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**USC Center in Law, Economics and Organization
Research Paper No. C07-6
USC Legal Studies Research Paper No. 07-4**



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SERIES**

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RACIAL CARTELS

*Daria Roithmayr*¹

ABSTRACT

This article puts forward two central arguments. First, we can better understand racial exclusion if we describe it as the anti-competitive work of racial cartels. During Jim Crow, whites united under the banner of white supremacy to exclude non-whites from key markets--labor, education, housing and politics, among others. Racially homogenous groups--like homeowners' associations, school boards, trade unions, citizens' councils, and real estate boards--worked together to anti-competitively exclude non-white groups, and thereby gained an unfair advantage. Describing this conduct as cartel conduct emphasizes the profitability and the collective nature of racism that conventional narratives do not.

Second, this article argues that racial identity can play a key role in enforcing cartel agreements and in stabilizing the operation of racial cartels. Neoclassical economists dismiss anything resembling a cartel theory of discrimination because economic theory predicts that cartel members will always cheat. This article suggests that by providing internal incentives (like self-esteem and shame) to abide by cartel agreements, racial identity may have prevented racial cartel members from defecting.

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INTRODUCTION

On a cold winter morning in Memphis, in January of 1919, a committee of four white switchmen marched into the office of Superintendent Edward Bodamer on the Yazoo and Mississippi Valley railroad. They were there, they said, to discuss a demand by the area yard workers to evict black switchmen and yard men: fire black workers immediately, or they would strike. Bodamer refused, reminding the committee that it was acting outside the authority of the union, and that a strike would be illegal. Dozens of switchmen and yard men met after the meeting, and all voted to walk off the job immediately.²

Over the next five days, the strike spread like wildfire to surrounding railroads and yards. At its peak, the strike united over 650 switchmen, shutting down operations in countless towns that lined the railroad in Tennessee, Mississippi and Illinois. The strike came to a halt at the end of five days, shortly after the railroad had promised an immediate investigation by government mediators.

A year later, the white switchmen were back in Bodamer's office, again demanding that he fire black workers. This time, however, the committee had the formal backing of the Brotherhood of Railroad Trainmen, one of the "Big Four" railroad brotherhoods. Unable to risk the impact of another strike, the railroads gave in to the BRT's demands and fired almost all of its black workers. Under pressure to make the changes more permanent, the railroad also adopted racially restrictive contract provisions that changed seniority systems and entrance requirements, and imposed limits on the number of black workers for particular positions.³

Why had white switchmen demanded racial exclusion in the railroads of the Midwest in the early twentieth century? After all, black workers had been working as trainmen and switchmen since the 1870s. Although white switchmen had complained on occasion, they had taken

² 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).

³ The success of the hate strike in Memphis signaled a major shift for the railroad industry. Nationwide, after this strike, white unions began to regularly demand racially restrictive contractual clauses, and most railroad union contracts began to carry them. *Id.* at 68.

little overt action against either the railroads or black workers. What had changed?

Job security, for one. Historian Eric Arnesen argues that post-war economic uncertainty over job prospects fueled the Memphis strike and other hate strikes like it. As the post-war economy deteriorated, workers like the railroad switchmen faced a labor market in such chaos that labor officials could not make any reliable predictions about the job market from week to week.⁴

In addition, white workers had lost their relative privilege over black workers. The war had disrupted the railroad's conventional practice of allocating positions on the basis of race. Responding to war-time shortages meant that railroads had to be more flexible in whom they placed where—some black workers had taken up white positions and railroads also hired some whites in historically black positions.⁵

As soldiers came back from the war, however, railroads had to decide whether to revert to their race-conscious practices or to retain their cross-racial hires. Some railroads moved quickly to evict both white workers who had occupied “black” positions and those few black workers who had taken skilled “white” positions. Others abandoned racial tracking altogether.⁶

One could tell the story of the Memphis wildcat strike as just another story of conventional racism. According to this account, whites excluded blacks on the railroad because they wanted a higher social status in the racial pecking order or because they believed in irrational stereotypes. Employers refused to hire blacks because they believed that black workers would be less productive. In the conventional story, excluding blacks cost employers and workers alike—employers ended up paying higher wages to indulge white workers' tastes, and workers gave up a useful ally in their labor struggles against employers.⁷

⁴ *Id.* at 67-68.

⁵ *Id.* at 68.

⁶ *Id.* at 68-69.

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

But we could also retell this story very differently as a story of cartel conduct, in which a very powerful racial cartel worked to monopolize material benefits—in this instance, jobs, social capital and power over unions--on the basis of racial exclusion.⁸ On this view, white workers coordinated to reserve jobs for themselves not just for the higher social status but for higher wages, greater opportunity for advancement and the increased prestige that came with the best jobs. They also benefitted from the protection of a closed shop, and the opportunity to become entrepreneurs that unions often provided.

A cartel framework also highlights the benefits that white employers got from the alliance. Although employers had to pay white workers higher wages, employers were also able to pay blacks lower wages than they might otherwise have by splitting the market into higher and lower-wage jobs. In addition, employers benefitted because they created a reserve of black strikebreakers to undercut labor power. Indeed, the very railroad workers that employers evicted served to break future railroad strikes by the same group.

This article puts forward two central arguments. First, we can better understand the history of Jim Crow racial exclusion as the quite profitable anti-competitive work of racial cartels. Whites united across class lines to exclude non-whites from key markets, including labor, education, housing and politics. Groups like homeowners' associations, school boards, trade unions, citizens' councils, and real estate boards worked together to anti-competitively exclude non-white groups (primarily blacks and Mexicans, but some Asian groups as well) on the basis of race for material benefit.

These groups operated very much like cartels in commodity markets that came to power at the turn of the century. Like those market cartels, racial cartels adopted collective agreements to exclude competitors from a range of markets—e.g., housing, education, and labor. Racial cartels punished those who cheated on the cartels' agreements, and rewarding those who worked hard for the collective. And like market cartels, whites profited handsomely from these endeavors. Far from incurring competitive disadvantage, racism actually gave whites an unfair competitive advantage in key markets.

⁸ ARNESEN, BROTHERHOODS OF COLOR, *supra* note 2 at 66.

Framing racial exclusion as anti-competitive conduct uncovers several aspects of racism that conventional narratives hide. A cartel account emphasizes the collective-action nature of racism, its material benefit to whites and the unfair competitive advantage that whites gained in key markets from exclusion. The cartel story also justifies anti-discrimination law as a species of antitrust intervention, designed to dismantle persistent cartel effects.

Second, this article argues that racial identity might have played key roles in enforcing cartel agreements and in stabilizing the operation of racial cartels. Neoclassical economists dismiss anything resembling a cartel theory of discrimination because economic theory predicts that cartels are unstable over time. Inevitably, economists argue, cartel members will defect for their own short-term individual gain, even though they might profit more by holding to their cartel agreements in the longer term.

This article suggests that racial identity may have served to keep white cartel members from cheating on or defecting from the cartel in the short term. As members of a particular racial group, cartel members might have been far less likely to defect, not just because they faced social pressure from other whites but because they risked internal guilt and shame if they violated agreements to exclude on the basis of race. Internal incentives may have been able to stabilize racial cartels long enough for whites to obtain an important (and unfair) competitive advantage.

Part I explores a general theory of racial cartels. This section draws from theoretical work in antitrust, economics, law, sociology and social psychology to describe the structure and function of racial cartels. Here, I compare racial cartels to market cartels on several points, including their anti-competitive focus, their material profit for cartel members, and the requirement that cartel members sacrifice short-term individual benefit for longer-term collective (and individual) gain.

In Part II, I take up the problem of cartel stability, including the more specific problems of coordination, free-riding and defection. In this section, I argue that racial identity can play key roles in stabilizing the operation of a racial cartel. If cartel members have internalized their racial identity, they are more likely to cooperate with other cartel members and less likely to cheat or defect. In particular, avoiding the guilt and shame that might accompany defection and feeling the self-esteem that comes from

racial solidarity can be very strong motivators for cartel conduct, as a review of the social psychology literature makes clear.

Part III examines these theoretical arguments as they play out in “cartels in action.” In particular, I look at the history of three cartels during the era of Jim Crow: (i) in the South, the political alliance across class lines to disfranchise non-whites in Texas; (ii) in the North, the alliance between homeowners’ associations and real estate boards in Chicago to exclude blacks, Asians and Mexicans from housing markets; and (iii) in the West, the collective action of school boards to exclude Mexican children from public education in Southern California.

Part IV steps back to explore how a racial cartel story might reshape our understanding of race, class and law. This section suggests that, as the term “racial cartel” indicates, race and class are neither separate nor reducible to each other, but instead defer to and depend on each other. Historical evidence appears to support this argument. In the racial cartels of Jim Crow, people made economic decisions about whether to sell across racial lines in a social context where relationships had already been marked by the racial hierarchy of slavery. Likewise, people structured racial relationships in a social field already shaped by the relations of production and class, for example between grower and agricultural worker. From this vantage, race appears to shape class, which in turn shapes race, etc.

In this section, I also suggest that the analogy between anti-trust and anti-discrimination law helps us understand why anti-discrimination law is both fair and efficient. I close with some observations about the role of cartels in a lock-in model of persistent racial disparity.

I. A THEORY OF RACIAL CARTELS

Neoclassical economic theory teaches that market forces should eliminate racial discrimination because discrimination imposes additional costs and is therefore inefficient. Economist Gary Becker has famously argued that market forces should drive out discriminating market participants because people with a “taste” for discrimination will have to pay more for indulging such a taste, and will thereby suffer a competitive

disadvantage compared to those without such a preference.⁹ For example, employers who want to discriminate in hiring must pay an additional cost if they refuse to hire non-whites, in part because they are not making full use of the available labor pool.

The notion of racial cartels challenges this neoclassical story, by suggesting that racism might actually pay dividends to whites, rather than costing them. To explain why, it might be helpful to say a few preliminary words about cartels, and 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, for example, by restricting output or by restricting entry into the market by other actors in order to raise prices.¹⁰ Cartels can take many forms, ranging from an informal gentleman's agreement to adopt simple export restriction schemes to a far more formal contractual agreement covering supply, pricing and a range of other areas.¹¹ Cartels can be primarily defensive, organized to gain competitive advantage in a chronically depressed market, or they can be far more offensive instruments of economic aggression that operate even during good times. Cartels can be state-sponsored, in which the state's legal and administrative machinery are enlisted to monitor and enforce cartel operation. Alternatively, they can be privately negotiated, and governed by social norms of cooperation or other informal means of enforcement.¹²

⁹ See BECKER, *ECONOMICS OF DISCRIMINATION*, *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, *ECONOMICS OF DISCRIMINATION*, *supra* note 7 at 46-47.

¹⁰ See THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 206-211 (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 and Georgios Kyriazis, *Cartels: Proof and Procedural Issues*, 16 *FORDHAM INT'L L.J.* 266 (1992/1993).

¹¹ GEORGE W. STOCKING AND MYRON W. WATKINS, *CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY* 5-10 (1946).

¹² *Id.*

Consider the example of a white homeowner's association in Chicago, operating during the era of Jim Crow.¹³ Homeowners' associations engaged in a wide range of strategies to keep potential black home buyers from moving into white neighborhoods—they harassed prospective buyers, restricted their access to capital, and retaliated against them physically and economically.¹⁴ Keeping neighborhoods exclusively white profited white homeowners in several ways. To name just two, residential segregation created a dual housing market, in which whites monopolized access to superior housing stock. It also concentrated wealthier neighbors (and the neighborhood benefits from that wealth) in one place.¹⁵ Perhaps most importantly, whites monopolize the benefits of higher property values associated with those neighborhood qualities.¹⁶

Describing racial exclusion by a group like the homeowners' association as the work of a racial cartel highlights two important points. First, like market cartels, racial cartels engage in anti-competitive strategies to extract monopoly profits and shift the cost associated with those profits onto their victims. Second, racial cartels must deal with collective action problems. We will consider each in turn.

