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RICHARD R.W. BROOKS

## The Banality of Racial Inequality

*Reproducing Racism: How Everyday Choices Lock in White Advantage*

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## INTRODUCTION

Consider a counterfactual America where there is race but no racism. An impossibility, even conceptually, cynics and skeptics will quite reasonably argue. Nonetheless, suspend your disbelief. Imagine everyone were given a pill that rendered them and their offspring completely and permanently blind to race and all its amorphous indicia. As a side effect they also experienced amnesia about their prior racial identities and those of others. Logs of racial determination in birth certificates and other official and unofficial records were swiped clean through a massive government program. Race remains as an idea, a concept, in the post-pill world, but no one can observe or remember it in others or themselves.<sup>1</sup>

Daria Roithmayr's argument in *Reproducing Racism*,<sup>2</sup> taken in its starkest terms, maintains that, without further state intervention, those people who would have been perceived as black before the pill would, well into the future and perhaps indefinitely, experience the same social and economic disadvantages they have faced for generations.<sup>3</sup> Absent additional state action, the fate of black Americans would remain locked in a pattern established long before their birth and based on reasons no one currently recognizes or endorses.<sup>4</sup>

A stark claim, no doubt, but nobody should be surprised by the suggestion that the children of slaves and their descendants bear inequalities carried forward from a more racist past. Libraries have been written on the various ways in which these inequalities are transferred across generations.<sup>5</sup> What distin-

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1. Rumors may circulate and persist within some circles. There would be cranks, there always are, who claim to see in others or themselves certain qualities of race. But no court, no official, and no one outside of certain fringe communities would give these claims any credence. Like other past hysteria, racial accusations would be accorded the same seriousness as black magic and witchcraft are today.
  2. DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).
  3. *Id.* at 11 ("And in the absence of government intervention, race will continue to matter in many of the same ways it has mattered during the country's history, long after electing a president who is black—or Latino or Asian for that matter—becomes a regular event.").
  4. *Id.* at 4-5.
  5. See, e.g., MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* (1999); AMARTYA SEN, *THE IDEA OF JUSTICE* (2011); UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS (Samuel Bowles et al. eds., 2005); Janet Currie, *Inequality at Birth: Some Causes and Consequences*, 101(3) *AMER. ECON. REV.* 1 (2011); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717 (2000); Diane S. Lauderdale, *Birth Outcomes for Arabic-Named Women in California Before and After September 11*, 43 *DEMOGRAPHY* 185 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

guishes Roithmayr's contribution to the inequality library is its indictment of the mundane, ostensibly race-neutral practices we all take for granted. Racial inequality will continue even in the post-pill world described above, but not through overt animus or more subtle forms of implicit or institutional discrimination. Rather, Roithmayr argues, our inequality is perpetuated through a set of seemingly innocuous, if not laudable, choices people take pride in making, such as referring a friend to a job or helping a child pay for college or a down payment on a home.<sup>6</sup>

Friends and families, left to their own devices, will always stand in the way of any real prospects for equality of opportunity. No one likes to think of loved ones in a negative light, but a moment's reflection reveals this undeniable truth—both as a practical and a theoretical matter. “[A]s long as some form of the family exists,” John Rawls wrote, the project of “fair opportunity can be only imperfectly carried out.”<sup>7</sup> George Bernard Shaw was even more doubtful about the prospects of equal opportunity. In a 1913 address to the Liberal Club of London, he taunted his host, saying, “[y]ou, Mr. Chairman, have spoken of equality of opportunity. The difficulty about that is that it is entirely and completely and eternally impossible.”<sup>8</sup> To Shaw, inequality was so inevitable and so profound that even a pill that made everyone forget family and friends could not overcome his pessimism concerning the likelihood of equality of opportunity.<sup>9</sup>

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6. Roithmayr tidily sums up the argument in the introduction of her book:

[T]his book argues that racial inequality reproduces itself automatically from generation to generation, in the everyday choices that people make about their lives. Choices like whether to refer a friend (or the friend of a friend) for a job or whether to give one's child help with college tuition turn out to play a central role in reproducing racial gaps. Even if all people everywhere in the US were to stop intentionally discriminating tomorrow, those racial gaps would still persist, because those gaps are produced by the everyday decisions that structure our social, political, and economic interactions. Put another way, racial inequality may now have become “locked in.”

ROITHMAYR, *supra* note 2, at 4-5.

7. JOHN RAWLS, *A THEORY OF JUSTICE* 64 (1999). For an excellent recent treatment of the problem of the family in the attainment of equal opportunity, see JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014). “Without necessarily even meaning to do so, parents pass along habits of appearance, vocabulary words, [and] ways of speaking, . . . which can give children substantial advantages. Parents give children advantages by engaging them intellectually, teaching them about the world, and, especially, instilling in them a sense of self-worth and efficacy.” *Id.* at 49.
8. George Bernard Shaw, *The Case for Equality*, in *WRITING OF TODAY: MODELS OF JOURNALISTIC PROSE* 218, 218 (J.W. Cunliffe & Gerhard R. Lomer eds., 1915).
9. General equality of opportunity was an impossibility to Shaw, but he suggested that one thing could be made equal among persons: “The fact is that you cannot equalize anything

Roithmayr is no pessimist. She sets her gaze on the banalities of inequality—the everyday mundane determinations that reproduce social and economic differences along racial lines—and seeks a remedy.<sup>10</sup> Her remedial preference does not call for busting up families, but rather undoing the effects of other combinations, so-called “racial cartels,” that once dominated the political and economic order of the country. Racial cartels may be past their heyday, but, Roithmayr argues, their lingering effects continue to privilege white Americans while disadvantaging certain racial minorities. Her argument proceeds in parts. The first is historical. Roithmayr establishes that historical decisions based on race gave whites an early advantage.<sup>11</sup> Of course, every competition has winners and losers. That’s life. But, Roithmayr presses, whites won their early advantage through morally and legally indefensible conduct, acting as cartels to exclude other racial groups from fair competition for desirable resources like jobs,<sup>12</sup> education,<sup>13</sup> housing,<sup>14</sup> and wealth.<sup>15</sup> Moreover, the argument continues, after unfairly acquiring market power, white Americans instituted racist practices that reproduced their ill-gotten advantage.<sup>16</sup> Racist behavior, however, is not the central point of Roithmayr’s argument: “This book is about why racial inequality persists,”<sup>17</sup> even if there is no ostensible racist behavior.

After describing the historical backdrop of unfair play through which whites gained an early advantage, Roithmayr then considers in the second part of her argument how the initial leg-up has reproduced itself over time across several domains (wealth, education, social networks, and housing) through family and other feedback loops.<sup>18</sup> The third part of the argument turns to a

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about human beings except their incomes. If in dealing with the subject you would only begin by facing that fact, it would save you a very great deal of trouble in the form of useless speculation.” *Id.*

10. Roithmayr’s project may be seen as a hopeful plea for future action of the very sort Shaw saw as futile. Much of the futility that Shaw observed, however, derived from his view of the impossibility of *individual* equality, whereas Roithmayr is more concerned with *group* inequality. For a discussion of the latter, see Samuel Bowles et al., *Group Inequality*, 12 J. EUR. ECON. ASS’N 129 (2014). It is with the group, not the individual, in mind that Roithmayr wrote (in an earlier article), “if we can’t figure out how to radically reconfigure the way that our institutions distribute advantage and disadvantage, inequality is likely here to stay.” Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 79 (2010).
11. ROITHMAYR, *supra* note 2, at 25-29, 35-37.
12. *Id.* at 82-92.
13. *Id.* at 69-81.
14. *Id.* at 38-48.
15. *Id.* at 55-68.
16. *Id.* at 35-37, 69-81.
17. *Id.* at 4.
18. *Id.* at 103-20.

more theoretical discussion of her lock-in model and develops the claim that the model provides new insight into America's persistent racial inequality.<sup>19</sup> The fourth and final part focuses on the responses and remedies that might arrest and counter the unmeritorious, essentially automated and mundane patterns of distributing advantage.<sup>20</sup>

## I. MODELS AND METAPHORS

Before turning to the details of the book's argument, a word of clarification about the title is warranted. Roithmayr is largely concerned with everyday choices that reproduce inequality. The inequality that these decisions perpetuate is correlated with race, and importantly so,<sup>21</sup> but racist ideologies are not themselves motivating those decisions. She does not assert that racism is a thing of the past.<sup>22</sup> Far from it. Roithmayr's argument, rather, is that the racism of the past is no longer required, even if it is still present, to maintain the differences it initially brought about.<sup>23</sup> Moreover, her argument allows that racist ideologies may be maintained or reproduced indirectly through these everyday choices,<sup>24</sup> but her primary targets of concern are path-dependent mechanisms that reproduce inequality.<sup>25</sup>

To make the idea of path-dependent racial inequality broadly accessible, Roithmayr relies on a number of metaphors throughout the book. From Polya

19. *Id.* at 121-34.

20. *Id.* at 135-50.

21. *Id.* at 6-8, 11 (“[I]ssues of class are, in the US, issues of race. . . . Owing to discrimination, those families who can afford to pass down wealth for college educations and housing down payments tend to be disproportionately white.”).

22. ROITHMAYR, *supra* note 2, at 4-5, 8.

23. *Id.* at 4-5 (“Even if all people everywhere in the US were to stop intentionally discriminating tomorrow, those racial gaps would still persist, because those gaps are produced by the everyday decisions that structure our social, political, and economic interactions.”).

24. *Id.* at 74-75, 80.

25. For comparison, take Wendy Leo Moore's usage of the same title for her 2007 book. WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* (2008). Despite sharing (part of) a title, these books reflect very different approaches to the study of racial inequality. Moore's book, which takes an empirical ethnographic approach, aims to show how racist ideologies are reproduced in American law schools and legal education. Roithmayr's approach also originated with an analysis of race in law schools and legal education. See Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004). But generally Roithmayr seeks to apply more social scientific models to explain why economic and social disadvantages persist across racial groups, even without “active” racism (for lack of a better term).

urns<sup>26</sup> to QWERTY keyboards,<sup>27</sup> she draws liberally and frequently on various models, examples, and analogies. Her master metaphor, however, is monopoly, or, more precisely, unfairly acquired, self-perpetuating market power.<sup>28</sup> Unfair competition, she urges, is the basic source of persistent racial advantages, the justification for intervention, and the best means for appreciating the remedies that ought to follow.<sup>29</sup> “In the context of monopoly,” Roithmayr concludes on the last page, observers “understand quite quickly the need for significant government intervention.”<sup>30</sup> Before arriving at that conclusion,

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26. ROITHMAYR, *supra* note 2, at 111-13.

27. *Id.* at 110-11. While readers may be familiar with the QWERTY keyboard and the VHS versus Betamax stories of path dependency, the discussion of the Polya urn will be new to many. These accounts are expanded upon *infra* text accompanying notes 150-152.

28. *Id.* at 132-33. Although Roithmayr is neither the first nor the only legal scholar to approach racial discrimination and inequality from an antitrust perspective, she has been a prominent and inventive developer of the cartel approach. See, e.g., *infra* note 31 and accompanying text. Robert Cooter may have been the first to use a cartel framework to make the connection between antitrust and antidiscrimination law. Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133 (1994). Roithmayr acknowledges Cooter’s early contribution and views her work as an extension of his “ideas about discriminatory cartels.” ROITHMAYR, *supra* note 2, at 31. David Bernstein also has used the cartel approach in his works on race. See DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 74 TEX. L. REV. 781 (1998) [hereinafter *Law and Economics*]; David E. Bernstein, *Philip Sober Restraining Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998); David E. Bernstein, *Railroad Unions, Racism, and Labor Regulations*, 5 INDEPENDENT REV. 237 (2000). In these works, Bernstein describes how racist cartels—for example, “a cartel of racist whites” and whites-only labor unions—were able to better extend their capacity to exclude blacks and other minorities from housing and labor markets with government support in the first part of the twentieth century. Bernstein, *Law and Economics supra*, at 825. For more recent work combining anticompetitive and antidiscrimination approaches, see, for example, Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CALIF. L. REV. 699 (2007); Darrell A. H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 KENTUCKY L. J. 23 (2012).

