, associations organized mobs to fire gunshots into residents' homes, burn crosses on their lawns, and physically break into their homes to ransack them.¹⁴⁹ For example, in 1910, a Chicago homeowners' association mounted a campaign against a Black woman who had bought property on Lake Street. The group began their campaign with insults and threats, and soon escalated to violence when harassment proved ineffective. Under cover of night, a masked group broke into the house, threatened the woman's family with murder and tore down the newly built house.¹⁵⁰

Most notably, like the national association of real estate agents, homeowners' associations helped to spread the use of restrictive covenants. Making sure that an area was covered by covenants was time consuming and expensive. Someone had to track down owners, gather signatures, compile descriptions of the properties and file signed documents in the right office. Filers also had to pay drafting and recording fees to put restrictions in deeds.¹⁵¹ Homeowners' associations came to the rescue, supplying both labor and money, and perhaps more importantly, organizational energy. The associations and the Chicago Real Estate Board worked together to launch a campaign to cover the city with restrictive covenants, and by the end of the 1930s, close to a third of Chicago properties were covered by restrictive covenants.¹⁵²

In 1948, in a blow to homeowners' associations, the Supreme Court struck down racially restrictive covenants as unconstitutional.¹⁵³ Associations immediately moved to come up with alternate covenants.¹⁵⁴ To replace explicit covenants, Chicago associations drafted and litigated agreements to keep "undesirable people" out of the neighborhood.¹⁵⁵ They also drafted "conservation agreements," which obligated a homeowner to effect "proper maintenance" of his property on threat of eviction.¹⁵⁶ Such agreements were selectively enforced, of course, against "undesirable" neighbors.¹⁵⁷

Of course, agreements are only as good as the monitoring and enforcing behind them, and the homeowners' association played the central role in policing. Associations structured themselves very much as local

149. See MASSEY & DENTON, *supra* note 25, at 34–35.

150. See PHILPOTT, *supra* note 125, at 154–55.

151. See Brooks, *supra* note 57, at 12.

152. See PHILPOTT, *supra* note 125, at 186–95.

153. *Shelley v. Kramer*, 334 U.S. 1 (1948).

154. See Mikva, *supra* note 25.

155. See *id.* at 17 (reporting the opinion of association leadership that Blacks should be discouraged from moving in and that they should be convinced that life in the neighborhood "would be unbearable.")

156. See *id.* at 14 (describing occupancy standards agreements, also called conservation agreements).

157. See *id.* at 17–18.

paramilitary organizations. Groups divided up their turf by neighborhood lines or blocks, and created association-wide networks to monitor buying and selling.¹⁵⁸ In addition, the Board enlisted the associations as spies to monitor both brokers and owners. The Board often asked associations to let them know when a resident was planning to sell his home, or when prospective Black homebuyers approached a homeowner looking to buy.¹⁵⁹ In line with the restrictive covenant, realtors also helped draft informal agreements between realtors, builders, bankers and individual property owners not to sell or lend to Blacks.¹⁶⁰

Homeowners' associations enforced their agreements using their members for both monitoring and enforcement, and punishment was usually swift and fierce. Associations publicized the names of people who sold across racial lines to encourage community shaming and economic retaliation. For example, "The Alarm Clock," a community newspaper sponsored by the Park Manor Improvement Association in Chicago, ran the following announcements:

Every case on which we can get facts where Whites have sold to negroes [sic] WILL BE PUBLICIZED. Every White person that we know who has sold to negroes [sic] will find the truth of his action no matter where he goes.

And in another section of the paper, the association advertised:

IT HAS BEEN REPORTED: Joseph Biondi of 7020 South Park sold to colored and has moved to 2007 W. 70th Street. He is an electrician for the Pennsylvania Railroad.¹⁶¹

These two case studies demonstrate the power of collective action and the profit to be had from racial exclusion. Calling these organizations cartels serves to uncover aspects of racial exclusion that conventional narratives obscure.

CONCLUSION

In other work, I have explored how the competitive advantage that racial cartels acquired during earlier periods can become self-reinforcing

158. See *id.* at 44–63 (describing structure and size of associations, their coalitions with other associations within political boundaries, their connection with larger regional federations).

159. See *id.* at 101–02, n.3. One homeowner was approached by a realty company to ask that he put his house for sale through their company, before he had put his home up. He suspected that the firm had learned of the potential sale through the Field Secretary of his regional association. See *id.* at 84.

160. See *id.* at 101.

161. *Id.* at 103–04.

over time, even after cartels ceased to operate in race-conscious ways.¹⁶² Network externalities—the way in which a person's wealth or property value depends on that of her neighbors—operate as institutional feedback loops that produce persistent inequality, even in the absence of continuing intentional discrimination.¹⁶³ The argument about cartel conduct lays the foundation for this feedback-loop argument about self-reinforcing and persistent inequality.