Describing racial exclusion as anti-competitive highlights the competitive advantage that whites gained in key markets via discrimination. For example, by excluding blacks from the labor market in skilled crafts, whites extracted monopoly profits (higher-wage jobs) and shifted the costs associated with those profits onto excluded market players (because they were paid lower wages or no wages).

Unlike market monopolies, the racial cartels sketched in theory here are likely to be much less focused on price manipulation than other forms of anti-competitive exclusion. In housing markets, for example, racial cartels

¹³ This example is considered in far more detail in Part III. See discussion accompanying *infra* notes 133 through 154.

¹⁴ See the more detailed discussion accompanying *infra* notes 121-122.

¹⁵ See *id.*

¹⁶ See Mary R. Jackman and Robert W. Jackman, *Racial Inequalities in Home Ownership*, 58 SOCIAL FORCES 1221, 1227-30 (1980) (documenting property value differences between black and white homes).

(like real estate boards) were less likely to focus on price manipulation, and more likely to negotiate racially restrictive covenants, or to restrict access to capital for potential non-white home buyers. But even if racial cartels do not engage in extensive price manipulation, the cartel aim is the same--to exclude competitors from the market for competitive gain.¹⁷

Although racial cartels enjoy similar benefits to market cartels, they also face the same problems. In particular, they must face (and solve) the typical collective action Catch-22: cartel members must abide by collective agreements that will benefit them in the long run, even though each member must bear short-term costs.¹⁸ For example, in a homeowners' association, members may have to forgo the opportunity to sell for an immediate profit to a willing seller across racial lines, in order to maintain collective property values over the longer term.¹⁹ This cost might be particularly high if the member suspects that the cartel is unstable and about to disintegrate, leaving her stuck with lower property values if she is among the last to defect when the neighborhood tips. If racial cartels are able to solve this stability problem (and I suggest some solutions in Part II), they can create significant benefit for their members over time.

Because cartels can generate profit for their members, the racial cartel story proves helpful to us to understand why Becker's story of discrimination is wrong. As Becker himself has acknowledged, cartels can actually benefit collective actors in the long-term, despite some cost in the short-term.²⁰ Indeed, Becker suggests that collective action by the majority might in fact increase their incomes if they were to engage in anti-competitive conduct against a minority. Far from costing more, then, discrimination might actually pay off (and quite handsomely) under certain conditions for whites.

¹⁷ Likewise, monopoly profits come in many forms depending on the market, and the same is true for racial cartels. For housing markets, profits might be better housing stock with higher property value in neighborhoods with wealthier neighbors; in labor markets, better jobs at higher wages; and, in education and political markets, respectively, better resourced schools and consolidated political power.

¹⁸ This point is discussed at length in Part II.

¹⁹ See the more detailed discussion in Part II.

²⁰ See BECKER, *ECONOMICS OF DISCRIMINATION*, *supra* note 7 at 19-38 (2d ed. 1971).

Racial cartel theory finds significant support in theoretical work from a range of disciplines. The early work of economist Lester Thurow proposed a monopoly model of discrimination, in which whites benefitted (to the tune of \$15.5 billion) by engaging in anti-competitive conduct.²¹ Focusing on labor markets, Thurow identified several types of discrimination which the monopolist could pursue to increase income and social distance:

- Employment discrimination, in which minorities suffer disproportionate unemployment;
- Wage discrimination, in which whites pay blacks less than their marginal product;
- Occupational discrimination, in which blacks are excluded from some preferred occupations and over-represented in others;
- Human capital discrimination, in which whites cause fewer state or corporate funds to be invested in black human capital, or when blacks are prevented from purchasing human capital;
- Monopoly power discrimination, in which blacks are excluded from access to areas of the economy that obtain monopoly profits;
- Capital market discrimination, in which blacks cannot borrow or invest equal amounts of funds at equal rates; and
- Price discrimination, in which prices of goods and services differ according to race.²²

Like Thurow, social psychologists have also suggested that social groups form, and then engage in social and material conflict, primarily as a

²¹ Thurow's calculations are as of 1960. See LESTER C. THUROW, POVERTY AND DISCRIMINATION 133, 117-129 (1969); See also LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY (1975); Anne O. Krueger, *The Economics of Discrimination*, 71 J. POL. ECON. 481 (1962).

²² See THUROW, POVERTY AND DISCRIMINATION, *supra* note 21 at 118-126.

way of monopolizing scarce resources.²³ Group conflict theorists have championed what is called “closure theory”(which draws heavily from the work of Marx and Weber), to argue that groups can monopolize resources by closing off membership to the group and then barring entry to key markets.²⁴ These group conflict scholars suggest that conflict between groups increases when competition over resources increases.²⁵ They also suggest that when groups perceive an external threat, they are far less likely to defect from the group, and far more likely to monitor the cartel conduct of others to make sure that everyone is abiding by group agreements.²⁶

Legal scholars have also developed a notion of racial cartel action. Importantly, Robert Cooter has suggested that social groups can benefit materially from exclusion by gaining monopoly control over markets:

Just as producers collude to fix prices and obtain monopoly profits, so sometimes social groups collude to obtain the advantages of monopoly control over markets. To enjoy the advantages of monopoly, a social group must reduce competition from others by excluding them from the market. In this way, the more powerful group can shift the cost of

²³ Group conflict theory is supported by a large body of empirical, ethnographic and field research, including work in history, sociology, social psychology and political science. Group conflict theory is often identified with the work of Muzafer Sherif and his experiments with boys at summer camp, the so-called Robber’s Cave study. Sherif found that the boys’ group structure and their conflict with another group in camp was 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 MUZAFER SHERIF, *THE ROBBERS’ CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION* (1988).

²⁴ 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, e.g., Frank Parkin, *Strategies of Social Closure* in *CLASS FORMATION, IN THE SOCIAL ANALYSIS OF CLASS STRUCTURE* (Frank Parkin ed. 1972); ROBERT MURPHY, *SOCIAL CLOSURE: THE THEORY OF MONOPOLIZATION AND EXCLUSION* (1988); RANDALL COLLINS, *CONFLICT SOCIOLOGY: TOWARDS AN EXPLANATORY SCIENCE* (1975).

²⁵ See DONALD T. CAMPBELL AND ROBERT A. LEVINE, *ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES AND GROUP BEHAVIOR* 33 (1971).

²⁶ See *id.*

segregation to its victims, and more costs besides, so that the victims of discrimination are worse off, and the discriminators are better off.²⁷

Not surprisingly, legal scholars tend to focus more on the role that law plays in racial cartel operation. In Cooter's view, formal law might be necessary at least at the outset of a cartel's formation, particularly in those cases in which social norms are not sufficiently strong to hold a group together.²⁸ For other scholars, social norms play the more important central role in cartel operation. Richard McAdams has argued that group cooperation during Jim Crow might have been policed via an informal system of social sanctions, in which members of the group who cheated or defected suffered the social disapproval of other members.²⁹ We will say more about the roles of law and social norms in the next section, when we examine the problem of cartel stability in greater detail.

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

A. Coordination Problems, Cheating and Defection

Many economists (and some social psychologists) have argued that cartel theory cannot explain racial discrimination because cartels are inherently unstable. Neoclassical theory predicts that cartels will dissolve quickly after their formation, for several reasons. First, cartel members

²⁷ *Id.* at 150.

²⁸ Cooter argues that such was the case with Jim Crow cartels. See Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L.R. 133, 153 (1994). See also RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 83-87 (1992) (arguing that anti-discrimination law was justified to break up a monopoly in public accommodations, often granted by virtue of government power, "such as a franchise from the Crown.")

²⁹ See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995). Although McAdams does not frame his analysis explicitly as a cartel analysis, his work has been characterized by others as part of a more general cartel theory of discrimination. See John Donohue, *The Law and Economics of Anti-Discrimination Law*, in *Handbook of Law and Economics* __ (A.M. Polinsky and Steven Shavell eds. 2006)(available at http://works.bepress.com/john_donohue/13 (last visited on Mar. 14, 2007).

have to coordinate with each other in order to come to agreement on the rules of engagement, whether the rules require members to sell at a monopoly price or refuse to sell in order to exclude others. Game theorists call this the coordination problem.³⁰ Second, cartels face the free-rider problem--free-riders will cheat on cartel agreements. As any member of any kind of group is well aware, each member of the cartel has an incentive to free-ride on other members of the cartel--to make others do all the hard work while the cheater enjoys all the benefits.³¹

Third and similarly, cartel members often have a strong incentive to defect, or abandon the cartel, for individual profit. Abiding by cartel agreements requires members to forgo immediate individual profit for longer term gain. For example, abiding by supply restrictions means that a member will forgo producing to capacity, in order to increase price.³²

A defector stands to gain a significant profit by undercutting the cartel agreement--by being first to increase supply, the defector can make a profit by selling greater volume at the higher price, before price drops in response to the increase in supply. Any cartel theory of discrimination must address the defection problem, as well as the coordination and free-rider problem.

B. Strategies for Stability

Although neoclassical theory predicts an instant demise, market cartels in a range of markets--sugar, rubber, steel, electric lamps, aluminum, chemicals, explosives--have enjoyed quite a robust existence. In fact, the

³⁰ See AVINASH DIXIT & BARRY NALEBUFF: THINKING STRATEGICALLY (1991); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960).

³¹ Mancur Olson famously has 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).

³² The problem of defection is well-known in the literature. See e.g., SCHELLING, THE STRATEGY OF CONFLICT, *supra* note 30 at 57-58. See also ROBERT AXELROD, THE EVOLUTION OF COOPERATION 13-14 (1984).

average duration for a market cartel is between 3 to 6 years.³³ To explain this anomaly, antitrust scholars have suggested a range of strategies that cartels might use to solve the stability problem. Among those that are most potentially relevant for racial cartels are (i) formalized public law; (ii) private contracts; and (iii) group social norms connected to group identity and ideology. We will discuss each in turn.

1. Public Law

First, cartels can sometimes hijack the machinery of the legislature and the coercive force of law to monitor and enforce cartel agreements, or to raise the costs of defection. In market monopolies, big cartels can be stabilized by government action like licensing procedures and closed-shop rules.³⁴ 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.³⁵ Using government machinery for monitoring and enforcement passed the cost of cartel policing from cartel to taxpayers, and thus lowered cartel costs.

As with market monopolies, racial cartels also effectively use of government regulation to lower cartel costs. For example, white homeowners and developers worked to enact segregation ordinances in several cities to police the boundaries of white neighborhoods. Segregation ordinances like those in Baltimore³⁶ and Louisville³⁷ reserved particular

³³ Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success*, J. ECON. LITERATURE 43, 50 (2006).

³⁴ Andrew Postlewaite & John Roberts, *A Note on the Stability of Large Cartels*, 45 ECONOMETRICA 1877, 1878 (1977).

³⁵ Kurt Wilk, *The International Sugar Regime*, 33 AM. POL. SCI. REV. 860, 871-73 (1939).

³⁶ See DONALD MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 41 (1998) (documenting that a Baltimore segregation ordinance reserved some neighborhoods for blacks and others for whites).

³⁷ See *Buchanan v. Warley*, 245 U.S. 60, 70-71 (1917) (describing the Louisville ordinance, which the Court struck down as unconstitutional).

spaces for black and white residents, or prohibited blacks from moving into blocks where a greater number of whites than blacks resided.