29. ROITHMAYR, *supra* note 2, at 4-5, 9-10. While acknowledging basic redistribution arguments—for example, “that regardless of unfairness, and regardless of the inequality between black and white, between the have and the have-nots, we ought to do as much as we can to eliminate racialized poverty”—Roithmayr offers to “those who oppose redistribution, the antitrust analogy . . . [:] It suggests that whites stacked the decks in their own favor, by rigging the rules of the game.” *Id.* at 133.

30. *Id.* at 157. “In the absence of restructuring, the everyday processes that we take for granted—referring our friends for a job, choosing a neighborhood with well-financed public schools, giving our children money for college tuition—will continue to reproduce racial inequality.” *Id.* Here one senses that Roithmayr advances the monopoly framework less as a descriptive account than as a persuasive stratagem. “The lock-in story of inequality accomplishes a great

however, she devotes a significant portion of the book to advancing a particular anti-competitive narrative—the lock-in account of racial inequality—that she has over a number of years developed in law review articles.<sup>31</sup>

Monopoly wrongly acquired and then ossified through network externalities is the core of Roithmayr's racial lock-in argument. Microsoft's antitrust litigation from the 1990s provides a key illustration.<sup>32</sup> "According to the allegations, Microsoft engaged in a range of very bad (and illegal) behavior," Roithmayr writes with an intentional colloquialism that runs throughout the book.<sup>33</sup> "Microsoft's bad behavior,"<sup>34</sup> combined with the basic network structure of the software industry,<sup>35</sup> "went on to trigger a 'positive feedback loop' in the operating systems market."<sup>36</sup> Thereafter Microsoft's early unfair "advantage snowballed" and eventually "became locked in."<sup>37</sup> Today, Roithmayr

deal if it persuades us that we ought to move quickly toward the more inclusionary path, before locked-in racial disparities become a permanent and unchanging part of the American landscape." *Id.*

31. Roithmayr is rightly credited as the principal developer of the lock-in model to racial inequality and as an early advocate of the cartel approach to discrimination. See, e.g., Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000); Daria Roithmayr, *Locked In Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003); Roithmayr, *supra* note 31, at 204; Roithmayr, *supra* note 10; Daria Roithmayr, *Them That Has, Gets*, 27 MISS. COLLEGE L. REV. 373 (2008).
32. ROITHMAYR, *supra* note 2, at 5-6, 59.
33. *Id.* at 5. In the acknowledgements, Roithmayr thanks her brother, who "helped me to translate what had been overly technical jargon into something more comprehensible. I'll never go back to the technical writing," she writes, "now that I've crossed over." *Id.* at x. Her prose often has a Malcolm Gladwell-like quality—for instance, where she describes "the benefits of being cool, or perhaps more accurately, the costs of being uncool" as a way of understanding the switching cost dynamics associated with her lock-in model. *Id.* at 138. This language is intended for a general readership and is effective in that regard. Sometimes, however, the language runs the risk of being too loose.
34. *Id.* at 5. Among other questionable practices, Roithmayr indicates, Microsoft pursued a policy of charging computer manufacturers a licensing fee for every computer they produced, even if those computers did not use Microsoft's Windows operating system. "If manufacturers wanted to load another operating system onto the computer, they had to pay twice—once to Microsoft, and once to the developer of the alternate operating system." *Id.*
35. "Consumers wanted to buy an operating system with the widest range of software available. In turn, software authors wanted to write software for the operating system with the most customers." *Id.*
36. *Id.*
37. *Id.* at 5-6. "Other competitors could not possibly overcome the software company's advantage. Notably, Microsoft's monopoly advantage lasted long after the company stopped engaging in anticompetitive behavior." *Id.* at 6.



argues, “white economic advantage has become institutionally locked in, in much the same way as Microsoft’s monopoly advantage did.”<sup>38</sup>

Microsoft’s anti-competitive behavior is not, however, an ideal fit for Roithmayr’s argument. Strictly speaking, Microsoft was a single, hierarchically organized entity, not a horizontal cartel of multiple actors, as Roithmayr characterizes “whites [who] formed racial cartels during slavery and Jim Crow to gain monopoly access to key markets.”<sup>39</sup> Yet, cartels do organize to exert market power like a monopolist,<sup>40</sup> so the analogy, while not perfect, provides some insight. This close-but-not-quite-exact quality holds for many of the models, metaphors, and analogies that Roithmayr uses. A large part of the reason for this misalignment is that Roithmayr is attempting something novel and distinctive for which there are no canned applications. Still, Roithmayr presents a compelling array of supporting arguments and analogies to make her points effectively for the lay reader.

To preserve scope for broad analogical connections, Roithmayr at times glances past legal details and definitions. For example, although she draws at times upon actual cartel conduct, she spends little time presenting and parsing legal arguments that could have been used to generate liability for this anti-competitive behavior, historically or in the recent past.<sup>41</sup> Monopolization is more metaphor than legal fact here. Similarly, while much is made of the state’s role in facilitating residential racial discrimination,<sup>42</sup> there is surprisingly

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38. *Id.* at 6. “Like Microsoft, whites engaged in early anticompetitive conduct to get ahead in key markets—jobs, education, and housing, to name the most relevant. That early unfair racial advantage now reproduces itself through increasing returns, by way of positive feedback loops that are embedded in every day social structures like the family and the neighborhood.” *Id.* at 60.

39. *Id.* at 6. The distinction is important in terms of grasping the dynamics of the anti-competitive conduct.

40. See JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 346 (1988).

41. Presenting doctrinal arguments for liability and regulation of racially discriminatory cartels would have made the book more useful to lawyers (but perhaps less accessible to lay readers, the target audience). See, e.g., Miller, *supra* note 28, at 40 (arguing that Section 2 of the Thirteenth Amendment empowers “Congress to prevent racialized cartels”); Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999 (2008); see also Ayres, *supra* note 28 (discussing the relationship between disparate impact litigation and a firm’s exercise of market power to extract rents from employees or consumers belonging to protected classes).

42. Roithmayr writes: “In the early twentieth century, racial cartels were mostly informal white organizations with little state support,” but “[a]fter World War I, the role of government in cartel conduct increased dramatically.” ROITHMAYR, *supra* note 2, at 36. She notes that state action—at the municipal, state and federal levels—was enlisted in residential segregation: “The Home Owners’ Loan Corporation, which offered low-cost mortgages to whites moving to the suburbs out of the inner city, used redlined maps to determine where and to

little discussion of the state action doctrine.<sup>43</sup> No doubt the publisher's interest in not sacrificing the general audience to satisfy the legal one motivated some of these oversights. Let the law geeks read law reviews. Yet as noted next, even general readers might have appreciated clearer definitions of "racial cartels" and "white cartels," which are central constructs of the lock-in argument.

## II. ABSTRACT AND ACTUAL CARTELS

What, exactly, is a racial cartel? The question is raised,<sup>44</sup> but never fully answered. "Economists," Roithmayr tells us, "typically define a cartel as a group of actors who work together to extract monopoly profits by manipulating price and limiting competition."<sup>45</sup> But what makes a cartel *racial*? A shared racial identity among cartel members would certainly be too inclusive a criterion for the kind of argument she is making. Otherwise, OPEC, Standard Oil, the De Beers diamond mongers and most other known cartels might be considered racial cartels. Perhaps the key is not the membership, but the identity of those excluded. But then every private club excluding minorities would be a racial cartel, which may be what Roithmayr has in mind but nevertheless seems too broad. All cartels are exclusive clubs, but surely not all exclusive clubs are cartels.

Moreover, when Roithmayr writes of "white cartels," it is often unclear how far this white economic conspiracy extends.<sup>46</sup> Sometimes "white cartels"

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whom to provide mortgage support. The Federal Housing Administration adopted similar racial restrictions." *Id.* at 36-37. Moreover, Roithmayr observes, "[s]ome of the most progressive social policies adopted by New Deal legislators functioned essentially as massive racial cartel anticompetitive supports favoring white workers." *Id.* at 37. White southerners "collaborated with members of the Roosevelt administration to exclude blacks from Social Security, by exempting agricultural workers and domestic workers." *Id.* at 37. Beyond these historical examples, Roithmayr delivers a searing indictment of the state with regard to, *inter alia*, present incarceration practices and Clinton-era welfare reform policies. *Id.* at 103-07.

43. See, e.g., RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS*, 140-167 (2013) (discussing the state action doctrine and residential segregation achieved through racially restrictive covenants).
44. ROITHMAYR, *supra* note 2, at 29 ("So what is a racial cartel?").
45. *Id.* "For example, OPEC, the oil-producing cartel, restricts the output of oil by its members in order to raise prices for a scarce commodity." *Id.*
46. Additionally Roithmayr in some places discusses race in a manner that seems to take its characteristics for granted (for example, "[w]hen it comes to differences among the races," *id.* at 60), and treats the concept of race loosely: "we can only assume that cartel conduct could make use of whites' group identity, an identity that is both easily observed and freighted with historical meaning." *Id.* at 31.

seem to implicate white Americans generally,<sup>47</sup> and at other times just those of a certain generation, or of a particular, though still abstract, place (such as the Jim Crow South<sup>48</sup> or northern communities with racial covenants<sup>49</sup>). When she writes of “the white organizations of Jim Crow[,] white unions, political parties, school districts, and associations among them,”<sup>50</sup> one has a clear sense of what made them white *organizations* (their “whites only” signs were superfluous), but it is still not obvious what made them racial cartels.

The puzzle of “racial cartels,” as used in the book, is resolved by viewing it as a framing device rather than in terms of strict legal or economic criteria. “To be sure,” Roithmayr has written elsewhere, “the analogy between racial cartels and ordinary market cartels is far from perfect. . . . More specifically, the [racial] cartel account does not conform to the precise technical definitions of cartel conduct.” Yet viewed metaphorically, argues Roithmayr, “the analogy captures far better than standard accounts the competitive advantage and collective dynamic of racial exclusion.” Of course she is right. As metaphor, “racial cartels” reveal important features of our racial history too often obscured by conventional accounts. But in this history there are also actual cartels, more than metaphors, engaged in racialized restraint of trade. Following the Civil War, for instance, plantation owners explicitly conspired to restrict labor opportunities of recently freed slaves—“You won’t hire my niggers, and I won’t hire yours”<sup>51</sup>—and these agreements, often supported by the state, continued well into the twentieth century.<sup>52</sup> Roithmayr herself provides other compelling examples of actual cartel conduct aimed at excluding competition from racial minorities.<sup>53</sup> The book’s argument is sharpest and most convincing in these specific cases. But in the back and forth between analogy and actual conduct, it is

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47. See *id.* at 69-81 (“How Whites Created Institutional Rules That Favored Them over Time”).

48. *Id.* at 25, 35-37.

49. *Id.* at 41-48.

50. *Id.* at 41.

51. See Miller, *supra* note 28, at 23 (quoting John Townsend Trowbridge’s survey of the South in the winter of 1865, published as J.T. TROWBRIDGE, *THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES, A JOURNEY THROUGH THE DESOLATE STATES, AND TALKS WITH THE PEOPLE* 427 (Hartford, Conn., L. Stebbins, 1866)).