The racial cartel story also offers an independent contribution to reframing conventional narratives about historical exclusion. First, by labeling exclusion as cartel conduct, the story emphasizes the unfair competitive advantage that Whites gained by being racist during Jim Crow and slavery. During these periods, Whites profited from keeping their non-White competitors out of key markets. Chicago homeowners' associations earned higher property values for their members. Texas working class farmers and elite planters consolidated their political power and control over the Democratic party. Unions negotiated higher wages for their White members.

Second, the concept of racial cartels and self-reinforcing advantage help us understand more precisely the role of history, and how it is that historical advantage still persists, generation after generation. White families are wealthier because their White ancestors colluded in racial cartels to acquire ill-gotten gains that have persisted over time. Contemporary White advantage can be traced to the advantages that racial cartels created for themselves by way of racial exclusion. The modern-day advantages that Whites enjoy—greater wealth in their neighborhoods, better access to political power, better social networks that are connected to more lucrative jobs with plenty of opportunity for advancement—can be traced to anti-competitive conduct perpetuated by historical cartels.

Finally, the concept of "racial cartels" helps us to frame anti-discrimination law as a form of government "antitrust" intervention, designed to eradicate the persistent effects of historical anti-competitive conduct. The lawsuits against Microsoft's monopoly in the operating systems market have been described as an effort to dismantle the self-reinforcing advantage that Microsoft's early behavior created. The argument to dismantle persistent advantage remains even when the original illegal conduct has stopped (as Microsoft claimed that it had). Likewise, if racial cartel effects persist over time, even after the dissolution of the cartels, then anti-discrimination law might be targeted to dismantle those persistent effects.

162. See Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373 (2008); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004–2005); DARIA ROITHMAYR, *THEM THAT'S GOT SHALL GET: WHY RACIAL INEQUALITY PERSISTS* (forthcoming).

163. See generally Roithmayr, *Them That Has, Gets*, *supra* note 159, (arguing that positive feedback loops perpetuate racial disparities).

It is important to point out that the racial cartel story appears to be historically specific to African Americans, Mexicans and some Asian groups. To be sure, other groups like Asians and White ethnic groups (Irish, Eastern European Jews and other immigrant groups) have faced similar anticompetitive exclusion at various times in this country's history. But important historical differences separate the experience of these groups. Blacks and Mexicans began the competition much further behind at the outset, because White cartel conduct was so much more severe. Slavery, for example, meant not only that Blacks could not own property but were in fact chattel property.¹⁶⁴ Land deprivation worked a particular onus for Mexicans, whose wealth disappeared when the U.S. redrew its boundaries. More recently, residential segregation has been far more pervasive and long lasting for Blacks and now for Latinos than it ever was for Jews or other White ethnic groups.¹⁶⁵ Comparatively speaking, Jews and many Asian groups have not experienced either the magnitude or duration of anti-competitive exclusion experienced by these groups.

An analysis of racial cartels leaves many questions unanswered. For example, this Article does not take up the larger question of political will or the smaller and narrower question of remedy. Forthcoming work rehearses a number of suggestions designed to restore market competitiveness in housing, labor, education and political markets.¹⁶⁶ But it bears noting here that larger, antitrust style reforms may be unlikely. Collectively, we might now find it too much of a sacrifice—economically, socially and politically—to do the sort of restructuring that would meaningfully dismantle or restructure persistent advantage that we trace from racial cartels. Indeed, we may have come too far down the road to switch

164. Economist James Curtis has compared historical racial differences in wealth before the end of the Civil War to modern racial differences in wealth. Curtis made two important findings.

First, he could explain wealth differences among Blacks between 1860 to 1870 by pointing to their legal status—whether they were free or enslaved. Second, he could trace modern wealth differences between Blacks and whites to the historical differences, adjusted for growth over time. Not surprisingly, the modern racial gap in wealth likely is connected to slavery, and to the fact that whites could own property (which included Black slaves) and Blacks could not. James Curtis, *Long-Run Differences in Wealth Among Blacks and Whites: Empirical Results from Structural Regression Decomposition*, 2001 Annual Meeting of the Social Science History Association Meetings, Chicago, Illinois, at 18.

165. For example, ethnic enclaves proved fleeting, in comparison with the Black ghetto. Segregation fell significantly for European immigrants after 1910 for a number of reasons, much of which had to do with a formation of white ethnic identity in reaction to the increasing in-migration of Blacks. See MASSEY AND DENTON, *supra* note 25, at 32–33. See also Deborah C. Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate* 9 OHIO ST. L.J. 915, 965–69 (1989) (arguing that Eastern European Jewish immigrants came with a set of labor skills in the garment industry that matched to particular service needs in the U.S. economy, and that Jews were able to find work in the civil service sector, an area of employment not open to Blacks).

166. See Roithmayr, *Them That Has, Gets*, *supra* note 159.

back. But if we can't figure out how to radically reconfigure the way that our institutions distribute advantage and disadvantage, inequality is likely here to stay.