Likewise, white planters persuaded Congress (with the consent of the administration) to enact the Black Codes, a group of laws that: (I) insisted on strict contract enforcement and limited competition over contracts to the beginning of the agricultural year; (ii) prohibited vagrancy; (iii) prevented labor recruiters from “enticing” away labor; and (iv) employed blacks who violated these laws as sources of labor.³⁸ At least one scholar has argued that the Black Codes were the equivalent of an anti-competitive agreement to hold down black wages.³⁹ Planters had an individual incentive to pay blacks higher wages in order to attract or retain newly mobile labor. The Black Codes prevented this price war of wages, using the machinery of federal legislation. On this view, social norms were not sufficient to prevent planters from defecting to raise wages. In the absence of the codes, enforcing agreements to keep freed labor on the farm might have proved costly and difficult, if not impossible.⁴⁰

2. Private Law:

Second, private contracts that are enforceable (or are perceived to be enforceable) can reduce cartel costs and help to stabilize cartel operation. In 1920, explosives manufacturers DuPont and the Nobel Dynamite Trust Company exchanged exclusive cross-licenses for present and future patents.⁴¹ On their face, these cross-licenses constituted merely an exchange of rights. In operation, the agreements prohibited each company from selling products manufactured under the patents in each other’s

³⁸ See Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?* 51 CHI. L. REV. 1161, 1662 (1984).

³⁹ See *id.*

⁴⁰ See THUROW, GENERATING INEQUALITY, *supra* note 21 at 169.

⁴¹ See STOCKING AND WATKINS, CARTELS IN ACTION, *supra* note 11 at 440.

territory. The agreements also made the players interdependent in a way that undermined real competition in the explosives markets.⁴²

Similarly, as will be discussed in more detail in Part III, white homeowners negotiated private restrictive covenants to prohibit the sale of homes in white neighborhoods across racial lines to blacks, Mexicans and Asians.⁴³ Much like cross-licensing, racially restrictive covenants bound neighbors to each other via legal obligation. As part of the contract to purchase the house, white home buyers legally agreed not to sell their property in the future to non-white buyers.⁴⁴ However, such agreements were enforceable not by the previous owner, but by the “third party beneficiary” neighbors, who presumably had relied on the racially homogenous character of the neighborhood to make their purchase.⁴⁵ Litigating (or the prospect of litigating) the enforcement of a restrictive covenant in court increased the costs of defection by white homeowners who had originally agreed to keep the neighborhood racially homogenous.⁴⁶

3. Social Incentives

Recently, several scholars have proposed that informal social incentives might be used in place of, or in addition to law, to solve collective action problems. In particular, group members can solve the free-

⁴² *See id.*

⁴³ *Gandolfo v. Hartman*, 49 Fed. 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* discusses a restrictive covenant that prohibited sale to persons of “Mexican descent” in Texas. 218 S.W.2d 272 (Texas Civ. App. 1949). Restrictive covenants prohibiting sale to blacks were numerous, and were only invalidated in 1948, in the case of *Shelley v. Kramer*, 334 U.S. 1 (1948).

⁴⁴ *See* discussion accompanying *infra* notes 128-129.

⁴⁵ *See Shelley v. Kramer*, 334 U.S. 1 (1948).

⁴⁶ Richard Brooks has argued that, even after restrictive covenants were outlawed in *Shelley v. Kramer*, restrictive covenants continued to produce residential segregation by signaling the racial exclusivity of white communities, and by functioning as an informal social norm enforced via social sanctions and incentives. Richard Brooks, *Covenants and Conventions*, Northwestern University School of Law Law and Economics Research Paper Series, September 2002.

rider problem if they can socially reward those who abide by agreements, and withhold the reward for those who don't contribute.⁴⁷

Richard McAdams has proposed that an informal economy of social esteem and social norms constitutes just such a selective system of reward.⁴⁸ According to McAdams, when members of a racial group abide by cooperative rules on racial exclusion, other members confer esteem on them for their cooperation, or "dis-esteem" if they violate the agreement. More specifically, group members who exclude along racial lines are rewarded with social approval, as are those members who police other members for their violations.⁴⁹ Conversely, those who cross racial boundaries are disesteemed—they are shunned, harassed, boycotted and even subjected at times to violence.⁵⁰

In arguing that the informal economy of social incentives helps to stabilize cartels, McAdams focuses on the payoffs that cartel members get from other people. But external incentives that rely on other people suffer from what I call the second-order stability problem. In the economy of external esteem, cartel members still must be relied upon to provide rewards and punishments of esteem or approval to make monitoring and policing effective. Accordingly, because cartel members still have an incentive to free-ride with regard to esteem policing, enforcement via the economy of social pressure by others simply shifts the problem to social policing.

⁴⁷ See OLSON, *THE LOGIC OF COLLECTIVE ACTION*, *supra* note 31 at 60.

⁴⁸ See McAdams, *Cooperation and Conflict*, *supra* note 29. McAdams argues that groups compete to produce relative social status, rather than material benefits like jobs, education and housing. *See id.*

⁴⁹ *See id.* at x.

⁵⁰ *See id.* at x.

C. Internal Incentives: Racial Identity and Cartel Stability

To solve the second-order problem, this article suggests that *internal* incentives can play an important role in cartel stability. Internal social incentives are those rewards and punishments that a person confers on himself—for example, a psychic reward for acting consistently with the group (like feeling good about solidarity with the group), or conversely a psychic cost for acting inconsistently (like feeling guilt or shame).⁵¹ In contrast with social approbation and retaliation, internal incentives like shame or self-esteem do not depend on other cartel members for their effectiveness. Accordingly, those internal incentives that are connected to racial identity (and to social identities more generally) might provide supplementary support in stabilizing racial cartels.

Social identities are ordinarily identified with particular social categories—race, gender, age, class, etc.⁵² Social identity categories bring with them a set of shared expectations—the rules of behavior—that help to define the category.⁵³ For example, if a person identifies herself as Japanese, a historian, a professor, and a mother, each of those categories is accompanied by a set of expectations or rules. To identify as a mother during the 1950s in the Midwestern U.S., for example, might have meant to be expected to devote one's primary energy to raising children and not to work outside the home.

When people internalize these shared expectations, most will experience a very significant internal psychological benefit—notably,

⁵¹ The distinction between external and internal incentives is not sharp, and indeed the two categories are linked. According to social psychologists, people often internalize attitudes and beliefs when they are externally rewarded for doing so (or punished for not doing so). People are also more likely to internalize a group norm or role if doing so will reduce the amount of time the person spends deciding how to act during moments of uncertainty. Get cite.

⁵² For an excellent work canvassing the wide range of theoretical literature on social identity, See SOCIAL IDENTITY AND SOCIAL COGNITION, (Dominic Abrams & Michael A. Hogg eds. 1999); SOCIAL IDENTITY AND INTERGROUP RELATIONS (Henri Tajfel ed. 1982).

⁵³ In more formal terms, Sheldon Stryker defines identity as internalized self-descriptions that are based on expectations shared by society. See, e.g., Sheldon Stryker, *Identity Salience and Role Performance*, 4 J. MARRIAGE & FAMILY 558 (1968); Richard Serpe & Sheldon Stryker, *The Construction and Reconstruction of Social Relationships*, in ADVANCES IN GROUP PROCESSES 45 (E. Lawler & B. Markovsky eds. 1987).

improved self-esteem--when they conform their actions to the shared expectations for a social identity category.⁵⁴ Conversely, most will experience anxiety or psychic dissonance if they act inconsistently with expectations. Importantly, people incur psychic costs not just because they fear retaliation or disapproval from others in the group, but because they have violated their own internalized expectations, or worse, they have deviated sufficiently far from that ideal type as to put their identity at risk.⁵⁵ For some social identities, like race or gender, choices about whether to conform to expectations will produce significantly more psychic pain or psychic benefit, largely because those social categories are more salient to a person's sense of self.⁵⁶

The psychic costs and benefits associated with racial identity can significantly shape collective action choices. By giving people a psychological reason to conform to cartel conduct, or to avoid breaking cartel rules, racial identity can "change the payoffs" associated with cartel conduct.⁵⁷ If the cartel member gets enough of a payoff in terms of both esteem from others and self-esteem by complying with cartel rules (or avoids enough of a hit), the member will take on collective cartel responsibilities that they might otherwise shirk if they were to pay attention only to "economic" costs in the more material sense. In this way, racial identity can induce people to comply with their cartel obligations, even

⁵⁴ William B. Swann, Jr., *Self-verification: Bringing Social Reality into Harmony with the Self*, in *PSYCHOLOGICAL PERSPECTIVES ON THE SELF* (J. Suls & A. Greenwald eds. 1983).

⁵⁵ Sheldon Stryker has laid out many of these key concepts in his book *SYMBOLIC INTERACTIONISM: A SOCIAL STRUCTURAL VERSION* (1980). For an overview of identity theory, See Sheldon Stryker and Peter Burke, *The Past, Present and Future of an Identity Theory*, 63 *SOC. PSYCHOL. Q.* 284 (2000).

⁵⁶ Sheldon Stryker and Richard T. Serpe, *Identity Salience and Psychological Centrality: Equivalent, Overlapping or Complementary Concepts?* 57 *SOCIAL PSYCH. QUART.* 16 (1994).

⁵⁷ Economists George Akerlof and Rachel Kranton have suggested that these costs and benefits from social identity might serve to shape the incentives that affect economic decision making. Akerlof and Kranton do not analyze incentives to cooperate; rather, they focus on the way that identity-associated psychic benefits can substitute for monetary compensation. George A. Akerlof and Rachel E. Kranton, *Economics and Identity*, 115 *Q.J. ECON.* 715 (2000). See also George A. Akerlof and Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 *J. ECON. PERSP.* 9, 12 (2005)

when compliance with collective cartel obligations comes at great cost to the cartel member.⁵⁸

As Part IV will explore in more detail, historical evidence exists that racial identity might have played a key role in stabilizing racial cartels. In the era of Jim Crow, white racial identity became associated with segregation and exclusion, even more so than ordinary in-group/out-group bias connected to group formation.⁵⁹ White groups formed agreements to exclude among workers, school board members, political parties, unions, homeowners' associations, citizens' councils and a wide range of other discriminating groups.

Group members who violated those agreements had to face not only physical and economic retaliation from others, but the guilt and shame that came from acting inconsistently with those expectations.⁶⁰ Those who abided by the agreement enjoyed not only the esteem of others but the improved self-esteem that came with solidarity.⁶¹ In this way, racial identity might have helped to stabilize racial cartels that otherwise would have dissolved under the pressure of economic incentives to defect.

The theoretical relationship between identity and anti-competitive conduct finds some support in earlier work by law and economics scholars. Richard Posner has alluded to the role that identity might play in the operation of a hypothetical medieval craft guild, much like the guilds that

⁵⁸ Indeed, one measure of how well a person has internalized her role or social identity is how much the person resists acting inconsistently with the normative rules that define the identity category.

⁵⁹ HENRI TAJFEL & J.C. TURNER, *THE SOCIAL IDENTITY THEORY OF INTERGROUP BEHAVIOR IN PSYCHOLOGY OF INTERGROUP RELATIONS* (S. Worchel & W.G. Austin eds. 1986). Of course, membership in a racial group is not necessarily unique in that regard. Membership in any identity-based group can on its own produce the cartel-like behavior of excluding members not in the group ("out-group members") and favoring members in the group ("in-group members"). Anthropologists and social psychologists long have noted that even assigning people to minimal and meaningless groups—assignments to groups who prefer the art of Klee or Kandinsky, for example—can generate cartel-like behavior. In carrying out certain tasks, people assigned to different groups will favor in-group members and will often actively disfavor out-group members as well. *Id.*

⁶⁰ *See, e.g., infra* note x (discussing real estate brokers' racial guilt in selling across racial lines).

⁶¹ *See id.*

employed weavers of fine linen and cloth in twelfth-century France.⁶² 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.⁶³

To promote compliance with these restrictions, and to keep supply artificially low, Posner's guild deploys some very specific racialized notions about the identity of "craftsman" that are tied to a more general ideological story about the "quality" of a product produced by the members of the guild. Craftsmen produce a particularly fine quality of cloth, and without regulation, quality would diminish markedly, or so the story goes.⁶⁴

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. The guild protects racial identity boundaries carefully via social capital and closure--members are encouraged to form a strong web of social relationships, with frequent intermarriage and the hiring of apprentices from guild member families.⁶⁵ Much like Posner's guild, racial groups during Jim Crow may have used identity to create anti-competitive barriers to entry in key markets like labor, housing and education.