52. Southern plantation owners, as Leon Litwak observed, “often effected combinations or understandings among themselves not to contract with any former slave who failed to produce a ‘consent paper’ or proper discharge from his previous owner.” LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 415 (1979); see also *Bailey v. Alabama*, 219 U.S. 219 (1911).

53. “Homeowners’ associations worked together with real estate boards to keep blacks out of housing markets. School boards worked together with local growers to keep Mexicans out of public schools. Working-class farmers worked together with elite planters to disfranchise blacks and eliminate their political power.” ROITHMAYR, *supra* note 2, at 6.

easy to lose sight of the level of argument suggested at any particular point in the book's use of racial cartels.

### III. RACIAL COVENANTS AND WHITE PRIMARIES: THE CENTRAL ACCOUNTS

Roithmayr argues that throughout the twentieth century, a number of "private business organizations functioned together in ways that *resembled* racial cartel activity."<sup>54</sup> Among these private actors, Roithmayr describes the tactics of railway workers, who organized to exclude blacks;<sup>55</sup> "agricultural growers" who "collaborated to segregate Mexican laborers"; crafts unions, citizens' councils, and even parent-teacher associations, all engaging in "collective action to exclude nonwhite groups from key education, labor, and political markets."<sup>56</sup> These cases are briefly mentioned, more as general sketches, rather than as concrete examples of racial cartels. For a more sustained discussion, Roithmayr looks at voting in Texas<sup>57</sup> and housing in Chicago.<sup>58</sup>

Finding racially discriminatory market manipulation in housing is, sadly, not a difficult task, even today.<sup>59</sup> Locating discrimination in historical records is even more easily accomplished, thanks to a great corpus of research developed by scholars of race and housing over the past century.<sup>60</sup> Local and national real

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54. *Id.* at 37 (emphasis added).

55. *Id.* at 22-27.

56. *Id.* at 37. "In the South, employers maintained segregation via a network of community norms. Outside of agriculture, employers and unions together orchestrated occupational segregation, essentially creating a dual labor market where blacks and whites did not compete with each other. Within particular industries, certain jobs were designated black jobs or white jobs." *Id.* at 36.

57. *Id.* at 41-48.

58. *Id.* at 49-52.

59. See LAURA GOTTESDIENER, *A DREAM FORECLOSED: BLACK AMERICA AND THE FIGHT FOR A PLACE TO CALL HOME* 63 (2013). Gottesdiener describes how in the early 2000s, the mortgage industry aggressively targeted African-American communities for sub-prime loans, advertising them in black churches and printing promotional material in a language recorded in the computer system as "African-American." *Id.*

60. See, e.g., JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1949); ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* (1993); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960* (2nd ed. 1998); THOMAS LEE PHILPOTT, *THE SLUM AND THE GHETTO: IMMIGRANTS, BLACKS, AND REFORMERS IN CHICAGO, 1880-1930* (1991); CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959); Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 *AM. J. SOC.* 329 (1990); Wendy Plotkin, *Deeds of Mistrust: Race, Housing, and Restriction*

estate boards surely operated as cartels<sup>61</sup>—setting policies, coordinating members, and disciplining defectors—and Roithmayr effectively describes their market-rigging practices.<sup>62</sup>

Roithmayr takes homeowners' associations to be "the poster children for racial cartels."<sup>63</sup> Chicago's homeowners' associations were "a model in efficient racial exclusion" she writes, "[t]ightly coordinated, well run, and legally armed with the restrictive covenant."<sup>64</sup> There are, however, reasons to question whether these organizations were as efficient and effective as Roithmayr suggests. First, while some Chicago neighborhood associations were better organized than others, collective action problems plagued them all. The more successful ones had to rely on the energy of a few motivated or entrepreneurial individuals, along with significant institutional support, such as the sort given by the University of Chicago to the Woodlawn Property Owners' Association,<sup>65</sup> which Roithmayr discusses at length. Second, neighborhood association-driven racially restrictive covenants in Chicago and other cities were often sloppy affairs replete with legal defects.<sup>66</sup> The historian Arnold Hirsch argued

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tive Covenants in Chicago, 1900-1953 (1999) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with author).

61. See BROOKS & ROSE, *supra* note 43, at 23.
62. ROITHMAYR, *supra* note 2, at 38-48.
63. *Id.* at 41.
64. *Id.* White homeowners' associations, Roithmayr argues, "looked a lot like a paramilitary cartel": they divvied up "turf on precisely defined geographic lines," and they used "tactics like harassment and coercion to keep" blacks out of their neighborhoods, "often terrorizing them physically." *Id.* at 35. As she describes them, these homeowners' associations behaved more like gangs, or perhaps vicious drug cartels, than nonviolent economic cartels. In fact, some homeowners' associations were more like gangs or terrorists than run-of-the-mill economic cartels. The distinction turned often, but not exclusively, on matters of class. Unfortunately, Roithmayr suppresses issues of class in this part of her analysis, although these issues do resurface later in the book when she returns to housing and neighborhood effects.
65. "As one prominent NAACP lawyer observed at a 1945 conference, racially restrictive covenants were usually only enforced if some self-selected agitators were especially active in stirring the pot. But another lawyer at the same conference noted that it was expensive to litigate these cases, a fact that dampened the neighboring homeowners' enthusiasm for doing so." BROOKS & ROSE, *supra* note 43, at 86. In addition, "Robert Hutchins, then president of the University of Chicago, rejected Earl Dickerson's request that the University not support the white neighborhood association defending covenants in *Hansberry v. Lee*." *Id.* at 86 n.26; (citing ROBERT J. BLAKELY, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY 97-98 (2006)).
66. See BROOKS & ROSE, *supra* note 43, at 123 ("Neighborhood agreements were notable for their failure to meet formal requirements—a spouse's signature missing here, a typing mistake there, an improper notarization on the next page. . . . [C]ivil rights lawyers all over the country learned to exploit these technical defects in defending their clients from eviction from covenanted properties.").

that it was for this reason that covenants had little impact in maintaining traditional racial barriers in Chicago.<sup>67</sup> Hirsch no doubt understated the impact of covenants with this logic, since much of their effect was social, rather than legal, and didn't depend on court enforcement. Still, the covenants imposed by neighborhood associations were often less effective than the members sought.

Efficiency and efficacy in the use of covenants were better realized by developers than neighborhood associations. Roithmayr overlooks this aspect of the covenant account, failing to address the role of racially restrictive deeds installed by developers in planned communities as distinct from the neighborhood-initiated restrictive agreements organized by existing communities.<sup>68</sup> Developer deed restrictions, which existed in both middle class tracts, like the Levittowns developed by William Levitt, and more upscale developments, such as those developed by the W.C. and A.N. Miller Company in the Washington, D.C. area, were able to cost-effectively subject whole communities to racial restrictions in one fell swoop, and these racially restrictive devices tended to avoid the legal defects common to neighborhood agreements.<sup>69</sup>

Class was also a significant factor in neighborhood agreements. Given the costs of establishing neighbor-driven racially restrictive covenants, working class neighborhoods, like Chicago's Back-of-the-Yards district, generally did not bother with them.<sup>70</sup> Racial covenants operated in wealthier neighborhoods,<sup>71</sup> where white homeowners could afford the expense of covenant drives

67. See HIRSCH, *supra* note 60, at 30 (“[R]estrictive covenants in Chicago served as little more than a fairly coarse sieve, unable to stop the flow of [the] black population when put to the test.”). Hirsch argued that covenants were regularly violated, seldom challenged and infrequently enforced by courts. Hirsch presented evidence that some judges in the Municipal Court of Chicago refused to uphold covenants, and that many cases were withdrawn, and that those cases that were successfully tried were infrequently enforced. See *id.* at 30 (describing the collapse of many Chicago racially restrictive covenants in the mid- and late 1940s); BROOKS & ROSE, *supra* note 43, at 124 (“At least one municipal judge declared that racial covenants were unconstitutional. This was an opinion that had zero precedential value, but it still served as a straw in the wind about the changing politics of race.”).

68. See BROOKS & ROSE, *supra* note 43, at 12 (noting that since “there was no community at all prior to the development, developers wrote the racial restrictions that informed new entrants about the behavior and attitudes that would be expected, and that also informed the disfavored would-be purchasers that they were not welcome. In older urban neighborhoods, where racial covenants emerged after the fact from agreements among the existing neighbors themselves, the case for loose knittedness is somewhat more ambiguous. But the greatest covenant activity appears to have been in middle-class neighborhoods . . .”).

69. *Id.* at 103-104, 185.

70. *Id.* at 125.

71. See Wendy Plotkin, *Neighbors and Boundaries: Racial Restrictive Covenants in Chicago, 1900-1948*, at 7 (1998) (unpublished manuscript) (on file with author) (“For the most part, the communities that most enthusiastically adopted covenants were more affluent [and]

and the costs of their enforcement.<sup>72</sup> By the same token, minority purchasers drawn to covenanted neighborhoods were generally themselves middle and upper-class buyers—buyers with enough cash or access to loans to purchase homes in covenanted neighborhoods notwithstanding the barriers erected by the Fair Housing Administration’s (FHA) discriminatory policies.<sup>73</sup>

Racial covenants in Chicago, and in the rest of the country, had a more complicated existence than is suggested in Roithmayr’s discussion. They were not simply established legal tools used by racist cartels to achieve their limited and foul objectives. Racial covenants were both more corrosive (generating, promoting, disseminating, and legitimating racist ideologies through housing policy and practice) and more constitutive of communities, including integrated ones, than is suggested by Roithmayr’s analysis. For instance, racially restrictive covenants may have played a stabilizing role in some communities that

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better educated than the white communities not covered by covenants.”). However, as I discuss in other work, some less wealthy neighborhoods used both violence and covenants as part of their strategy to maintain racial exclusivity in their community. This mix of strategy was often born out of mixed motives. That is, neighborhood associations from middle- and upper-class neighborhoods frequently ran campaigns to install covenants in white working class neighborhoods that abutted black communities. The apparent motivation for this behavior was to firm up resistance to residential integration in the “threatened” working class neighborhoods, which served as buffer zones between the more affluent neighborhoods and the black neighborhoods. Individuals in these working class neighborhoods also employed violent tactics (especially bombings) against blacks who attempted to relocate there. Richard R.W. Brooks, *Covenants & Conventions* 19 n.66 (Nw. Law & Econ. Research Paper No. 02-8, 2002).

72. See BROOKS & ROSE, *supra* note 43, at 125. Brooks and Rose note that “the costs of all these [covenant drives] added up. One association’s campaign in the 1920s cost between \$25 and \$100 per property owner, a considerable sum in that era.” *Id.* at 123.
73. See BROOKS & ROSE, *supra* note 43, at 125 (“Thus it may not be accidental that the one major Chicago covenant case—the one that made its way to the history books and the law school casebooks—was instigated . . . by the well-to-do [minority] real estate dealer Carl Hansberry, together with Harry Pace, then the president of the Supreme Liberty Life Insurance Company. The Supreme Liberty Life Insurance Company was a Chicago institution much involved in African American real estate mortgages. It was especially important in the 1930s and later, given African Americans’ difficulties in securing FHA loan qualification; its longstanding general counsel was NAACP lawyer Earl Dickerson. After taking advice from Dickerson, Hansberry joined Pace to break the covenants of the Washington Park neighborhood . . . just south . . . [of] the University of Chicago . . .”). Hansberry first contested the neighborhood covenants “when a cooperating white woman sublet a covenanted apartment to him and his family, claiming that they were cousins.” Neighbors successfully sued her, however, forcing the Hansberrys to move. The following year, with a mortgage from Supreme Liberty Life Insurance Company, the Hansberry “family purchased a covenanted apartment building through another white intermediary, this time a real estate speculator. . . . The Hansberry case immediately attracted the attention of the *Chicago Defender* newspaper, which among other things sharply criticized the otherwise progressive University of Chicago for its role in trying to keep the neighborhood white.” *Id.* at 126.

were already somewhat racially integrated by preventing the neighborhood from “tipping” and thereby slowing or preventing white flight.<sup>74</sup>

Texas’s all-white primary may have been a more straightforwardly exclusionary cartel tool. Roithmayr presents an abbreviated, but still illuminating, account of the collective efforts of Texas Democrats and Fort Bend County Jaybirds to disenfranchise black voters.<sup>75</sup> These accounts of housing and voting cartels are designed to get her readers to see racial inequality in a new light. “Describing the homeowners’ association and the Fort Bend County Jaybirds as racial cartels,” she writes, “serves to highlight several aspects of racial exclusion that conventional theory obscures.”<sup>76</sup> She argues that key insights are gained when we adopt this new perspective: “First, a cartel story emphasizes that whites benefited from racism.”<sup>77</sup> Second, the “cartel story also focuses on the way that whites worked together collectively to exclude, and the techniques

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74. See BROOKS & ROSE, *supra* note 43, at 205-06 (“Oddly enough, at least some of the older racially restrictive covenants had acted as de facto benevolent quotas in the 1920s, ‘30s and ‘40s, even though they were certainly not so intended. This was because . . . the neighbor-driven covenants had generally taken effect when some supermajority of the neighbors had signed, while potentially leaving the remaining residences open to minority members. Obviously the older neighborhood racial covenants had not aimed at integration—quite the contrary, the signatories would have been happy to have 100 percent if they could have gotten it. . . . [R]acial covenants in fact existed in some integrated neighborhoods like the Shelleys’ [from *Shelley v. Kraemer*], and they might possibly have had the effect of stabilizing those neighborhoods racially by cabining the white residents’ worries about other white neighbors’ potential defections. This is not to make excuses for the older racial restrictions, but only to point out that their existence had many twists and turns, and that some of their techniques might have been used for more sympathetic purposes. Clearly the traditional racial covenants—including the neighbor-driven ones—had enormous down sides, most directly in closing off minority housing opportunities, and even more importantly and perniciously, solidifying the idea that racial mixing caused housing values to decline.”).

75. ROITHMAYR, *supra* note 2, at 49-52.

76. *Id.* at 53.

77. *Id.*; see also *id.* (“White homeowners created a wholly separate segment of the housing market for themselves, a segment with higher property values, wealthier neighbors, and superior housing stock. White Democrats strengthened their political power in Texas, having put aside their class differences under the banner of white supremacy.”).



they used to keep each other in line.”<sup>78</sup> Third, “a cartel story focuses on the effect of all this exclusion on fair competition.”<sup>79</sup>

But do we really need a “cartel story” to know that some whites benefited by excluding blacks and other racial minorities, that there was collusion among vested interests to achieve this exclusion, and that the conduct and outcomes were unfair? Scarcity and economic competition – familiar frames in the literature on American race relations – suggest all these points. Nonetheless, the cartel account may be the best way to tie these factors together in an accessible manner, and that’s a valuable contribution to the literature. Moreover, and perhaps most importantly, as Roithmayr suggests, the cartel story “can justify government moves to dismantle the effects of such cartel behavior as a kind of antitrust intervention.”<sup>80</sup> This too is a valuable contribution, but to make it more than just a suggestion, the book would have had to engage the legal arguments and details that were perhaps sacrificed to make the book accessible to the lay reader.<sup>81</sup>

#### IV. WEALTH, NETWORKS, AND FEEDBACK LOOPS

According to Roithmayr’s lock-in account, unfair practices led to racial inequalities, and then networked feedback loops kept the differences going.<sup>82</sup> Social networks are the engine behind the distribution of resources, Roithmayr writes. “[M]ost of us derive our well-being from our networks . . . [W]e rely on four basic types of social ‘network’ arrangements – (1) families, (2) friends and colleagues, (3) neighborhoods, and (4) workplaces and other kinds of market-based institutions.”<sup>83</sup> These networks create feedback loops, which are

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78. *Id.*; see also *id.* (“Homeowners’ associations and Texas political parties used a potent mix of violence, harassment, and legal coercion. Identity organized much of this collective action. Defecting homeowners, real estate brokers and political parties were punished severely for crossing racial lines. And often cartel members’ own shame and guilt kept them in line without the need for external punishment.”).

79. *Id.*; see also *id.* (“Thinking about a homeowners’ association as a cartel highlights that the association acted to undermine fair competition for housing and for access to public schools. Whites rigged the game to their advantage, in much the same way cartels ordinarily do.”).

80. *Id.*

81. See sources *supra* note 28, such as Miller and Ayres, for examples of how government intervention may be justified through existing antitrust and antidiscrimination doctrine to remedy racial inequality.

82. ROITHMAYR, *supra* note 2, at 6 (“This book will argue that white economic advantage has become institutionally locked in . . . This unfair advantage, acquired early in our nation’s history, has now become self-reinforcing and cumulative. A number of institutional feedback loops parlay earlier advantage into continuing advantage.”).

83. *Id.* at 60.

the key to the lock-in model of racial inequality. "Through positive feedback loops, inequality reproduces itself from decade to decade, automatically and in the absence of intentional discrimination."<sup>84</sup> Roithmayr describes the operation of networks and feedback loops in generating and maintaining inequalities in wealth, institutional access, professional outlooks, and housing opportunities.<sup>85</sup> Let's begin with wealth.

### A. *The Racial Wealth Gap*

What explains the persistent racial wealth gap? Researchers have sought to identify the sources of the wealth gap by focusing on earnings and education, cultural practices, and, finally, family background and networks. Roithmayr favors this last account. Empiricists have had widely varying degrees of success in explaining wealth differences by race, identifying as little as five percent to more than one hundred and twenty percent of the gap.<sup>86</sup> The variation is largely due to the multiplicity of identification strategies and data employed.<sup>87</sup> Nonetheless, some consistent patterns are observed across studies.<sup>88</sup> Most

84. *Id.* at 57.

85. *Id.* at 57-68.

86. John Karl Scholz & Kara Levine, *U.S. Black-White Wealth Inequality: A Survey*, U. WIS.-MADISON DEP'T. ECON. & INST. RES. POVERTY 10 (June 9, 2003), [http://www.ssc.wisc.edu/~scholz/Research/Wealth\\_survey\\_v5.pdf](http://www.ssc.wisc.edu/~scholz/Research/Wealth_survey_v5.pdf) [<http://perma.cc/W2Q4-TYNQ>] ("Most estimates, however, fall between 60 and 90 percent. When coefficients estimated from a sample of blacks are used to predict white wealth, estimates range between 12 and 84 percent, with most falling between 20 and 35 percent.").

87. *Id.* at 13 ("Empirical specifications vary significantly across studies, which makes it difficult to understand how demographic variables influence wealth accumulation. Interpretation of coefficients is also complicated.").

88. Some researchers use a basic regression model with race indicators as one of many control variables. See, e.g., DALTON CONLEY, *BEING BLACK, LIVING IN THE RED; RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); JESSE OWENS SMITH, *THE POLITICS OF ETHNIC AND RACIAL INEQUALITY: A SYSTEMATIC COMPARATIVE MACRO-ANALYSIS FROM THE COLONIAL PERIOD TO THE PRESENT* (3d ed. 2003); Erik Hurst et al., *The Wealth Dynamics of American Families, 1984-94*, BROOKINGS INST. (1998), [http://www.brookings.edu/~media/Projects/BPEA/1998%201/1998a\\_bpea\\_hurst\\_luoh\\_stafford\\_gale.PDF](http://www.brookings.edu/~media/Projects/BPEA/1998%201/1998a_bpea_hurst_luoh_stafford_gale.PDF) [<http://perma.cc/X8TV-35R2>]. Others use a regression decomposition approach, running race-specific regressions (for example, on whites only) to predict black wealth or vice versa. See, e.g., Joseph G. Altonji & Ulrich Doraszelski, *The Role of Permanent Income and Demographics in Black/White Differences in Wealth* (Nat'l Bureau of Econ. Res., Working Paper No. 8473, 2001), <http://www.nber.org/papers/w8473.pdf> [<http://perma.cc/5HT5-CN54>]. In theory, the choice should not matter, but regrettably for these models, it often does. Finally, others use nonparametric approaches to avoid the linearity constraint placed on income and wealth. See, e.g., Robert Barsky et al., *Accounting for the Black-White Wealth*

studies find income or earnings to be the single best predictor of the wealth gap—explaining, for example, between twelve and seventy-two percent of the black-white wealth difference.<sup>89</sup> Neither these differences in earnings, nor differences in education, however, can fully account for the significant racial differences in wealth and wealth accumulation.<sup>90</sup>

Some commentators have claimed that cultural differences account for some of the racial wealth gap. Implicit in this claim are often assertions of dysfunctional behaviors among blacks and some other racial minorities that undermine their ability to save and invest.<sup>91</sup> Yet the evidence of racially or culturally contingent savings and investment behaviors is inconsistent and in any event too insignificant to account for the generally observed racial wealth gap.<sup>92</sup> While a number of early studies suggested that blacks actually saved at

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*Gap: A Nonparametric Approach*, 97 J. AM. STAT. ASS'N. 663, 672 (2001) (using a nonparametric approach to find that income alone accounts for sixty-four percent of the wealth gap between blacks and whites).

89. Scholz & Levine, *supra* note 86, at 12; *id.* at 36 (“There is a consensus that labor income accounts for the majority of the racial wealth gap, which suggests that wealth inequality in the population is likely to be strongly related to inequality in labor income.”). Yet some studies do find that earnings play a larger role in wealth accumulation in the lower half of the wealth. See Barsky et al., *supra* note 88; Scholz & Levine, *supra* note 86, at 12-13.
90. Education and wealth are, of course, highly correlated. Differences in education predict differences in earnings, and these differences could then cause differences in wealth. Hence, looking at the effects of education on the wage-gap may provide a useful view on the wealth gap. Focusing on highly educated men, Dan Black and others find that measurement error in the census education measure leads to a modest portion of the wage gap. Dan Black et al., *Why Do Minority Men Earn Less? A Study of Wage Differentials Among the Highly Educated*, 88 REV. ECON. & STAT. 300, 307 (2006). Beyond census measurement error, they observe one pattern for Hispanic and Asian men (that is, their wage gap with respect to white men is attributable to premarket factors—primarily differences in formal education and English language proficiency), *id.* at 311-12, and another pattern for black men (that is, premarket factors explain only a fraction (roughly one-quarter) of their wage gap, except “[f]or a subsample of black men born outside the South to parents with some college education, [wherein] these factors do account for the entire wage gap”), *id.* at 300.
91. See, e.g., Annamaria Lusardi, *Financial Education and the Saving Behavior of African-American and Hispanic Households* (Sept. 2005) (unpublished manuscript), [http://www.dartmouth.edu/~alusardi/Papers/Education\\_African&Hispanic.pdf](http://www.dartmouth.edu/~alusardi/Papers/Education_African&Hispanic.pdf) [<http://perma.cc/6Q7W-VSPJ>] (citing Emily C. Lawrance, *Poverty and the Rate of Time Preference: Evidence from Panel Data*, 99 J. POL. ECON. 54 (2001) for the proposition that blacks and Hispanics are more impatient than whites).
92. The savings rate among blacks generally is lower than that of whites, but this difference largely goes away when income is taken into account. One study that specifically attempted to isolate black-white differences in savings rates observed that in one formulation, the wealth gap would fall by only one percent if black households saved at the same rates as whites. Maury Gittleman & Edward N. Wolff, *Racial Wealth Disparities: Is the Gap Closing?* 4 (Levy Econ. Inst. Working Paper No. 311, 2000).

higher rates than whites, current analyses tend to find little or no differences in racial savings rates. Maury Gittleman of the Bureau of Labor Statistics and his collaborator, Edward Wolff, however, did report a higher savings rate among whites.<sup>93</sup> Yet with income taken into account, this difference in the savings rate explained only one percent of the wealth gap.<sup>94</sup> Differences in investments, if not in savings, might better explain the wealth gap. There is some evidence that whites earn a higher return on their investments than blacks and that blacks are more likely than whites to hold liquid (and other lower-return) assets.<sup>95</sup> Here again, however, the evidence is mixed and seems largely mediated by income. As blacks get richer, their asset portfolios and rates of return tend to look a lot like those of whites in the same income brackets.<sup>96</sup>

But income doesn't smooth away all observed racial differences in asset portfolio and returns. To fill in the gap, researchers have turned their attention to the effect of family transfers, including gifts and inheritances, as the likely source of wealth differences between blacks and whites.<sup>97</sup> Some regression estimates and simulations suggest that family financial transfers may account for up to a quarter of the wealth gap. One might predict that gifts and inheritances would have a large effect on the wealth of advantaged households. Less well-off families, black or white, simply cannot pass on such benefits to their children.<sup>98</sup> Family financial transfers, if they play a meaningful role in generating

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93. *Id.* at 8.