Beyond identity, the issue of cartel stability might be more tractable for another reason. To confer significant competitive advantage for whites, racial cartels need not have lasted in an inordinate amount of time. Even those cartels that lasted only a short time could have produced significant

⁶² Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 9 (1993).

⁶³ *See id.* at 9-10.

⁶⁴ *See id.* at 11-12.

⁶⁵ *Id.* at 10. Likewise, Janet Landa has proposed that in various countries, the Chinese identity constitutes an anchor-point around which social capital is organized to improve the competitiveness of Chinese middlemen. Landa focuses on the improvement of trust and information dissemination that accompanies an ethnically homogenous economic group. Janet T. Landa, *A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUDIES 349 (1981).

competitive advantage for whites in key markets, if that competitive advantage then reproduced itself over time even in the absence of continuing cartel behavior.

I have written elsewhere that the racial cartel advantage can quickly become self-reinforcing over time, through mechanisms that word to transmit competitive advantage from one generation to the next.⁶⁶ This self-reinforcing process can reproduce competitive advantage even in the absence of continuing cartel conduct.

If early cartel advantage is self-reinforcing even in the absence of continuing conduct, then cartels can produce long-lasting advantage even when they have a relatively short life span. This is particularly true for those cartels that form early in the history of particular markets. So, for example, a homeowners' association that forms just as whites are moving to the suburbs with federal financing might have a lasting impact on the racial composition of the neighborhood, even if the association does not endure for very long. Put simply, short-term cartels like the homeowners' association can have long-term effects.

III. CARTELS IN ACTION: HISTORICAL EVIDENCE OF RACIAL CARTELS IN U.S. HISTORY

The following discussion explores how our racial cartel theory might play out in practice. This section looks at three historical cases of group-based racial exclusion that could be characterized as cartel conduct: Texas political parties conspiring to disfranchise black and Mexican voters, Chicago homeowners' associations (and their partners-in-crime, real estate boards) coordinating to exclude black residents, and Southern California school boards collectively barring Mexican students from public schools.

These groups all pursued racial exclusion as either a primary purpose, a primary strategy or both. They all faced the threat of defectors, and deployed racial identity to combat that threat. Finally, they all

⁶⁶ Daria Roithmayr, *Them That Has, Gets*, in *ECONOMIC AND SOCIAL INEQUALITY: THE ROLE OF RACE IN LAW, MARKETS, AND SOCIAL STRUCTURES*, Russell Sage Foundation Press (Emma C. Jordan ed. 2007) (forthcoming).

conferred significant competitive advantage during Jim Crow for whites in key markets—political, housing and education markets, in particular.

As much as these cartels shared common group structures and strategies, however, they also differed significantly. For example, although law played a very important role in coordinating cooperation for political parties in Texas, it played a minimal role in excluding Mexican children from public schools in Southern California.⁶⁷ Likewise, racial identity might have played a stronger role in homeowners' associations in Chicago than it did in Texas politics or public school exclusion.⁶⁸ Before beginning our discussion, therefore, it is important to emphasize that racial cartels were quite dynamic and varied significantly across geography and time.

A. The South: Disfranchising Black Voters in Texas Political Markets

On its face, disfranchisement politics in Texas appears to be an easy case to describe as cartel conduct. Conservative Democrats and Populists joined forces across class lines to push black voters off the rolls once and for all. This alliance between elites and non-elites looks like a textbook cartel agreement to eliminate the “competition” of black votes in “political markets.” Despite the incentive of each faction to use the black vote against the other, elites and non-elites united under the banner of white supremacy in what appeared to be a mutual treaty of disarmament, deployed to consolidate political advantage. A more detailed review of Texas political history confirms this initial intuition.

In contrast to the North, white cartel power in the South really emerged only after the end of the Civil War, when southern whites reclaimed their power from northern Republicans. For a short time during Reconstruction, southern whites had been subject to federal regulation and the presence of federal troops to enforce newly-enacted legislation (by a Republican-controlled Congress). But shortly after the president withdrew

⁶⁷ See *infra* note x.

⁶⁸ See *infra* note x.

federal troops and Democrats retook control of southern state legislatures, white cartel conduct materialized, particularly in labor markets.⁶⁹

Historians long have argued about what motivated whites in the South to disfranchise blacks.⁷⁰ C. Vann Woodward has claimed that conservative Democrats from the black belt (counties in which blacks outnumbered whites) initiated the move to disfranchise, to keep independent parties from winning by mobilizing black voters.⁷¹ Likewise, J. Morgan Kousser has suggested that conservative Democrats instituted disfranchisement to defeat potential opposition parties or coalitions, but for reasons having more to do with class and racial hierarchy than with electoral or political advantage.⁷²

In contrast, V.O. Key has argued that, although much of the move to disfranchise *was* initiated by conservative Democrats for political advantage, “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.”⁷³ From both sides of the aisle, however, historians tell us that whites worked in coordinated fashion to shut down competition from black voters, forming alliances where necessary across

⁶⁹ White groups worked particularly hard to stratify the labor market. Textile mill owners marked off certain jobs as the preserve of white workers. CHARLES H. WESLEY, *NEGRO LABOR IN THE U.S. 1850-1925* 238-39 (1927). Blacks were excluded from cotton mills, and from construction and craft union membership. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* 222,229 (1951). Indeed, after the end of Reconstruction, blacks were pushed out of all branches of work except for agricultural work and domestic services. Working-class whites might have recruited blacks to join them in a growing agrarian and labor reform movement, and to unite with them politically to unseat the planter-dominated (and then industrialist-dominated) Democratic party. But instead, whites chose to unite with elites to exclude on the basis of race.

⁷⁰ J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910* 6-8 (1974)

⁷¹ WOODWARD, *ORIGINS OF THE NEW SOUTH*, *supra* note 69 at 222, 229.

⁷² KOUSSER, *SHAPING OF SOUTHERN POLITICS*, *supra* note 70 at 16-17.

⁷³ V.O. KEY, JR. *SOUTHERN POLITICS IN STATE AND NATION* xx (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 MICHAEL PERMAN, *STRUGGLE FOR MASTERY, DISFRANCHISEMENT IN THE SOUTH 1888-1908* xx (2001)

political, economic and social interests under the banner of white supremacy.

Of course, certain whites began the Jim Crow period with a sizable advantage. During slavery, white planters in the South had almost completely monopolized political power over non slave-holding white farmers. These planter elites had used a range of legal tools to maintain that monopoly power, including: property requirements for voting and for running for office; laws that counted slaves for purposes of districting; laws that gave them exclusive control over the labor of their slaves; and of course, plain old gerrymandering.⁷⁴

Once back in power, Democrats confronted squarely the question of the newly-enfranchised black vote, and the danger of splitting the white vote. The history of exclusion can be divided into two stages—the era of manipulation, in which whites used a range of strategies to push black voters to vote a certain way, and then the era of manipulation, where whites stopped blacks (and a fair number of poor whites) from voting at all.

A significant shift in power between white elites and non-elites in the late 1880s and early 1890s inaugurated the beginning of the era of manipulation. Economic depression changed the relationship between white planters and yeoman farmers significantly.⁷⁵ Small farmers who were having trouble holding onto their land and keeping up their crop prices began to unite against financiers in the east and the increasingly pro-industrialist leadership of the Democratic Party.⁷⁶ They formed the Southern Farmers' Alliance in the late 80s, and by 1889, the alliance had

⁷⁴ Ray Marshall, *Industrialization and Race Relations in the Southern United States*, in *INDUSTRIALIZATION AND RACE RELATIONS* 61 (1965). *See also* Harold M. Baron, *The Demand for Black Labor: Historical Notes on the Political Economy of Racism*, 5 *RADICAL AM.* 9 (1971) (arguing that non-slave holders had no power to pass laws to restrict slave labor practices).

⁷⁵ STERLING D. SPERO & ABRAM HARRIS, *THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT* 3-15 (1931). The non-white elite included yeoman farmers, tenants, artisans, laborers. *See id.*

⁷⁶ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 77 (1955); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 283 (8th ed. 2000).

branches in every state in the South.⁷⁷ These radical farmers also formed the Populist party to give political form to their economic interests.⁷⁸

Southern politics during this period was quite competitive, as these parties appealed openly to voters (men) of both races.⁷⁹ Independents began openly competing for political power by courting the black vote, and by promoting a platform of limited egalitarianism. The Populist party tried to unite with black voters in Georgia, Texas and Arkansas, despite the loss of prestige the party risked in crossing racial lines.⁸⁰ The era of competition produced some quite strange bedfellows—in response to independent appeals to black voters, conservative Democrats also courted the black vote, and Populists in some places proposed fusion with Republicans, despite the conflict in class interests.⁸¹ Importantly, the elite were not in favor of outright disfranchisement at this point, largely because they feared the force of the newly enacted Fourteenth and Fifteenth Amendments.⁸²

But beginning in 1890, the period of open competition gave way gradually to the era of vote elimination. Mississippi was the first to amend

⁷⁷ FRANKLIN, FROM SLAVERY TO FREEDOM, *supra* note 76 at 284; WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 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 owner with hired hand to promote radical agrarian interests. FRANKLIN, FROM SLAVERY TO FREEDOM, *supra* note 76x at 284; WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 at 193, 246.

⁷⁸ 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). KOUSSER, SHAPING OF SOUTHERN POLITICS, *supra* note 70 at 25. *See also* WOODWARD, THE STRANGE CAREER OF JIM CROW, *supra* note 76 at 60.

⁷⁹ *See* WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 at 327. Woodward observed of white supremacy, in contrast to the image of the solid South, "[t]he real question was *which whites* should be supreme." *Id.* at 328.

⁸⁰ WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 at 236, 256; WOODWARD, STRANGE CAREER OF JIM CROW, *supra* note 76 at 60.

⁸¹ WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 at 288-89.

⁸² FRANKLIN, FROM SLAVERY TO FREEDOM, *supra* note 76 at 281; WOODWARD, ORIGINS OF THE NEW SOUTH, *supra* note 69 at 251.

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, where we will focus our discussion.⁸³

In Texas, whites very much feared the potential power of the black vote. Black Republicans provided a constant but small opposition to white Democrats. Black voters posed even more of a threat when they supported third-parties like the Greenbacks-Independents, the Farmers' Alliance and Populists.⁸⁴ In the 1896 election, a full-fledged war broke out amongst Democratic factions, with each side (but particularly the conservative Democrats) resorting to violence, intimidation and legal restriction.⁸⁵ Although white Texans had already neutralized many black voters through violence, intimidation or fraud, a significant percentage voted in state elections in 1900 and 1902, and the black vote remained a threat for both white factions.⁸⁶

In 1902, Texas Democrats finally passed the "Terrell Election Law," which provided for a poll tax and a secret ballot for general elections and primaries. Remarkably, county committees were also allowed to impose additional requirements for primary voting, a move that foreshadowed creation of the state's infamous "white primary."⁸⁷ Legislators passed the Terrell law largely because they feared that some independent party might use the black vote to achieve victory.⁸⁸

⁸³ KOUSSER, SHAPING OF SOUTHERN POLITICS, *supra* note 70 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

⁸⁴ 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.

⁸⁵ *Id.*

⁸⁶ *Id.* at 208-09.

⁸⁷ *Id.* at 208.

⁸⁸ *Id.* at 209.

After the turn of the century, cartel strategy shifted from the poll tax to white primaries. In 1923, a now all-white Texas legislature passed a law that unambiguously prohibited black participation in a Democratic party primary election held in the state.⁸⁹ Federal courts quickly stepped in to block this blatantly illegal move. In *Nixon v. Herndon*, the U.S. Supreme Court held that the primary law violated the equal protection clause of Fourteenth Amendment.⁹⁰ 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.⁹¹

In *Nixon v. Condon*, the Court struck down this second round restriction, again on Fourteenth Amendment grounds.⁹² 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.