94. *Id.* at 9.

95. See, e.g., Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q.J. ECON. 321, 332-33 (1990); Nancy A. Jianakoplos & Paul L. Menchik, *Wealth Mobility*, 79 R. ECON. STAT. 18 (1997).

96. Gittleman & Wolff, *supra* note 92, at 8; Scholz & Levine, *supra* note 86, at 28-29; Ronald L. Straight, *Wealth: Asset-Accumulation Differences by Race—SCF Data, 1995 and 1998*, 92 AM. ECON. REV. 330, 332-33 (2002); Edward N. Wolff, *Recent Trends in Wealth Ownership, 1983-1998*, at 7 (Jerome Levy Econ. Inst., Working Paper No. 300, 2000).

97. See OLIVER & SHAPIRO, *supra* note 88, at 152; Robert B. Avery & Michael S. Rendall, *Lifetime Inheritances of Three Generations of Whites and Blacks*, 107 AM. J. SOC. 1300, 1300 (1997); Blau & Graham, *supra* note 95, at 321; Gittleman & Wolff, *supra* note 92, at 2; Jianakoplos & Menchik, *supra* note 95, at 19; James P. Smith, *Racial and Ethnic Differences in Wealth in the Health and Retirement Survey*, 30 J. HUM. RES. S158, S158 (1995); cf. Altonji & Doraszelski, *supra* note 88, at 6 (“[T]he legacy of discrimination could lead to a link between intergenerational transfers and income that is stronger for whites than for blacks.”).

98. “The evidence about the effect of inheritances on the median wealth gap is scant, although we suspect that inheritances have little or no effect on the wealth of the median household, instead playing a larger role at the upper end of the wealth distribution.” Scholz & Levine, *supra* note 86, at 14. “Fewer than half of all households in the [study sample] report having received an inheritance. Therefore, the median inheritance amount for both whites and blacks is zero.” *Id.* at 46 n.25.

the wealth gap, might be expected to have a larger impact among the advantaged.

There is strong consensus that the family resource advantage of whites plays a large role in creating and maintaining the wealth gap, but there is no agreement about the exact mechanism.<sup>99</sup> No doubt this sounds entirely obvious. The children of wealthy parents eventually grow up to become wealthy adults. But the claim is not as straightforward as it might appear. It's not clear *how* parental wealth affects the wealth of children and whether it operates differently for blacks and other racial or ethnic minorities as compared to whites. Do wealthy parents contribute to their adult children's wealth by investing more in their early and continuing education? And might racial differences in the expected returns to education lead to different educational investments by comparable black and white parents? Or do wealthy parents simply enrich their children through direct financial contributions, where for historical reasons, whites have a lot more money to give?

### B. Family Feedback Loops

As an empirical matter, the questions above are far from resolved. To the list of possible mechanisms explaining the racial wealth gap, Roithmayr offers a novel rhetorical account: "Early anticompetitive conduct garnered for whites additional wealth, acquired on the backs of slaves or from victims of white cartel conduct in unions, homeowners' associations and political parties."<sup>100</sup> Thereafter, family feedback loops simply perpetuate a state of affairs wherein "white families continue to pass down the ill-gotten wealth they acquired during Jim Crow and slavery. Families of color have no such *racism dividend* to pass down."<sup>101</sup> These dividends are distributed not only at death, but also, and

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99. White households are only slightly more likely than non-white households to have received intergenerational wealth transfers, but those that have received transfers receive a substantially larger amount. Mark O. Wilhelm, *The Role of Intergenerational Transfers in Spreading Asset Ownership*, in *ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP* 140 (Thomas M. Shapiro & Edward N. Wolff eds. 2005). There is some evidence that non-white families spend less on their adult children for every extra dollar of resources than white families do. See, e.g., Joseph G. Altonji & Ernesto Villanueva, *The Marginal Propensity to Spend on Adult Children*, B.E. J. ECON. ANALYSIS & POL'Y, Feb. 2007, at 36-37 (observing that for every extra dollar of resources, white parents spend about four cents on their adult children, whereas non-white parents spend about three cents). The source of the wealth gap must lie elsewhere.

100. ROITHMAYR, *supra* note 2, at 60.

101. *Id.* at 57 (emphasis added). "White families pass down far more than families of color, and family transfers contribute a great deal to racial wealth differences, particularly at the bot-

perhaps primarily, *inter vivos*. Roithmayr calls particular attention to two kinds of *inter vivos* transfers: “First, white parents help their children to make a down payment on a house far more often than do nonwhite parents. Second, white parents help with college tuition, which boosts a child’s future earnings and wealth as well.”<sup>102</sup> These are the essential family feedback loops, she argues, that preserve racial differences over time.

There is empirical support for Roithmayr’s argument. Industrial and labor economist Francine Blau and financial economist John Graham were among the first to suggest that *inter vivos* parental transfers and inheritances from older generation to younger generation whites might explain the black-white gap in subsequent generations.<sup>103</sup> Sociologists Melvin Oliver and Thomas Shapiro brought popular attention to this suggestion in *Black Wealth/White Wealth*, showing that the wealth of blacks tends to be less sensitive to income and other demographic characteristics than the wealth of whites.<sup>104</sup> Oliver and Shapiro offer a convincing descriptive account of how the legacy of racial discrimination in the United States might perpetuate such wealth differences through families across generations.<sup>105</sup> Their account has been supported, as well as complicated, by a number of more formal statistical analyses conducted by economists and sociologists (including Oliver and Shapiro themselves).<sup>106</sup>

In addition, Dalton Conley has argued that parental wealth is more important than one’s own income for predicting one’s wealth.<sup>107</sup> Taking into account parental wealth, along with several other demographic characteristics, Conley is able to explain fully the average differences in wealth between blacks and whites.<sup>108</sup> But the work of some economists points in another direction. Employing a clever approach to control for family background characteristics,

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tom and top of wealth brackets. . . . Indeed, racial differences in parental wealth are a central factor in the contemporary racial wealth gap.” *Id.* at 61 (footnotes omitted).

102. *Id.* at 62.

103. Blau & Graham, *supra* note 95.

104. OLIVER & SHAPIRO, *supra* note 88, at 109-11.

105. *Id.*

106. See, e.g., OLIVER & SHAPIRO, *supra* note 88; THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004); Joseph G. Altonji et al., *Black/White Differences in Wealth*, 24 *ECON. PERSPECTIVES* 38 (2000); Robert Barsky et al., *supra* note 88; Kerwin Kofi Charles & Erik Hurst, *The Correlation of Wealth Across Generations*, 111 *J. OF POL. ECON.* 155 (2003); David Low, *Quantifying Explanations for Black-White Wealth Inequality* (New York Univ. Working Paper, 2013), <http://www.econ.as.nyu.edu/docs/IO/28319/BlackWhiteWealthInequality.pdf> [<http://perma.cc/23C8-TM8K>]

107. Dalton Conley, *Getting into The Black: Race, Wealth & Public Policy*, 114 *POL. SCI. Q.* 595 (1999).

108. *Id.* at 596.

Joseph Altonji and Ulrich Doraszelski developed an analysis of wealth accumulation focusing on a sample of siblings.<sup>109</sup> If parental wealth is important, Altonji and Doraszelski hypothesize, then their analysis should look very different when it includes a variable indicating that various individuals in their sample come from the same family (a family fixed effects approach) compared to when no such account is made (the standard approach).<sup>110</sup> Finding little difference between the fixed effects and standard approach, they reject the claim that parental wealth explains the significant observed differences in the rates at which blacks and whites accumulate wealth.<sup>111</sup> Yet they do not deny that family background characteristics might affect other aspects of the wealth function.<sup>112</sup> In other words, even if parental wealth doesn't help whites get richer faster than blacks, it might still start them off with a lot more than blacks; in terms of a (wealth regression) line, whites may have a higher intercept, if not a steeper slope.

### C. Education and Mental Models

Roithmayr's analysis of capital does not focus on only cash, stocks, bonds, and real property. She recognizes that social capital may be as important, if not more important, than financial capital in generating and maintaining wealth.<sup>113</sup> Consider, for instance, parental spending on elite education for their children. These expenditures certainly promote their children's educational and occupational attainment, which is likely to translate into wealth down the road. But there is more to it than that, as David Wilkins observes: "students attending elite schools are also socialized into habits and possibilities of eliteness and granted . . . membership in the elite networks."<sup>114</sup> Moreover, economists Kerwin Charles and Erik Hurst present evidence showing that parents' passing on their attitudes about wealth (that is, saving and investment preferences) was a significant predictor of a child's later wealth.<sup>115</sup>

In line with these empirical studies, attitude formation and transmission, particularly in educational settings, are central parts of Roithmayr's thesis, which she places under the heading of institutional rules. "Institutional rules

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109. Altonji & Doraszelski, *supra* note 88.

110. *Id.* at 6-7.

111. *Id.* at 40.

112. *Id.*

113. ROITHMAYR, *supra* note 2, at 83-92.

114. David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1931 (2005) (emphasis omitted).

115. Charles & Hurst, *supra* note 106, at 1173-79.

are the rules of the game that govern the day-to-day operation of an institution."<sup>116</sup> These rules influence not only what we do, but also how we think about and justify our choices and those of others.<sup>117</sup> "Perhaps most importantly," she observes, "institutional rules play an important role in shaping the mental models that people use to interpret the environment."<sup>118</sup> As Roithmayr writes, "these mental models and their accompanying institutional rules can get stuck in a particular niche, unable to move toward potentially more efficient rules and mental models."<sup>119</sup> Mental models and institutional rules often interact to create a perceived neutrality or naturalness to institutional practices, making them even more secure.

Roithmayr illustrates these claims effectively by looking at law school admissions rules, particularly the early development of the Law School Admission Test (LSAT). For instance, she observes, "remarkably, law schools wanted something that correlated specifically to first year grades but *not* to bar passage scores."<sup>120</sup> The law schools' admission committees had their reasons for preferring a test more aligned with first-year grades, but it is far from obvious that these grades are a better predictor of success in legal practice than bar exam scores. Bar passage rates and first-year grades, of course, remain highly controversial in law school affirmative action debates.<sup>121</sup>

Roithmayr also usefully recalls the historical collusion, as told by Jerold Auerbach, between the American Bar Association and the American Association of Law Schools to exclude racial and ethnic minorities, along with foreigners,

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116. ROITHMAYR, *supra* note 2, at 71. These rules may be informal, like social etiquette, or formal and subject to legal enforcement—and sometimes both. "Sometimes institutional rules are both formal and informal at the same time—in certain places in the US, both legal and social norms prohibit smoking." *Id.*

117. *Id.* at 74 ("Mental models are the internal stories that people use to make sense of their world and interpret their environment. . . . Those mental models filter experience and perceptions in a way that constrains people from considering significantly different ways of doing things.").