This time, the Supreme Court in *Grove v. Townsend* 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.⁹³ A few years later, however, in *Smith v. Allwright*, the Court reversed itself, finding that state law so extensively pervaded the party's participation in elections that the Convention constituted illegal state action.⁹⁴

In the wake of the Supreme Court's rulings, whites now turned from legal restrictions to private cartel action at a much more local level. In Fort

⁸⁹ 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* (2003).

⁹⁰ *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁹¹ *See id.* at x.

⁹² *Nixon v. Condon*, 286 U.S. 73 (1932).

⁹³ *Grove v. Townsend*, 295 U.S. 45 (1935).

⁹⁴ *Smith v. Allwright*, 321 U.S. 649 (1944)

Bend County, Texas, a group of local whites formed the Young Men's Democratic Club, which purported to be a literary and social club, but which in fact had formed for the purpose of wresting control from the county's many black elected officials.⁹⁵ In the late 1880s, blacks outnumbered whites about four to one in Fort Bend county.⁹⁶

Not surprisingly given the county's demographics, black voters helped to elect a large number of blacks to political office during Reconstruction. To wrest control from black voters, the YMDC deployed a range of anti-competitive strategies, including violence, election fraud and harassment. In the end, the YMDC achieved complete success, marginalizing the black majority, and driving huge numbers of black voters away from Fort Bend County and into more politically friendly territory.⁹⁷

As was true of many white cartel organizations, the Young Men's Democratic Club soon divided itself along class lines into two groups.⁹⁸ The more numerous faction, the Jaybirds, consisted of four hundred or so of the county's wealthier property owners, almost all Democrats and all white, as required by the organization's membership rules.⁹⁹ From the beginning, the Jaybird party looked just like an ordinary political party, with an executive committee, a regular primary, and expenses paid via an assessment from candidates running in the party primary.¹⁰⁰

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.¹⁰¹ In shootouts that evoked the violence of the wild West, the Woodpeckers and Jaybirds

⁹⁵ Clark's book, *Black Victory*, also details the history of the Jaybirds and the Woodpeckers. CLARK, *BLACK VICTORY*, *supra* note x at 70-78, 245-47.

⁹⁶ *Id.* at 78

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 245-46.

¹⁰¹ *Id.* at 78.

fought bitterly over who would eventually determine the agenda for the organization. Ultimately, the Jaybirds claimed victory, and dominated local politics for decades afterward.¹⁰²

As part of the ordinary election process, the Jaybirds held a separate pre-primary election, to determine the party's nominee for the Democratic primary, which took place a few months later.¹⁰³ Not surprisingly given the Jaybird's prominence, the Jaybird candidate almost always ran without opposition and then went on to win in both the Democratic primaries and the general election.¹⁰⁴ In effect, the Jaybird pre-primary functioned as the equivalent of the general election.¹⁰⁵

In 1953, in *Terry v. Adams*,¹⁰⁶ the Supreme Court finally 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.

The story of Texas disfranchisement politics can usefully be described as a racial cartel story. Legal scholars Samuel Issacharoff and Richard Pildes have argued that white primaries were unconstitutional precisely because they reduced the competitiveness of political elections.¹⁰⁷ More specifically, they argue that the white primary's racial restrictions on membership served to consolidate power in political markets during Jim Crow.

In particular, the authors point out that the primary restrictions worked to unify an unruly, deeply divided Democratic party that had split along several axes, including class, agricultural policy and ideology. As noted earlier, black voters often proved to be key allies with a great deal of

¹⁰² *Id.* at 81.

¹⁰³ *Id.* at 245-46.

¹⁰⁴ *Id.* at 84.

¹⁰⁵ *Id.* at 247 (referring to case law summary).

¹⁰⁶ *Terry v. Adams*, 345 U.S. 461 (1953).

¹⁰⁷ Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

voting power. The swing voters of their time, they were the marginally decisive voting bloc in several factional (and often class-related) struggles among white voters within the party.

Against this historical backdrop, the white primary can be understood as an anti-competitive agreement of mutual disarmament. In agreeing to the white primary, the Democratic party ultimately created among the warring factions “a credible commitment or a pre-commitment pact 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.”¹⁰⁸

B. The North: Excluding Blacks in Chicago Housing Markets

Perhaps the best example of a racial cartels emerges in the history of residential housing segregation in Chicago. Like Texas political groups, this cartel also united different groups with different incentives under the common banner of exclusion. As the following discussion details, in Chicago housing markets, both the real estate board and the homeowners’ association united to restrict access to housing on the basis of race. The history of the alliance between board and association can be read usefully as a cartel story.

Even before the Civil War, whites in Northern cities had excluded blacks from housing, labor, education and political markets. Anti-competitive sentiment in the North was already quite strong. In fact, some scholars have argued that whites abolished slavery in the North in large part because slave labor undercut white wages.¹⁰⁹ Having emancipated slaves, whites then moved to restrict competition from them by excluding them from key areas of social, economic and political life--denying them the right to vote, segregating public education, segregating public accommodations and creating a split labor market, in which whites monopolized the highest-wage jobs in skilled positions.¹¹⁰

Enter the Europeans. Between 1830 and 1860, European immigrants came by the millions to cities like Chicago—Irish, German and Scandinavian in particular.

¹⁰⁸ *Id.* at 663.

¹⁰⁹ See LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES* 6, 47 (1965).

¹¹⁰ *Id.* at 75-77 (labor market); 114-120 (education); 156-57 (labor market).

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.¹¹¹ 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.¹¹² In a number of cities, these white ethnic groups played an important role in actively excluding blacks from white residential neighborhoods, citing to property devaluation to justify their exclusion.¹¹³

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 50.0.¹¹⁴ Beginning in earnest in 1860, blacks began to migrate in the thousands, and then in the millions, to Chicago.¹¹⁵ Pulled from the north by increasing labor demand in industrializing cities (as strikebreakers and in low-skilled jobs), and pushed from the South by boll-weevil infestation and the drive to modernize farms, blacks migrated to find jobs and a new way of life. Demand for black labor skyrocketed around WWI, fueled by immigrant labor restrictions that cut off the supply of immigrant on which industrial employers had come to depend. From 1890 to 1915, black Chicago residents grew from fifteen thousand to over fifty thousand, and this growth was dwarfed in size by a subsequent wave during and after World War I.¹¹⁶

¹¹¹ *Id.* at 166-67.

¹¹² *Id.* at 164-67

¹¹³ *Id.* at 169-70.

¹¹⁴ MASSEY AND DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 20. The segregation index ranges from 0, which reflects a thoroughly mixed population, to 1, which reflects a completely segregated population. An index of .50 means that 50% of blacks would have had to move to a neighborhood where the black percentage is lower to shift the city towards evenness. *Id.* 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: BLACKS AND WHITE IMMIGRANTS SINCE 1880* 266, 288 (1980).

¹¹⁵ For a good overview of the contours of black migration to the North, *See* MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36, THOMAS PHILPOTT, *THE SLUM AND THE GHETTO: NEIGHBORHOOD DETERIORATION AND MIDDLE CLASS REFORM, CHICAGO, 1880-1930* (1978).

¹¹⁶ ALAN SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920* 11 (1967).

Northern whites reacted with alarm and hostility to the accelerating migration of blacks into what they perceived as their territory. Working-class whites, particularly recently-arrived immigrants, feared economic competition and social displacement.¹¹⁷ Accordingly, these whites moved quickly to restrict black newcomers to certain parts of the city.

By 1900, whites had restricted black migrants to several settlements, 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.¹¹⁸ By the turn of the century, the boundaries for residential segregation in Chicago had been sketched.¹¹⁹ Thereafter, residential segregation grew dramatically, in the period between 1910 and 1920, and by 1940, racial separation was almost total, achieving a segregation index of .95.¹²⁰

Whites used many means to keep blacks out of white Chicago neighborhoods. White families refused to sell their homes to black buyers, and established racially restrictive covenants to bind successive sellers of property in white neighborhoods.¹²¹ They also worked to restrict access to credit for blacks by pressuring banks and other lenders not to provide financial services to blacks. White elites along the North Shore also worked towards segregation by targeting black domestic workers—a white homeowners' committee requested neighborhood families unable to house domestic workers on their own premises to fire those workers. They also barred blacks from churches, restaurants and shopping centers.¹²²

At the violent end of the spectrum, whites physically harassed and assaulted prospective buyers (and defecting sellers) when other options proved ineffective. Working collectively, white homeowners offered to buy out black homeowners, and

¹¹⁷ MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 29. In 1850, 77 percent of Chicago residents were of foreign origin, and over 400,000 had arrived during the wave of immigration that occurred during 1880. PHILPOTT, *THE SLUM AND THE GHETTO*, *supra* note 115 at 118.

¹¹⁸ PHILPOTT, *THE SLUM AND THE GHETTO*, *supra* note 115 at 147.

¹¹⁹ *Id.* at 121.

¹²⁰ MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 20. *See also* PHILPOTT, *SLUM AND THE GHETTO*, *supra* note 115 at 133; SPEAR, *BLACK CHICAGO*, *supra* note 116 at 20.

¹²¹ MASSEY AND DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 34-35.

¹²² PHILPOTT, *SLUM AND THE GHETTO*, *supra* note 115 at 155

then harassed those who refused such offers. They organized mobs to fire gunshots into residents' homes, burn crosses on their lawns, and physically attacked new homeowners or broke into their homes to ransack them.¹²³ Occasionally, violence erupted in mass form, as in the Chicago race riot of 1919, fueled in large part by whites reaction to the search for housing by black residents.¹²⁴

Two organizations formed the centerpieces of racial cartel activity in Chicago--the city's real estate board and the more localized homeowners' association.¹²⁵ The Real Estate Board, which was made up of hundreds of individual real estate businesses, operated primarily as a trade organization to lobby on behalf of real estate interests locally and nationally.¹²⁶ Most importantly, the board could adopt standards and rules to govern business conduct, and could expel a broker who violated those rules. The Board used that power to solidify and consolidate white racial power in housing markets. For example, in 1917, the Board adopted a formal policy asking brokers to keep blacks out of white residential areas. Then, just as the 1921 building boom had begun expanding housing for the city's whites, the Board voted officially to expel any broker who leased or sold property in white neighborhoods to black residents.¹²⁷

Shortly thereafter, the Board drafted a new legal restriction--the restrictive covenant--that individual white homeowners could enforce privately. The restrictive covenant contractually obligated homeowners (and their heirs) not to sell, lease or allow occupancy of property by blacks.¹²⁸ Although the restrictive covenant required far less energy than passing ordinances or formal policies, ensuring full neighborhood coverage was time consuming and expensive. Residents had to track down owners, gather signatures, compile descriptions of the properties and file signed documents in the right office. Filers also incurred drafting and recording fees to put restrictions in

¹²³ MASSEY AND DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 34-35.

¹²⁴ SPEAR, *BLACK CHICAGO*, *supra* note 116 at 208.

¹²⁵ Zorita Mikva, *The Neighborhood Improvement Association: A Counter-force to the Expansion of Chicago's Negro Population* 26 (June 1951)(unpublished M.A. dissertation, Univ. Of Chicago) (on file with author).

¹²⁶ ROSE HELPER, *RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS* 4 (1969).

¹²⁷ PHILPOTT, *THE SLUM AND THE GHETTO*, *supra* note 115 at 185.

¹²⁸ *See generally* *Shelley v. Kraemer*, 334 U.S. at 2 (describing racially restrictive covenants). *See also* MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 37.

deeds.¹²⁹ Persuading people to donate their time and money towards the enterprise, the Chicago Real Estate Board launched 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.¹³⁰

The Board also used more formalized institutional rules and practices to regulate group member conduct. The Board adopted codes of conduct and rules of ethics marking as “deviant” the practice of selling across racial lines. Most notably, the Chicago Real Estate Board (like the national board) adopted a code provision prohibiting brokers from selling to buyers who threatened to disrupt the racial composition of the neighborhood.¹³¹ Indeed, the Chicago Board spearheaded the campaign that would ultimately produce the National Board policy on selling across racial lines. Thanks to the efforts of Chicago community leader Nathan MacChesney, the National Association of Real Estate Boards adopted a formal policy, Article 34 of the 1924 Code of Ethics, which prohibited relators 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 Article 34.¹³²

In addition to the city board, local homeowners’ associations also played a key role in organizing residential segregation. Chicago homeowners and property improvement organizations counted among their members primarily home owners or apartment owners. Very often these were white ethnic immigrants who had recently moved to the city. In Chicago, these organizations typically claimed between 50 and 2000 members. The city’s associations concentrated themselves at the southern edge of the Black Belt and west of the black community in Morgan Park.¹³³

In 1948, the Supreme Court decided the case of *Shelley v. Kramer*, in which the Court struck down racially restrictive covenants as unconstitutional.¹³⁴ In response to the court’s decision, the homeowners’ association moved in to take over the work that

¹²⁹ Brooks, *Covenants and Conventions*, *supra* note 46 at 12.