118. *Id.*

119. *Id.*

120. *Id.* at 78 ("The committee reasoned that because an applicant could take the bar multiple times, everyone would pass sooner or later, and thus the bar posed no meaningful measure of the quality for which schools wanted to screen.").

121. Compare, e.g., Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004), with Ian Ayres & Richard R.W. Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. (2005), and David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN L. REV. 1855 (2005), and Wilkins, *supra* note 114.



from legal education and practice.<sup>122</sup> But active and conscious collusion to exclude on the basis of race or ethnicity is not the story that she is telling in this part of the book. The argument is subtler. “At a more abstract level, law schools retain an admissions test that disproportionately excludes students of color because they think it measures something real about the merit of applicants.”<sup>123</sup> Law school admissions officers are working with a “mental model” of merit and deservingness that evaluates students based on criteria that were questionable from the start.<sup>124</sup> She continues, “[i]n this way, the mental models that structure our understanding of merit are tied closely to the country’s history of white privilege.”<sup>125</sup> Her legal treatment of education here is reminiscent of Pierre Bourdieu’s *Homo Academicus*.<sup>126</sup> She effectively introduces *power* explicitly into the discussion, rendering a narrative that is both thoughtful and revealing.

#### D. Employment and Housing

“To be sure,” Rotihmayr concedes, “this [mental model] narrative risks an overly static view of the world, as is true of the lock-in model more generally.”<sup>127</sup> But this concession does not deter her from extending the framework to employment. She argues that the mental model of merit may be even more distorted when it comes to jobs. “Contrary to some narratives about merit and hard work,” says Roithmayr, “the reality is that a person’s chance of getting a

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122. ROITHMAYR, *supra* note 2, at 78 (“Jerold Auerbach and others have documented the connection between these suspect rules and the desire to exclude certain groups from law schools.”).

123. *Id.* at 80.

124. *Id.* (“Some have pointed out the way in which the mental model of merit that ranks people by grades or performance both reflects and rationalizes a system that disproportionately awards resources to one group. According to this argument, we justify the exclusion of people of color from law schools by arguing that white students deserve admission because they did well on the LSAT and got good grades.”).

125. *Id.*

126. See PIERRE BOURDIEU, *HOMO ACADEMICUS* 69 (Peter Collier trans., Stanford University Press 1988) (1984) (discussing academic power and the production and reproduction of social structures, particularly in law, where knowledge works “in the service of order and power” as opposed to academic disciplines where knowledge scrutinizes “order and power, aiming . . . at analyzing them as they are, at analyzing the nature of social order and the state”).

127. ROITHMAYR, *supra* note 2, at 80 (“The world does change, as do people’s mental models. Some schools briefly experimented with waiving the LSAT for undergraduates from their home institutions with certain qualifications, and an American Bar Association committee has voted twice in straw polls to remove the LSAT requirement, in part for the reasons discussed. But the ideology of merit dies hard, and is likely to persist so long as whites continue to enjoy disproportionate admission.” (citation omitted)).

good job depends quite heavily on her social network."<sup>128</sup> Social links reproduce racial employment inequality through formal and informal job networks.<sup>129</sup> Network size and density is influenced by one's racial context.<sup>130</sup> Class, again, is a driving factor,<sup>131</sup> as is the early history of discrimination,<sup>132</sup> Roithmayr argues, "even if all intentional discrimination were to end tomorrow, social networks would continue to reproduce gaps in wages and employment status."<sup>133</sup> Racial homophily, operative for whites as well as blacks, continues to separate networks.<sup>134</sup>

Long-established institutional rules and practices continue to disfavor minorities, but, explains Roithmayr, these are not the main factors securing modern-day racial inequality. Segregation perpetuates our present inequality. "If social networks were to be integrated," Roithmayr observes, "then the resources contained in those networks might be more evenly shared. Job referrals would be doled out more evenly. Family help for housing and college would be shared among nonwhite children as fairly as among white children."<sup>135</sup> With this line of argument, Roithmayr shifts the inquiry from inequality to segregation, with residential segregation, in particular, underwriting many of the differences in institutional access and wealth discussed throughout the book.

128. *Id.* at 89.

129. *Id.*

130. "In particular, research demonstrates that compared to whites, black and Latino job seekers have networks that are smaller in size and have fewer links per person to potential employment." *Id.*

131. *See id.* ("Social networks for ghetto residents are much smaller and the contacts that they do have are less likely to be employed or fully employed than people of color from low-poverty neighborhoods."); *id.* at 91 ("As the foregoing discussion makes clear, the key problem is that networks are segregated by race and also by class.").

132. *Id.* at 89 ("It comes as no surprise to learn that as an empirical matter, owing to historical discrimination, blacks and Latinos are far more likely to reside in the layers of hierarchy at the bottom, far from direct access to employment. At the same time, black and brown networks are less likely to be well connected to people further up the referral hierarchy. Owing to the self-reinforcing dynamics of networks, people of color are more likely to remain at the bottom of the hierarchy over time, and are at greatest risk for becoming (and remaining) a marginalized class if circumstances push a referral network below its critical threshold.").

133. *Id.* at 91.

134. Roithmayr argues: "Social psychologists tell us that . . . networks remain segregated simply because like tends to attract like. Social psychologists call this attractive force 'homophily.' . . . In addition, people form their social networks in places—neighborhoods, schools, workplaces—that tend to be segregated . . . even in communities where there is little or no intentional discrimination." *Id.* (citation omitted).

135. *Id.* "Intermarriage and integrated social networks, to say nothing of integrated neighborhoods, would go a long way toward redistributing wealth." *Id.*

Roithmayr effectively enlists both theoretical and empirical literatures on racial housing patterns, and she confronts class issues most explicitly in the chapter focusing on how neighborhood effects reproduce racial segregation. While observing that wealth and class differences are maintained through contemporary housing and neighborhood feedback loops,<sup>136</sup> the history of residential and racial discrimination is never far removed from her analysis. “Restrictive covenants paved the way to residential segregation, as homeowners’ associations policed against the entry of blacks and Latinos into all-white neighborhoods. Residential segregation, in turn, structured racial differences in wealth, social networks, and institutional networks of distribution.”<sup>137</sup>

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Two lingering questions are suggested by the discussion of historical segregation in this context. First, why start with Jim Crow and not, for instance, slavery? Where to begin—the so-called starting gate problem—is a challenge faced by all equality theorists.<sup>138</sup> Roithmayr is aware of the issue and some of the knotty questions it raises.<sup>139</sup> “What would have happened if the government had made good on its promise of forty acres and a mule to American

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136. “Finally, we should note that residential segregation in particular has played a central role in persistent wealth disparity.” *Id.* at 67.

137. *Id.* at 67. Jim Crow policies assured that blacks would have not only inadequate housing, but also inferior neighborhood amenities, from schools and other social services to even inferior water and sewage services. See Werner Troesken, *The Limits of Jim Crow: Race and the Provision of Water and Sewerage Services in American Cities, 1880–1925*, 62 J. ECON. HIST., 734 (2002). There is evidence that in some cities, such as Memphis, Tennessee, fear of typhoid and other water-borne diseases moving from black to white households motivated officials to install “extensive and equitable [water and sewer] systems that appear to have benefited both whites and blacks.” *Id.* at 748. However, evidence from other cities, like Savannah, Georgia, reveal that with sufficient segregation officials were able commit “to under-provide African Americans with sewer and water services.” *Id.*

138. See FISHKIN, *supra* note 7, at 65–74.

139. For example, she observes the possibility of competing starting gates. “We can actually trace the starting point for race differences in wealth even farther back,” she writes, “to Jim Crow and slavery.” ROITHMAYR, *supra* note 2, at 62. But the Jim Crow period and our long history of slavery are very different points—not to mention the differences within these periods. Are blacks from the American South who trekked north during the great migrations at the same starting gate with West Indian immigrants who moved to northern U.S. cities during Jim Crow—to say the least of poor European immigrants? Identifying the right moment, or starting gate, when comparing the outcomes of two or more groups or individuals may be the biggest challenge to equality of opportunity arguments.

former slaves?”<sup>140</sup> Clear answers to such questions are, of course, elusive. However, because the starting points are so central to her lock-in theory, Roithmayr might have done a little more to explain what are her relevant points of departure, for which groups, and why.

This brings us to the second lingering matter in this section: is there anything distinctive about black or Latino inequality, and, if so, how do racial covenants and the like help us to appreciate this distinction? Racial restrictions were notoriously inclusive in their list of excluded groups. While “Whites Only” or “Caucasians Only” were common in covenants, just as often there was an enumerated list of groups who were unwelcome in the neighborhood. “Armenians, Jews, Hebrews, Persians[,] and Syrians, or anyone else of the ‘Semitic race’” were identified for exclusion in some covenants, as were, of course, persons of “Negro, African, or Asiatic race,” in addition to Mongolians, Mexicans, and numerous other nationalities.<sup>141</sup> Since all of these groups, and unnamed others, suffered from unfair cartel-like conduct facilitated through covenants, by which criterion are blacks and Latinos selected for redress? Roithmayr, no doubt, has an answer to this question, but it is not clear from the text. One is left wishing for more discussion on how she selected the starting points and groups for her analysis.<sup>142</sup>

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140. *Id.* A recent paper by Melinda Miller provides some evidence for this thought experiment. Comparing the outcomes of former slaves generally to those from the Cherokee Nation—which, in contrast to the failed larger promise of “40 acres and a mule,” actually provided opportunities for freedmen to claim land—Miller reports that former Cherokee slaves had greater absolute wealth and experienced a smaller racial “wealth gap” than former slaves of the Confederacy in 1880. Moreover, the children of Cherokee freedmen continued to experience these advantages in 1900. Melinda C. Miller, *Land and Racial Wealth Inequality*, 101 *AM. ECON. REV.* 371, 373-75 (2011); Melinda C. Miller, *The One Thing Needful: Free Land and Black Mobility, 1880-1900* (Nov. 2011) (unpublished manuscript) (on file with author), <http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/miller-111115.pdf> [<http://perma.cc/VDF2-PTMW>].

141. BROOKS & ROSE, *supra* note 43, at 222, 233 n.4, 252 n.9.

142. Fortunately, for the truly curious, some answers are available in Roithmayr’s articles. See, e.g., Roithmayr, *supra* note 10, at 78: “It is important to point out that the racial cartel story appears to be historically specific to African Americans, Mexicans and some Asian groups.” Roithmayr further observes, “other groups like Asians and White ethnic groups (Irish, Eastern European Jews and other immigrant groups) have faced similar anticompetitive exclusion at various times in this country’s history. But important historical differences separate the experience of these groups. . . . Comparatively speaking, Jews and many Asian groups have not experienced either the magnitude or duration of anti-competitive exclusion experienced by these groups.” *Id.*

## V. THEORY AND IMPLICATIONS

In the first chapter of *Reproducing Racism*, Roithmayr quickly casts off an admittedly “[i]ncomplete and [u]nsatisfying”<sup>143</sup> set of alternative theoretical explanations for persistent racial inequality, beginning with conventional economic accounts<sup>144</sup> and then moving swiftly through various psychological,<sup>145</sup> biological,<sup>146</sup> cultural,<sup>147</sup> and structural arguments.<sup>148</sup> Her lock-in logic is, of

143. ROITHMAYR, *supra* note 2, at 13.

144. Gary Becker’s model of actors exhibiting a “taste for discrimination” opens a succinct and useful discussion of irrational and rational discrimination. *Id.* at 15-17.