¹³⁰ PHILPOTT, *THE SLUM AND THE GHETTO*, *supra* note 115 at 186-95.

¹³¹ *Id.* at 192.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *Shelley v. Kramer*, 334 U.S. 1 (1948).

covenants had done. Zorita Mikva's comprehensive study of Chicago property improvement and homeowners' associations describes group strategy during this period.¹³⁵ After the Court's decision in *Shelley v. Kramer*, the associations had to shift to non-legal and informal means to keep blacks out of the neighborhood.¹³⁶ Moving away from specific references to race, the associations drafted and litigated to enforce agreements to keep "undesirable people" out of the neighborhood.¹³⁷ They also drafted "conservation agreements," which obligated a homeowner to effect "proper maintenance" of his property on threat of eviction.¹³⁸ Such agreements were selectively enforced, of course, against "undesirable" neighbors.¹³⁹

Associations also used a number of other strategies to bar non-whites from moving in. For example, the Hyde Park Improvement Protective Club targeted middle-class blacks by pressuring them to sell and by offering black renters bonuses for moving before the expiration of their leases. The association also blacklisted real estate brokers and landlords who did business with blacks, and boycotted businesses who sold across racial lines.¹⁴⁰ The Club even went so far as to vandalize the home of a black family that refused to move voluntarily.¹⁴¹

Likewise, the Southtown Planning Association, representing the area of Englewood on the city's South Side, created a building corporation to buy property from blacks who bought into the community, and also made use of government redevelopment plans to demolish the area's black housing and replace with new

¹³⁵ Zorita Mikva, *The Neighborhood Improvement Association*, *supra* note 125.

¹³⁶ Mikva, *supra* note 125 at 14-21 (describing substitute measure on which homeowners relied to prevent selling across racial lines), 27 (noting that associations often paid for costs that another association incurred litigating)

¹³⁷ *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.")

¹³⁸ *See id.* at 14 (describing occupancy standards agreements, also called conservation agreements).

¹³⁹ *See id.* at 17-18.

¹⁴⁰ PHILPOTT, *SLUM AND THE GHETTO*, *supra* note 115 at 156;

¹⁴¹ SPEAR, *BLACK CHICAGO*, *supra* note 116 at 22-23.

middle-class housing, to be occupied by whites.¹⁴² (The SPA proposed to relocate black residents in the suburb of Robbins.) The SPA also launched in 1947 a program encouraging member clubs to adopt the “Choose Your Neighbor” program, which used creative restrictive covenants to exclude “undesirable” neighbors.¹⁴³

Politics also proved a productive arena for the homeowners’ association and the Chicago Real Estate Board. The two institutions often worked in tandem to exert pressure on city government officials, and mobilizing in favor or against legislation or other government policy was a big part of both organizations’ portfolio.¹⁴⁴ With the Board’s help, associations often organized on a ward by ward basis to aggressively lobby city representatives, and published community newspapers to distribute information as part of the mobilization effort.¹⁴⁵ In the 1950s, for example, property improvement associations worked in tandem with the real estate board to hold the alderman for Ward 40 hostage, forcing him to vote against a public housing project in his ward even though he supported public housing.¹⁴⁶

Of course, agreements are only as good as the monitoring and enforcing behind them. Here, the structure of the homeowners’ association played an important role. As part of the neighborhood fight against residential integration, the owners’ associations were structured very much as local paramilitary organizations. Groups divided up their turf by neighborhood lines or blocks, and created association wide networks to monitor buying and selling.¹⁴⁷ In addition, the Board and associations often worked together to monitor both brokers and owners. The Board often encouraged associations to let them know when an individual was planning to sell his home, or to inform them when

¹⁴² Mikva, Neighborhood Improvement Association, *supra* note 125 at 82-83.

¹⁴³ *Id.* at 82.

¹⁴⁴ *Id.* at 36.

¹⁴⁵ *Id.* at 36-38 (influencing city officials) and 39 (publishing newspapers). *See also* Spear, Black Chicago, *supra* note 116 at 209-210 (describing complaints against the Chicago Real Estate Board for determining which neighborhoods were “desirable” or not.)

¹⁴⁶ Mikva, Neighborhood Improvement Association, *supra* note 125 at 38.

¹⁴⁷ *Id.* at 44-63 (describing structure and size of associations, their coalitions with other associations within political boundaries, their connection with larger regional federations.)

prospective black home buyers had approached a home owner looking to buy.¹⁴⁸ Realtors also helped to draft informal agreements between realtors, builders, bankers and individual property owners not to sell or lend to blacks.¹⁴⁹

Punishment for violating cartel norms was often immediate and significant. Associations often publicized the names of people who sold across racial lines, to encourage shaming and or economic coercion. 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.” “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.”¹⁵⁰

As could be predicted from such an announcement, the association’s arsenal of coercive weapons also included physical violence. 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 family with murder and tore down the newly built house.¹⁵¹

Ample evidence exists that racial identity in homeowners’ association played a key role in policing compliance with cartel obligations. For example, in 1907, the Woodlawn Property Owners’ association explicitly demanded “race loyalty” from the area’s realtors, after four black families had moved into West Woodlawn.¹⁵² Social capital among this group also strengthened its operation and discouraged cheating. Groups often took great pains to nurture close relationships between members in order

¹⁴⁸ *Id.* at 101-102, 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. *Id.* at 84.

¹⁴⁹ *Id.* at 101.

¹⁵⁰ *Id.* at 103-104.

¹⁵¹ PHILPOTT, SLUM AND GHETTO, *supra* note 115 at 154-55.

¹⁵² *See id.*

to strengthen the identity and loyalty of group members.¹⁵³ Owners' associations met at the homes of members and served home-cooked food at the meetings.¹⁵⁴

Rose Helper's 1969 study of the practices of Chicago real estate brokers confirms that racial identity, and associated feelings of guilt and self-esteem, motivated many brokers to refrain from selling across racial lines. Helper extensively interviewed real estate brokers in Chicago about their policies regarding sales to black home buyers. 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.

As McAdams would predict, many Chicago brokers appeared motivated by a fear of retaliation, from colleagues or residents, for violating rules of exclusion. A fair number of brokers cited to potential economic retaliation—loss of clients, sources of mortgage funds, insurance, and property listings. An even larger number of brokers feared social consequences, including the wrath of immediate neighbors, loss of social status with colleagues and damage to their reputation and social standing in the community. As one broker put it, “you become a social outcast among other real estate brokers.”¹⁵⁵

But internal incentives did much to police the real estate broker community in Chicago as well. Many brokers expressed the belief that it was morally wrong to hurt white homeowners, or cause them emotional upheaval, property loss and other harms. A group of respondents characterized cross-border selling as unethical, or 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.¹⁵⁶

Consistent with the notion that identity helps to hold cartels together, a number of broker's responses referred to their identity as a white person. As one put it, “[w]hether I'm a priest, a rabbi or a real estate man, I'm still a member of a race.” Other brokers spoke of their obligations as “white real estate brokers:”

¹⁵³ *Id.* at 22-23.

¹⁵⁴ *Id.* at 35.

¹⁵⁵ *Id.* at 136.

¹⁵⁶ HELPER, RACIAL POLICIES AND PRACTICES, *supra* note x at pp. 116-17.

“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.”¹⁵⁷

To be sure, a small number of brokers overcame their internal and external obstacles to sell to blacks. Indeed, brokers had significant incentives to cheat or defect. Block busting and panic peddling proved a significant source of revenue for these brokers, who had created separate professional networks and sources of capital to enable them to operate with less fear of retaliation.¹⁵⁸ Once these brokers had sold a critical mass of houses in a neighborhood (often three or more families), then “respectable” brokers would follow. 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.¹⁵⁹

But the circumstances of defection appear to confirm the notion of identity-related costs. That is, brokers appear to have sold when potential economic benefit was great enough and psychological and economic cost small enough (“the neighborhood will tip with or without me”) to minimize the guilt and shame associated with violating identity-based norms.

Local institutions like the real estate board and the property owners’ association were not the only driving force in segregation. The federal government, and federal law, played a very important role in managing cartel conduct beginning in the 1930s.¹⁶⁰ Through its urban redevelopment programs and housing programs, government provided massive competitive advantages to whites and disadvantages to blacks. Urban development and public housing programs razed black neighborhoods and

¹⁵⁷ *Id.* at 119.

¹⁵⁸ *Id.* See also Dmitri Mehlhorn, *A Requiem for Blockbusting: Race, Economics and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145 (1998).

¹⁵⁹ HELPER, RACIAL POLICIES AND PRACTICES, *supra* note x at ____.

¹⁶⁰ Much has been written about the federal role in residential segregation. See Kenneth Jackson, *Race, Ethnicity and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 *J. URB. HIST.* 421, 423 (1980); KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987); MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 51-55.

moved their residents to public housing projects. Together with the Federal Housing Authority and the Veteran's Administration, the federal Home Owners Loan Corporation institutionalized redlining as a national practice. Federal programs provided government-backed low-cost mortgages only to white home buyers and denied such assistance to black buyers or buyers in black neighborhoods.¹⁶¹ In addition, FHA and VA loan programs financed the selective out-migration of middle-class whites to the suburbs¹⁶². 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 1950.¹⁶³

As Michael Jones-Correa has argued with regard to segregated housing, these government programs and regulations did not invent new institutional practices.¹⁶⁴ Rather, they adopted and reinforced existing practices, using the coercive power of the state and institutional resources to monitor and enforce those norms. For example, the National Real Estate Board adopted practices already prevalent in local real estate boards, like the Chicago Board. Likewise, HOLC, the FHA and the VA appropriated many of the social norms of homeowners' associations.¹⁶⁵ By nationalizing, federal programs helped to spread these practices more widely among smaller local cartels, by providing national standards as a coordinating model.

C. The West: Excluding Mexicans in Public Education in Southern California

Although significantly different from the first two case studies, the story of segregation against Mexican children in public schools in California might still be usefully described as a cartel story. In this narrative, local school boards colluded to exclude on the basis of race for longer-term material gain in both education and labor markets. The school boards cartel, unlike the first two cartels discussed in this section, relied more on social norms than on law to coordinate exclusion. The history of

¹⁶¹ MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 36 at 51.

¹⁶² *Id.* at 53.

¹⁶³ *Id.* at 54.

¹⁶⁴ Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 *POL. SCI. Q.* 541, 565 (Winter, 2000-2001).

¹⁶⁵ *See id.*

Mexican exclusion from public schools illustrates how well-entrenched social norms can sustain a cartel even without law's help.

Education markets and labor markets were (and are now) tied together structurally in Southern California. Contemporary commercial agriculture requires a cheap supply of labor. Up until the early 1920s, agriculture had depended heavily on Chinese and Japanese immigrants to work the fields. When the supply from both of these groups dried up after Congress enacted restrictive immigration legislation in the 1880s and 1920s, growers began to import Mexican labor from the South to avoid having to sell off their farms or subdivide them into smaller individual holdings.¹⁶⁶

Thus, Mexicans came to dominate the agricultural labor force in the farm counties of the Imperial and San Joaquin valleys and the citrus belt surrounding Los Angeles. In growers' eyes, Mexicans made ideal agricultural workers—they were easily exploited because they were poor, because they faced significant information and (in many cases) language barriers, and because those who came without documents were easily deported.¹⁶⁷

Growers enjoyed significant benefits from exploiting Mexican workers' willingness to work for lower wages—they avoided the higher costs of finding labor in a competitive market. In an article in the *Pacific Rural* press during 1927, the paper noted that agriculture would be forced to compete for labor in the absence of Mexican workers, and the price of farm labor would mount.¹⁶⁸ By segmenting the labor market, growers lowered labor costs significantly.

Not surprisingly, then, education posed a significant threat to agriculture labor markets. Anglo growers knew that an educated Mexican worker would be far less likely to accept low wages (often less than a dollar a day, the lowest wages paid to any group) and far more likely to organize for improved wages and working conditions. In the words of one grower, "[t]he schools teach Mexicans to look upon farm labor as menial. . . It [education] only makes them dissatisfied and teaches them to read the wrong kind of literature."¹⁶⁹

¹⁶⁶ For an excellent description of Mexicans in agriculture in Southern California during the relevant time period, *See* CAREY MCWILLIAMS, *FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* 124-130 (1971).

¹⁶⁷ *See id.*

¹⁶⁸ *Id.* at 126.

¹⁶⁹ CHARLES WOLLENBERG, *ALL DELIBERATE SPEED* 111 (1976) (citing to Paul Taylor, *Mexican Labor* (1970)).

Moreover, educated Mexicans would also be significantly more likely to become labor market and entrepreneurial competitors—to move from low-wage labor into higher-wage agricultural labor or the land-ownership class, as the Japanese and Hindus had done earlier. Finally, child labor figured prominently in agricultural labor, and segregated schools frequently adopted special schedules during harvest time to accommodate children who accompanied their families into the fields. Thus, excluding Mexican children from public schools paid off not just socially but economically, by facilitating exploitation and restricting competition from Mexican agricultural workers.

That racial exclusion paid off becomes even more obvious when one looks at the correlation between economic position (agricultural worker vs. rancher) and school status. Neil Foley points out that where Mexicans held land, in ranch counties, they did not face exclusion from education or in other areas of public life, nor were they stereotyped in the same way. In contrast, in farm counties, where Mexicans worked as sharecroppers or migrant agricultural labor for white landholders or commercial interests, white school boards were far more likely to segregate Mexican children from public schools, and to embrace explicitly racial ideology.¹⁷⁰

The case of *Mendez v. Westminster* tells the story of the school board of education in Santa Ana, California. The long history of board decision making to exclude Mexican children from public schools looks like cartel decision-making.¹⁷¹ Santa Ana, established in 1869, was a small-sized urban town that employed Mexican labor extensively as citrus workers and vegetable labor.¹⁷² As workers migrated from Mexico to find work, Anglo growers located Mexican laborers in small residential clusters and laborer camps in Santa Ana, designated as Mexican “colonies.”¹⁷³ Mexican workers were also steered to small rural villages, and often entire villages were populated by citrus workers.¹⁷⁴

¹⁷⁰ NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS AND POOR WHITES IN TEXAS COTTON CULTURE* 42, 61 (1997). *See also* David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* 235 (1995). I am indebted to Ariela Gross for pointing this fact out to me.

¹⁷¹ 161 F.2d 774 (9th Cir. 1947).

¹⁷² GILBERT G. GONZALEZ, *LABOR AND COMMUNITY: MEXICAN CITRUS WORKER VILLAGES IN A SOUTHERN CALIFORNIA COUNTY 1900-1950* 45, 51, 63 (1994).

¹⁷³ *Id.* at 63.

¹⁷⁴ *Id.* at 57-58, 63.

Mexican agriculture communities were formed via private real estate promotion, company-sponsored housing and migration to poorer neighborhoods on the outskirts of town closer to groves and fields.¹⁷⁵ Segregated schooling coincided with Mexican migration into the region. Segregated schools emphasized teaching English and the development of manual, industrial and vocational skills—shop or industrial arts for boys and home economics for girls.¹⁷⁶ Junior high schooling constituted the terminal stage of schooling for most Mexican children.¹⁷⁷

Segregation in Santa Ana proceeded much as it did in countless other towns and rural villages in the Southwest. In the early 1900s, the Santa Ana Board of Education decided for the first time to set up on an ad hoc basis a separate classroom for Mexican children in an Anglo school. That same year, the superintendent recommended the use of an existing school to house the growing numbers of “Spanish” children, and directed that the curriculum focus on “manual training” for boys and sewing and mending for girls.¹⁷⁸ By 1918, the school had adopted a program of IQ testing and vocational tracking for Mexican students. At that time, the school board also established a night program for Mexican adults, to provide instruction in “more sanitary ways of living.”¹⁷⁹

Over the next ten to fifteen years, the Board and Superintendent turned informally classified schools into permanently separate Mexican schools, and they also authorized the construction of additional school buildings. The country drew school district lines to ensure that Mexican children attended a separate school, and busing also transported out of district children to a Mexican school. The Board also regularly denied requests for transfers to Anglo schools by Mexican parents. Of particular note, the Board voted to allow Mexican schools to operate half-days during the walnut-picking season.¹⁸⁰

Importantly, the school board relied on informal policy and custom to regulate cartel conduct, and not law. Although the California state education code did not

¹⁷⁵ *Id.* at 59.

¹⁷⁶ *Id.* at 101-102.

¹⁷⁷ *Id.* at 106.

¹⁷⁸ Gilbert Gonzalez, *Segregation of Mexican Children in a Southern California City: The Legacy of Expansionism and the American Southwest*, 16 WESTERN HIST. Q. 55, 64 (1985)

¹⁷⁹ *Id.* at 58-64.

¹⁸⁰ *Id.*

explicitly exclude Mexicans the way it excluded Japanese and Chinese children, school boards and their lawyers found other provisions to support their exclusionary policies.¹⁸¹ For example, the Santa Ana Board lawyer opined in 1919 that, although the state's Education Code did not explicitly address Mexicans, the board could legally segregate on the grounds of language, overage and irregular attendance (largely due to migrant worker demands during the year).¹⁸² Many other boards adopted similar interpretations of the Code's provisions in order to school Mexican children separately.¹⁸³ Still other boards interpreted the existing statute to include Mexican children under the category "Indian."¹⁸⁴ Under pressure from parents, the school board implemented a practice of first separating and then building separate schools for Mexican children.

Social norms built around racial identity (and its accompanying ideology) helped to justify the school board's decision to segregate. About Mexican and Mexican-American children, California educators wrote that they were "dull, stupid and phlegmatic."¹⁸⁵ IQ testing supported such findings. William Sheldon, a social scientist from the University of Texas, used the IQ test to purportedly compare the abilities of Mexican and American students in Texas. Not surprisingly given the history of the test itself, and the motivations of the researcher, Sheldon found that Mexicans had 85 percent the IQ of Americans.¹⁸⁶ These "group differences" helped to define white groups as distinct from Mexican groups, and to justify keeping schoolchildren separate, lest Mexican children drag white scholastic achievement down.

Racial identity helped to keep the school board united behind the choice to segregate. Like homeowners and political parties, many members of the school board had significant reason to "defect"—in this case, to vote against segregation and

¹⁸¹ Section 8003 of the code required separate schools for "Indian children and for children of Chinese, Japanese or Mongolian parentage." *Id.* at 63.

¹⁸² *Id.* at 64.

¹⁸³ *Id.*

¹⁸⁴ Ariela Gross, *The Caucasian Cloak: Mexican Americans and the Politics of Whiteness in the 20th Century Southwest*, __ *Geo. L. J.* __, 26 (2006).

¹⁸⁵ Gilbert Gonzalez, *Segregation of Mexican Children*, *supra* note 178 at 113.

¹⁸⁶ *Id.* (citing to Grace Stanley, California educator, "Special School for Mexicans," *The Survey* (Sept. 15, 1920) at 714).

dismantle separate schooling. Board members, and indeed many of the white parents themselves, acknowledged again and again that operating separate schools was significantly more expensive for the schools than integration would have been.

Indeed, duplicate schools, textbooks and teachers were expensive, although most schools spent significantly less on resources for Mexican schools than for Anglos.¹⁸⁷ In addition, each individual school had an incentive to enroll Mexican students, in order to increase enrollment and accrue more federal and state financial aid. For these reasons, school board members had to police against those school principals and dissident school board members who argued to defect from the party line in favor of integrating Mexican students.¹⁸⁸

In 1928, opposition ran particularly high, and dissenting board members objected to the expense for improvements to the Mexican schools because “we do not have proper facilities for the American school children.”¹⁸⁹ In an act of rebellion, the board decided not to fund the improvements. Invoking notions of racial loyalty and group fidelity, the school board eventually brought into line dissenting members, and segregation ceased to be a subject of any controversy on the board.¹⁹⁰ Legal segregation against Mexican students continued until the Ninth Circuit decided the case of *Mendez v. Westminster* in 1947.¹⁹¹

V. IMPLICATIONS OF A CARTEL MODEL: RACE, CLASS AND ANTITRUST

What does the cartel story say about racial exclusion that conventional narratives do not? A cartel account uncovers several aspects of racial exclusion that conventional narratives obscure. As discussed in Part I, a cartel story emphasizes the benefits of racism to whites, the collusive nature of the enterprise, and the central role that racial identity played in uniting whites across class lines to perpetuate exclusion. Most centrally, a cartel story emphasizes that racism paid off, big time. Homeowners profited from excluding blacks and Mexicans from Chicago neighborhoods—they

¹⁸⁷ *Id.* at 66.

¹⁸⁸ *Id.* at 66.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 68.

¹⁹¹ 161 F.2d 774 (9th Cir. 1947).

retained higher property values, concentrated the wealth of their neighbors, and monopolized superior housing stock. Anglo growers consolidated their control over migrant labor. White Democrats strengthened their political power in the South, having minimized their class differences under the banner of white supremacy.

More generally, the cartel story helps us to highlight different relationships in the story of racial exclusion in two ways. First, the cartel story describes the relationship of race and class as interdependent and bi-directional, rather than separate and autonomous, or collapsed into each other. Second, the cartel story also can help to re-describe the role of law in racial inequality, re-framing it both as a participant in cartel creation and a necessary remedy to cartel power. The following discussion considers each of these in turn.

A. The Feedback Loop of Race and Class

A cartel story helps the student of racism to re-think the role that class might play in contemporary racial inequality. Conventional accounts suggest that race and autonomy operate independently of each other, occasionally overlapping in scope. Alternatively, a Marxian account of race and class suggests that race is simply a tool used by elites to divide the working class.

Viewed through a more complex systems-oriented lens, however, the cartel account rejects the Marxian reformulation that reduces racism to the instrumental exercise of class or economic interest. Nor does the cartel account embrace the autonomous model either

Instead, the concept of racial cartels, even in the terminology that combines race with cartel, suggests that race and class defer to and depend on each other, in a mutually constitutive feedback loop of interdependence. Race and class each provide the particular historical context in which cartel decision making takes place. By both supplying rules of behavior and shaping the payoffs of particular choices, racial identity serves as the social context in which people come to understand what is in their material self-interest.

People making economic choices do so already having been socialized (or “habituated”) as decision-making subjects within a particular racial identity.¹⁹² So, for

¹⁹² Much has been written about the way in which ideology constrains agency and choice in individual decision making. For the argument that people make choices having been socialized by ideology into a particular habitus, *See* PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Nice transl.) (1977); *See also* LOUIS ALTHUSSER, *IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES, IN LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127-86 (1970).

example, white homeowners in Jim Crow Chicago had already long been socialized into particular understandings of themselves as “whites” and others as “blacks,” long before they had to make decisions about whether to sell across racial lines.¹⁹³ And racial cartels did not just benefit from monopoly in economic markets. They also benefitted from exclusion in political and social markets, as the Texas story illustrates.