145. The discussion here is essentially limited to bias and implicit attitudes measured by the Implicit Association Test. Roithmayr raises some of the familiar challenges to (and defenses of) the IAT, including questions about what exactly the test is measuring and the applicability of split-second discrimination in everyday life. *Id.* at 20-21. Beyond that, psychological models get short shrift here. Although she begins generally by mentioning psychological mechanisms grounded in stereotypes, there is no discussion of stereotype threat—considered in, for example, Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 79 J. PERSONALITY & SOC. PSYCH. 797 (1995), or aversive racism, discussed in, for example, John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCH. SCIENCE 315 (2000), or other conscious and subconscious psychological accounts of racial decision making and behavior either by majority or minority group members that might account for persistent inequality across groups. Of course, one book does not need to address every psychological theory concerning race in fine detail (there are quite a few), but the fact that she doesn’t even touch on a number of the more basic theories gives the discussion here an ad hoc quality.

146. The chapter begins with Richard J. Herrnstein and Charles Murray’s polemic *The Bell Curve*, which reinvigorated old and ugly debates on race, genetic differences, and measured intelligence. ROITHMAYR, *supra* note 2, at 13. After that there is little mention of the topic, beyond a brief mention of Stephen Jay Gould’s discussion of “the darker days of our intellectual history, in which scholars argued that blacks and ‘Mongoloids’ were inferior because of their physiological or genetic characteristics.” *Id.* at 17. Roithmayr notes that, “as time passed, most if not all of these ideas were thoroughly discredited as scientifically unsupported, although the ideas did reappear in modified and more sophisticated form from time to time, as was true in *The Bell Curve*.” *Id.* at 18.

147. Roithmayr nicely reminds us where the cultural explanations originated. “Anthropologist Oscar Lewis first made the now-infamous argument that a ‘culture of poverty’ explained persistent gaps.” *Id.* at 21. Senator Daniel Patrick Moynihan, however, may be particularly associated with this claim, which remains popular among a number of conservative commentators. Off. Pol’y Planning & Res., *The Negro Family: The Case for National Action*, U.S. DEP’T LAB. (1965), <http://www.dol.gov/oasam/programs/history/webid-meynihn.htm> [<http://perma.cc/4XVR-4XFD>].

148. Here Roithmayr thoughtfully and importantly connects structural constraints—like segregation within (or spatial mismatch between) residential and employment sites—to cultural claims. The connection, of course, is important for her favored explanation. ROITHMAYR, *supra* note 2, at 23 (“As this book will argue, the best explanations assert that culture and

course, itself a kind of structural argument, building on earlier economic models.<sup>149</sup> To illustrate the operation of lock-in, Roithmayr makes use of several path-dependency stories.<sup>150</sup> Readers will find some of these accounts familiar, such as the QWERTY keyboard and the VHS versus Betamax stories. Her discussion of the Polya urn experiment, however, will likely be new to many lawyers and some legal scholars, although old hat to mathematicians.<sup>151</sup> The experiment begins with an urn containing an equal number of red and white balls.<sup>152</sup> Next, the experimenter selects a single ball at random from the urn and returns it along with a new ball of the same color. At this point there is no longer an equal number of red and white balls in the urn. There is exactly one more ball of one color than the other. A second ball is then randomly selected from the urn and returned with another ball of the same color. Then a third ball is selected and returned with another of the same color, and so on.

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structure reflect and reproduce each other in a positive feedback loop that moves from culture to structure and back again.”).

149. The key insight is attributed to the economist Glenn Loury, whom Roithmayr identifies as the first to suggest “that persistent racial gaps might be traced to feedback loops, though they weren’t called that yet.” *Id.* at 23. She writes:

Loury pointed out that residentially segregated neighborhoods produce underfunded schools, and parents with poorly connected social networks decreased a child’s chances of getting a job. In particular, children from those neighborhoods or those parental networks are less likely to get (or have to pay more to get) the training to do skilled work. Accordingly, each generation suffered the deprivations of the prior generation and reproduced them for the next generation.

*Id.* at 23-24.

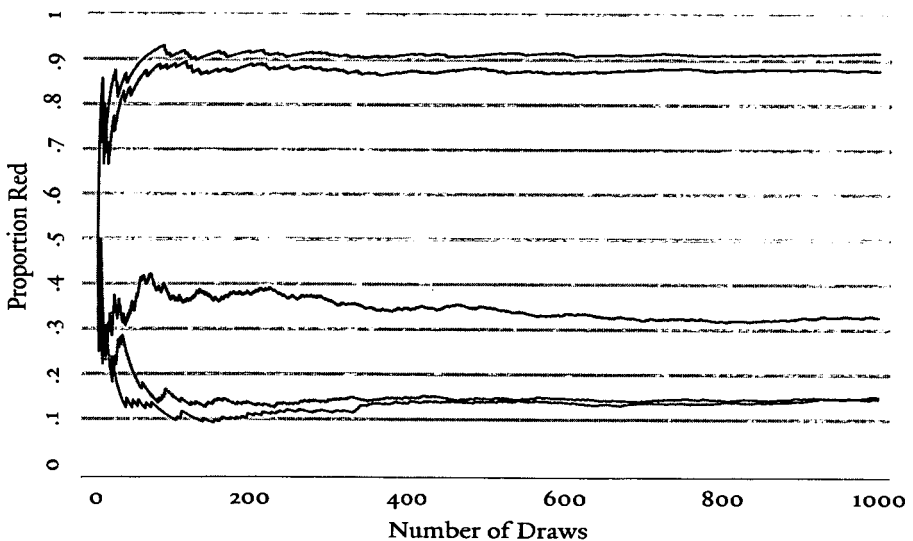
150. Here it might have been useful to introduce Oliver Williamson’s notion of the “fundamental transformation,” wherein the winner of some initially competitive contest (say, for example, a supplier in a competitive bidding process) acquires monopoly or market power, or some other advantage, in future contests. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 61 (1985). Roithmayr relies more on the language of “switching costs,” ROITHMAYR, *supra* note 2, at 113-118, 136-38, which are of course related to the former notion, that is, “transaction-specific know-how and skills and the difficulties of skill transfer mean that it will be costly to switch to an alternative supplier.” Kirk Monteverde & David J. Teece, *Supplier Switching Costs and Vertical Integration in the Automobile Industry*, 13 *BELL J. ECON.* 206, 206 (1982).
151. See, e.g., David Blackwell & James B. MacQueen, *Ferguson Distributions Via Polya Urn Schemes*, 1 *ANNALS STAT.* 353 (1973).
152. ROITHMAYR, *supra* note 2, at 28. Roithmayr here relies on W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994) for the description of the experiment. An accessible and engaging discussion of the experiment can be found in Joel E. Cohen, *How Is the Past Related to the Future?*, *CTR. FOR ADVANCED STUD. BEHAV. SCI.* (1982). Going beyond the basic two-color dichotomy, Blackwell and MacQueen extend the result to a continuum of colors. Blackwell & MacQueen, *supra* note 151.

The relevant feature of this experiment for Roithmayr is that while there may be large fluctuations in the percentage of red and white balls following the initial rounds of draws, “at some key threshold point in the drawing process, as the urn continues to fill,” she writes, “the percentage of reds and whites settles at a particular proportion, and remains very stable for all later draws. Amazingly, later events don’t change the final percentages.”<sup>153</sup>

As if by magic, the urn suddenly and dramatically settles down to some fixed and quite durable proportion of red and white balls[,] no matter how many more draws the experimenter completes. . . . Even more interesting, this ending proportion will vary from experiment to experiment. In one run, the urn might settle into a proportion of 22 [sic] percent red and 68 percent white. On a subsequent run, the proportion might instead end up at 78 percent red.<sup>154</sup>

Figure 1 shows five simulations of the Polya urn experiment that I ran.<sup>155</sup>

**Figure 1.**  
BASIC URN (TRADITIONAL POLYA URN EXPERIMENT)



<sup>153</sup>. ROITHMAYR, *supra* note 2, at 28.

<sup>154</sup>. *Id.* at 112.

<sup>155</sup>. Program and log files on file with author.

Roithmayr's observation concerning the highly variable ending proportions is clearly apparent in the figure. Two simulations settle with less than twenty percent red balls, two above eighty percent, and one with a little more than thirty percent. Moreover, notwithstanding the high variance at the start, the tail of each distribution ends up fairly flat. In other words, "the urn's early history matters far more than later history, because the early draws chart the path that subsequent developments will reinforce. By analogy," writes Roithmayr, "the early history of competition among racial groups can explain contemporary outcomes."<sup>156</sup> Exactly how does this analogy work? "In much the same way that the early draws of the urn determined the ultimate composition of the urn," Roithmayr tells us, "those early rounds of economic, social, and political competition among the races were rigged anticompetitively by racial cartels."<sup>157</sup>

But that framing doesn't quite fit. Early selection *in* the urn isn't "rigged." It's random. Selection is determined by the relative proportions of red and white balls. Proximity, connectedness, and neighborhood effects play no role in the selection process. There is no color segregation within the urn. The balls are all always mixed up. The Polya urn experiment describes a process that locks in certain proportions based on distributions established by early randomness. At each round, each ball, regardless of its color, has fair odds of being selected when the experimenter reaches in the urn and picks one. If red balls are disfavored, it is merely because they are numerical minorities. But Roithmayr isn't telling a story about numerical minorities. She is concerned with racial and ethnic minorities.

Non-Hispanic whites in the United States are projected to fall below the threshold of numerical majority in 2042, with continued declining relative numbers thereafter.<sup>158</sup> As whites increasingly become numerical minorities, their chances of being selected for society's prizes and privileges should fall – if selection is made as it is in the urn. Roithmayr's argument, however, implies that white advantage will persist even as their numbers fall. This doesn't mean the Polya urn is a poor analogy for her argument. For instance, perhaps it is not how balls in the urn are selected that's telling, but rather how new balls are brought in.

Among other things, the traditional Polya urn experiment describes a process of inclusion that is entirely biased. Exclusion is not a salient frame of the

156. ROITHMAYR, *supra* note 2, at 28-29.

157. *Id.* at 28-29. She continues, "If the early draws favored whites, it should now come as no surprise that the urn is now mostly white." *Id.* at 29.

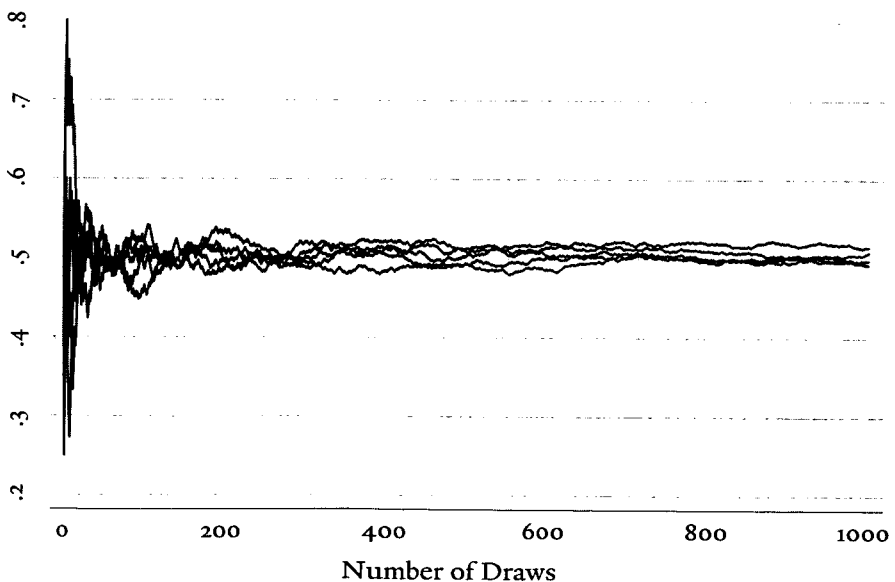
158. Grayson K. Vincent & Victoria A. Velkoff, *The Next Four Decades: The Older Population in the United States: 2010 to 2050*, U.S. CENSUS BUREAU 1 (May 2010), <http://www.census.gov/prod/2010pubs/p25-1138.pdf> [<http://perma.cc/CCM3-FTSZ>].