Likewise, racial identity and social decision making on the basis of race are both always and already situated in a particular context with particular material relationships. During the era of Jim Crow, people understood themselves as racial subjects and structured their racial relationships to others in a field already marked by class relations of hierarchy and subordination. Anglo school board members in Southern California chose to exclude Mexicans from public education in a field where their position as Anglos was already marked with their class interest as growers, and the understanding that Mexicans were their primary source of cheap labor. The racial relationships between white workers and black workers were shaped by their competitive relationship with each other.

Why didn't union members in Memphis choose to join in class solidarity with black railroad workers, as members of industrial unions later did? Because, in that particular historical moment, white railroad workers understood their class interests to be racially stratified, having been socialized in the South to the racial hierarchy of slavery. At the same time, that racial hierarchy had evolved in a context of growing industrialization and the relations of production in which the railroad industry participated.

This path-dependent, positive feedback loop relationship between social and material finds support in the work of new historic institutionalists like Timur Kuran, Avner Grief, Douglass North, Paul David and others.¹⁹⁴ These scholars argue that institutions of law and culture are not fully autonomous from market outcomes, nor are they fully reducible to market outcomes, but are instead both constrained by and

¹⁹³ James Coleman, *Social Capital in the Creation of Human Capital*, 94 J. AMER. SOC. 95 (1988). Coleman describes the primary features of social capital, including its role in facilitating information, trust and the creation of social norms.

¹⁹⁴ See Timur Kuran, *Explaining the Economic Trajectories of Civilizations: Musings on the Systemic Approach* (presented at First International Conference for USC Institute for Economic Research on Civilizations, Feb. 23, 2007 (on file with author); Avner Greif, *Historical and Comparative Institutional Analysis*, 88 AMER. ECON. REV. 80 (1998). DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); Paul David, *Why Are Institutions the Carriers of History?* 5 STRUCTURAL CHANGE AND ECONOMIC DYNAMICS 205 (1994).

constraints to market outcomes. Likewise, racial hierarchy as an institution that resembles culture (but should not be interpreted as its equivalent) both constrains and is constrained by class relations. Market relations both constrain and are constrained by racial hierarchy.

This bi-directional evolutionary relationship, however, is a historically specific and dynamic relation, contingent very much on particular place and time. The interrelatedness and complementarity of race and class have evolved in different ways in different places and at different times. Thus, while we can investigate the historical relations that produced racial stratification in the trade and craft unions in the North at the turn of the century, a different set of relations and factors informed educational exclusion in the West in the early twentieth century. One relied on law; the other on social norms. We cannot reduce this observation about the relationship of race and class to specific generalizations, but instead must investigate and map the relationship with a great deal of attention to historical detail. History matters, very much.

B. Reconfiguring The Role of Law: Anti-Discrimination as Antitrust

In addition to reconfiguring race and class, the cartel story of racial exclusion also serves to reconfigure the relation of law to discrimination, in two ways. First, racial cartels emphasize the important role that law plays in coordinating cartel conduct. The cartel story tells a far more interesting and complex story about the role of law than does the conventional narrative about law and racism. Second, the cartel story describes anti-discrimination law as a potential remedy to counteract the power of cartel-generated exclusion. Consider each of these in turn.

In the conventional story, a state passes discriminatory legislation because the law reflects a pre-existing consensus to exclude. For example, Texas history often tells the story of disfranchisement as a simple story in which Democrats passed disfranchisement legislation merely as an afterthought, to reflect an already existing agreement to disempower black voters.

In the cartel story, by contrast, law does not simply reflect the choice by a majority to exclude but actually creates the conditions for the possibility of that choice. Indeed, the cartel reaches for the law when sufficient consensus does not exist to hold the cartel together. Consider for example the political alliances in Texas between Conservative Democrats and Populists to disfranchise blacks. Why did white political parties need to resort to law to enforce the agreement between Populists and Conservative Democrats to disfranchise voters? Why wasn't social pressure or identity enough to keep this cartel together?

Each side had a very strong incentive to defect. Each faction stood to gain significantly from crossing racial lines. And, in this particular case, the less powerful faction was not as subject to the pressure of identity-based social norms. As historian J. Morgan Kousser notes, those white community leaders who were likely to form third parties like the Populists and to court the black vote had not risen through the ranks of the Party and did not feel the same loyalty—or political identity—as the regulars. These men also tended to occupy positions further down in the social and economic pecking order, and were therefore likely to lose less in social status if they had violated their agreement to disfranchise.¹⁹⁵ Thus, because the Populists could not be counted on to continue to exclude blacks just on the basis of an informal agreement, Conservative Democrats pushed through legislation that required such exclusion. Law stepped in where social incentives, internal and external, were not sufficiently strong to bind members to their obligations.

Just as the cartel narrative tells a far more interesting story about the role of law in creating cartels, so does the narrative tell a far more complex story about law as an antitrust remedy that breaks up the significant structural power of the cartel. A few legal scholars have adopted this anti-discrimination as antitrust analogy, arguing that federal legislation in the 1960s was necessary to break up racial cartels, either because government power had been instrumental in creating a racial cartel to begin with, or because social norms were sufficiently strong to require the coercive power of law to disrupt them.¹⁹⁶ A more robust account of racial cartels helps to further develop this analogy.

My own earlier work has helped to develop the analogy between antitrust and anti-discrimination, and I will not rehearse those arguments at length here.¹⁹⁷ I do want to emphasize, however, that the cartel framework provides significant conceptual

¹⁹⁵ KOUSSER, SHAPING OF SOUTHERN POLITICS, *supra* note 70 at 33-34.

¹⁹⁶ Richard McAdams and Richard Epstein might fall into this category. See Richard McAdams, *Cooperation and Conflict*, *supra* note 29, and Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 84-87 (1995) (arguing that regulation was justified to offset the monopoly power of common carriers and public accommodations)). Others have argued that civil rights laws served only to impede natural market forces that would have dismantled cartels on their own, namely because cartels (they assume) are Milton Friedman and perhaps Gary Becker fall into this category. See JOHN DONOHUE, *LAW AND ECONOMICS OF ANTIDISCRIMINATION LAW*, *supra* note x at 20 (citing to Milton Friedman, *Capitalism and Freedom* (1962)).

¹⁹⁷ Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000). See also Daria Roithmayr, *Locked In Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004).

justification for legal anti-discrimination remedies that are fairly interventionist. Although it is not without significant controversy, many people accept the idea that anti-trust law is both fair and economically efficient. More specifically, antitrust law is understood as fair because market players who engage in anti-competitive conduct are deviating from the meritocracy of the market, and are therefore acting unfairly. This is particularly true when a market actor resorts to blatantly illegal conduct like violence, harassment, and partisan favoritism. Antitrust law is also understood as efficient, because anti-competitive conduct distorts the market. Antitrust law therefore clears the way for the market to efficiently allocate resources, opportunities and incentives to those who will maximize their value, thus producing inefficient results

By developing the analogy between anti-discrimination law and anti-trust law in the context of racial cartels, we can better understand anti-discrimination law as both fair and efficient, for many of the same reasons. If racial exclusion was anti-competitive, then anti-discrimination law eliminates unfair competitive advantage—according to Lester, Thurow, the additional \$15.5 billion head start¹⁹⁸--that whites got from exclusion. Anti-discrimination law might also be more efficient because it removes distortions from labor, housing, education and political markets that impede efficient results. Economic growth is far more likely in a world where people are not excluded from schools, jobs and neighborhoods because of their race. Particularly in a newly-competitive global economy, in which skilled positions will constitute an increasing share of labor market opportunity, an antitrust remedy to dismantle segregation in education seems particularly central.

CONCLUSION

This article forms the foundation for a much broader argument about anti-discrimination law. In my forthcoming book, I will extend the analogy between persistent market monopoly and persistent racial disparity. In particular, I will argue that, just as market monopolies can persist over time and become locked in, even in the absence of continuing misconduct, so too can racial disparity can become locked in even when whites are no longer engaging in intentional exclusion.

This argument proceeds in three steps. First, I argue that during the era of Jim Crow, white racial cartels engaged in anti-competitive conduct that conferred significant competitive advantage to whites in key markets. Second, I argue that this early “first-mover” advantage has now become structurally self-reinforcing over time,

¹⁹⁸ See THUROW, GENERATING INEQUALITY, *supra* note 21.

through a series of feedback loops that transmit advantage from generation to generation. Among other mechanisms, I refer to the persistent advantage for each generation that benefits from living in wealthier neighborhoods with better funded schools, getting assistance from parents on tuition and down payments on buying a house, being connected through social networks to people with higher-wage jobs, etc.¹⁹⁹ Third, I suggest that this self-reinforcing advantage may now have become locked in place, in the absence of significant government intervention to dismantle these self-reinforcing feedback loops.

In this “lock-in” framework, racial cartels are less a general description of racial exclusion, and more a particular historical stage in an evolutionary process, appearing after the exploitation of slavery and before the locked-in persistence of racial disparity that appears to characterize present-day race relations. In this story, history matters and very much. Cartels that appeared and then dissolved during Jim Crow generated an unfair competitive advantage that continues to reproduce itself today, much like the monopoly advantage that persists long after Microsoft has stopped engaging in illegal conduct.

One can imagine what impact this history-specific cartel analysis might have had on contemporary anti-discrimination jurisprudence. Consider racial disparities in the construction industry. Historians agree that much of persistent racial disparity in the South can be traced to the fact that craft and trades unions in the construction industry actively excluded blacks in the early-to-mid 1900s.²⁰⁰ And yet the U.S. Supreme Court struck down as unconstitutional a set-aside program for construction workers in Richmond, on the grounds that persistent disparities were traceable to societal discrimination, and the set-aside program was not sufficiently narrowly tailored.²⁰¹

If the Court had decided *Croson* with an eye towards racial cartels and their long-lasting impact, however, the Court might have described persistent racial disparities in the construction industry as the self-reinforcing legacy of cartel conduct by building and construction trades unions in Richmond, rather than as the product of

¹⁹⁹ For the earlier formulation of this argument, *See* Roithmayr, *Them That Has Gets*, *supra* note 66. *See also*, Roithmayr, *Barriers to Entry*, *supra* note x; Roithmayr, *Locked In Segregation*, *supra* note x.

²⁰⁰ For an excellent history of racial exclusion in the construction industry and building trades unions, *See* HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW* 235-247(1977)

²⁰¹ 488 U.S. 469 (1989).

diffuse societal discrimination.²⁰² Likewise, the Court might have framed the minority set-aside program it struck down not as a poorly tailored remedy for societal bias but as a species of antitrust remedy, equivalent to dismantling Standard Oil or AT&T.²⁰³

Do racial cartels exist today? Are there modern-day equivalents of Chicago homeowners' associations or California school boards that coordinate exclusionary conduct to keep non-whites out of key markets? In the newly globalized economy, nationality, some argue that citizenship and ethnicity may now have replaced race as the central organizing principle for exclusionary cartels.²⁰⁴ These days, group identity might crystallize less around race and more around nation (or perhaps ethnicity) in global competition.²⁰⁵ In future work, I will explore that possibility.

But even if one argues that racial cartels are a thing of the past, or are really just products of a particular place and time, this article suggests that framing racism as anti-competitive conduct can dispel the still-popular notion that market forces inevitably will eliminate racism and racial disparity. As Gary Becker himself has acknowledged, ignorance about 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."²⁰⁶ Hopefully, this article and the larger project of locked-in disparity begins to fill that gap.

²⁰² *Id.* at 498-499 (discussing the diffuse nature of societal discrimination).

²⁰³ *Id.* at 507-08 (discussing the lack of narrow tailoring).

²⁰⁴ See Victoria .M. Esses, John F. Dovidio, Antoinette H. Semanya, & Lynne M. Jackson, *Attitudes Toward Immigrants and Immigration: The Role of National and International Identities*, in *THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION* (Dominic Abrams, Michael A. Hogg & Jose M. Marques eds. 2003).

²⁰⁵ See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1980).

²⁰⁶ BECKER, *ECONOMICS OF DISCRIMINATION*, *supra* note7 at 8.