Polya urn. Disfavored-color balls are not removed or prohibited from the urn. All the bias results from the method of inclusion. Recall that each ball selected from the urn is returned with a ball of the same color. We might say that the selected ball invites a same-colored partner-ball back to the urn in a manner akin to the kind of racial patronage that Roithmayr described as operating in job networks. Nothing is happening *to* the numerically disfavored balls in the urn—or at least that’s one way of looking at the process. This too is a feature of Roithmayr’s narrative account, an important but subtle feature, which the Polya urn makes exceedingly clear: everybody knows that it is wrong to *exclude* based on color, but including those “like you” is perfectly natural and good, just like family and friends. That, at least, is one way of looking at things.<sup>159</sup>

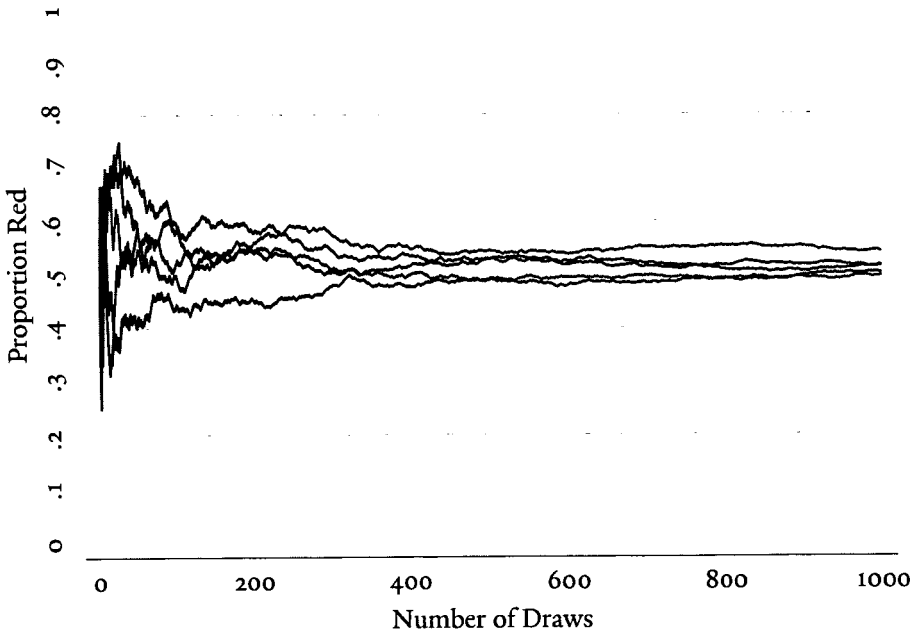
Consider another way—that is, another process of adding balls to the urn. What if the selected ball were made to return with a ball of a *different* color? The result of that experiment, which I call the “anti-urn,” is shown in Figure 2.<sup>160</sup> Again, there is significant fluctuation in the early draws, but very quickly the proportions of red and white balls settle down at near equality. An experiment is hardly needed to appreciate this result. By including balls of the non-selected color, the experimenter constantly adds countervailing probability mass to achieve a balance. Roithmayr, it is fair to say, may likely endorse this inclusion criterion. Even though it is as color conscious as the original Polya experiment, this inclusion criterion brings balance to the urn, which in turn makes selection of red and white balls equally likely.

**Figure 2.**  
ANTI-URN (ADDING BALL OF OTHER COLOR)



An alternative method to approach balance in the urn, and therefore an alternative method to move selection toward equality, would be for the experimenter to choose at random the color of the new ball that is to be placed in the urn along with the selected ball. No doubt such an approach would lead to equality, although perhaps not with the same efficiency and speed as would be achieved by color-conscious inclusion of balls different in color from the ones selected.<sup>161</sup> One may read into Roithmayr’s discussion that it is too late in the game for that kind of neutral selection. It is a tempting leap, to suggest, for instance, that if we are already in the settled tail of a traditional Polya urn process, it would not matter much if the experimenter suddenly started to randomly choose the color ball to partner with the selected ball that is going back to the urn.

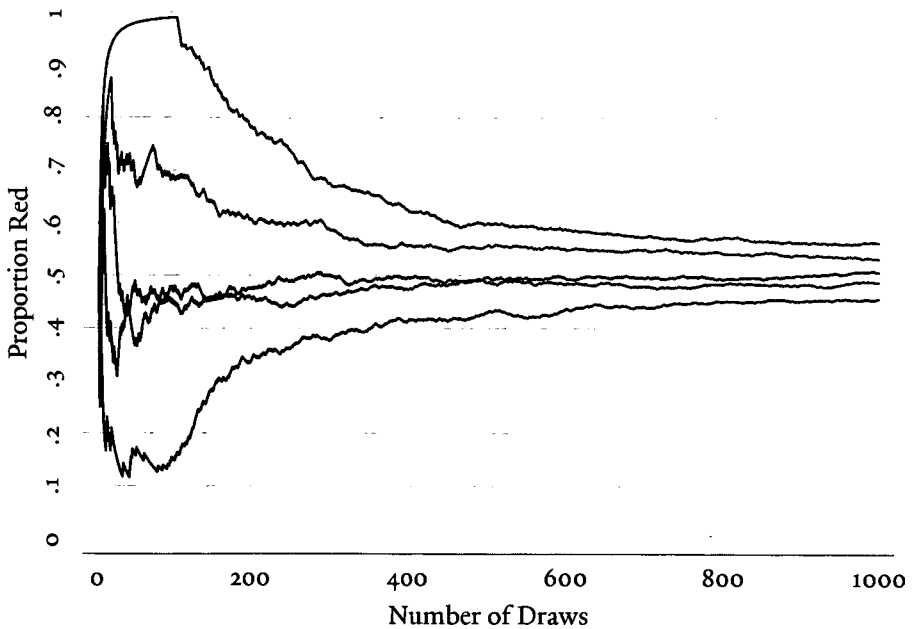
Figure 3.  
RANDOM URN (ADDING BALL OF RANDOM COLOR)



161. In a related vein, see, for example, Roland G. Fryer Jr. & Glenn C. Loury, *Affirmative Action and Its Mythology*, 19 J. ECON. PERSPS. (2005); and Abraham L. Wickelgren, *Affirmative Action: More Efficient Than Color Blindness*, 10 TEX. J. CIV. LIBERTIES & CIV. RTS. (2005) (each demonstrating distinct efficiencies gained by “color-conscious” affirmative action).

Caution would be warranted in taking that leap. The analogy breaks down in attempting to resist random inclusion by arguing that nothing would change after the early history has set its course. The course can be altered by a random process. Consider, for example, a traditional Polya urn process where after the first one hundred draws, the experimenter begins to add balls of a randomly chosen color instead of the same color as the selected ball. The result from several runs of this experiment is shown in Figure 4. Variable proportions are kicked off by the early history of arbitrary draws, but eventually convergence toward equality is reached by including balls of randomly chosen colors.

**Figure 4.**  
MIXED URN (100 BASIC, THEN RANDOM)



What insights are gained from the traditional Polya urn experiment and its variations? Path dependency established by early advantage and followed by mechanisms of inclusion based on likeness can lock-in long-term patterns of inequality. But if the mechanisms of inclusion are changed, long-term patterns can also, in time, change. Hence, one may be optimistic, as Roithmayr ultimately is, about the possibility of change and the possibility of some equality. Mundane matters of selection and inclusion must, however, be carefully con-

sidered. Ostensibly fair contests, such as random draws from an urn or color-blind tests of formal equality—won't necessarily lead to real equality if biased mechanisms interact with the contests.

Consider, for example, Bernard Williams's fable of the warrior society, where after a prolonged period hereditary caste-based discrimination in favor of warrior families, the society changed to fair and formal contests for the award of privileged positions.<sup>162</sup> Children of the old warrior families continued to secure privilege, not because the contests were rigged (for they were *now* fair), but because their family advantage had better prepared them for the contest. Families biased the contest. It's not hard to understand. Who wouldn't give their child every advantage possible?

Warrior families, in the end, are just like all other families. It is this fact that makes Williams's fable so broadly accessible. In much the same way that Williams makes use of the warrior society, Roithmayr deploys Polya urns—along with QWERTY keyboards, VHS tapes, operating programs, racial covenants, wildcat strikes, and market cartelization, among other descriptions—to offer graspable narratives on an elusive topic. There is something for everyone to grab hold of here. And it is this diversity that makes Roithmayr's account so broadly accessible and effective.

## CONCLUSION

In 2007 Chief Justice Roberts wrote, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>163</sup> A provocative tautology, borrowed without attribution from the lower court,<sup>164</sup> its purpose was entirely rhetorical. Roberts was urging that the time had come for the Court, if not the nation, to look beyond race. Race no longer mattered, he implied, except among racist integrationists and the like. Barack Obama's presidential election the following year gave fleeting support to this view of a post-racial America. Yet by 2014, when racial discourse hit a fever pitch with protests

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162. Bernard Williams, *The Idea of Equality*, in *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972*, at 230–249 (1973); see also Fishkin, *supra* note 7, at 11–13, 24–82 (offering an extended discussion of Williams's *Idea of Equality* in the context of competing theories of equality of opportunity, including his own).

163. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

164. “The way to end racial discrimination is to stop discriminating by race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1222 (9th Cir., 2005) (Bea, J., dissenting). For some discussion on the origins of the expression, see Eugene Volokh, *The Origin of “The Way To Stop Discrimination on the Basis of Race Is To Stop Discriminating on the Basis of Race,”* VOLOKH CONSPIRACY (July 17, 2007, 10:30 AM), <http://volokh.com/posts/1184684008.shtml> [<http://perma.cc/W97R-ZZ5N>].

and riots throughout the country,<sup>165</sup> it was implausible to claim that race no longer mattered. The only question was how race mattered. “Race matters,” Justice Sotomayor wrote in that fitful year, “in part because of the long history of racial minorities being denied access to the political process. . . . Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.”<sup>166</sup> These are the essential challenges advanced by Roithmayr. What is to be done? Sotomayor, again, offers an answer: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”<sup>167</sup> Readers of *Reproducing Racism* will be well primed for the difficult yet crucial conversation that awaits.

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165. See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<http://perma.cc/N86D-5ECX>]; Karen Tumulty, *Ferguson, Staten Island: Similar Events Bring Very Different Reaction*, WASH. POST, Dec. 4, 2014, [http://www.washingtonpost.com/politics/ferguson-staten-island-similar-events-bring-very-different-reaction/2014/12/04/bf4a482c-7bd9-11e4-b821-503cc7efed9e\\_story.html](http://www.washingtonpost.com/politics/ferguson-staten-island-similar-events-bring-very-different-reaction/2014/12/04/bf4a482c-7bd9-11e4-b821-503cc7efed9e_story.html) [<http://perma.cc/4DTG-M52J>]; Reid J. Epstein, *Poll: Views of Race Relations Worse Than Before Obama Took Office*, WALL ST. J.: WASH. WIRE (Dec. 17, 2014, 12:09 AM), <http://blogs.wsj.com/washwire/2014/12/17/poll-views-of-race-relations-worse-than-before-obama-took-office> [<http://perma.cc/KG8R-RJ5S>].

166. *Schuetz v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (citations omitted).

167. *Id.*