

# U.C.L.A. Law Review

## Race as a Technology of Global Economic Governance

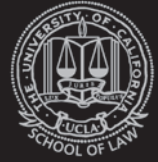
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### ABSTRACT

This Article offers an account of the role of race in global political economy—in particular, how to understand racialization as part of the process by which institutions of economic hierarchy not only were created but continue to be legitimated. It offers the conception of race as a technology: the product of racialized forms of knowing, which serve the practical goal of maintaining and legitimating hierarchy, in particular in the context of political economy. The Article begins by considering the monumental scope of related work that has gone before, both within the legal academy and in other scholarly disciplines. It then offers a few narratives of key dimensions of the contemporary global economy—commodity production and labor migration—and a reflection on the international legal doctrines and institutions that maintain these phenomena as indicia of economic inequality. It concludes by considering race as a technology of global economic governance. The conception of race as a technology of global economic governance highlights multiple connections between racialization, law, and global political economy: race as a technology of empirics, in which racial categories purported to be based on empirical knowledge; race as a technology of legal rule, in which laws and institutions helped to shape, as well as enforced, the identity constructs purportedly rooted in empirical knowledge; and race as a technology of economic allocation and production, itself dependent on the knowledge and practice of the technologies of empirics and legal rule, in which one's racial identity has directly influenced one's place in global chains of production and consumption.

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## INTRODUCTION

To theorize race in the global order is to approach a palimpsest.<sup>1</sup> The concept of racial difference sits at the foundation of the legal, political, and social structures of hierarchy that shape our contemporary global order, playing a key role in the mediation of the contradiction between universalistic claims to equality and liberty, and fundamental practices of domination and oppression. Yet racial hierarchies, in their conception and in their implementation, have often slipped beneath the surface of what is politically legible, written over by other narratives, sometimes with only the hints of previous erasures.<sup>2</sup>

These processes of writing (referring to inception in the broader sense) and rewriting have occurred both in the structures of power themselves and among the critiques of those structures. The expansion of the West unfolded in dependence on conquest of other peoples and their lands, labor, and resources. Racialization of these peoples constituted a primary focus of the knowledge production concomitant with these histories, and a central component of their legitimation. A vital part of the effort of scholars of contemporary race relations has been to track how racialization largely transmuted from text to subtext.<sup>3</sup>

In our particular locality within the global order, those subtexts resurfaced, often abruptly, as political discourse shifted radically following the 2016 national elections in the United States and United Kingdom, set in the context of an apparent rise of ethnonationalism globally. The turn of the millennium saw triumphalist “end of history”<sup>4</sup> narratives claiming the ascendancy of universal

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1. The metaphor of the palimpsest helps to capture the ways in which both the processes of racialization itself, and the analytical project of identifying and understanding them, seem to have accreted in overlapping layers over time. The Oxford English Dictionary defines a “palimpsest” as “a parchment or other writing-material written upon twice, the original writing having been erased or rubbed out to make place for the second; a manuscript in which a later writing is written over an effaced earlier writing.” Sarah Dillon, *Reinscribing De Quincey’s Palimpsest: The Significance of the Palimpsest in Contemporary Literary and Cultural Studies*, 19 TEXTUAL PRAC. 243, 244 (2005) (quoting OXFORD ENGLISH DICTIONARY). Dillon discusses the concept of “palimpsestuousness” in the context of cultural theory and deconstruction. *Id.* at 244–49.
  2. For a few of the numerous eloquent treatments of this conundrum, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
  3. See *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xxix (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (discussing “the ongoing dynamics of racialized power, and its embeddedness in practices and values which have been shorn of any explicit, formal manifestations of racism”).
  4. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

liberalism, accompanying the apparent victory of capitalism over its contenders—followed soon thereafter by celebrations, and also contestations, of “post-racialism.”<sup>5</sup> The return of openly avowed, highly visible white nationalism,<sup>6</sup> arising in the context of the greater socioeconomic insecurity of populations traditionally benefited by white privilege, has lent a renewed urgency to the analytic project of understanding the role of race and racialization in producing those hierarchies of privilege.

At various points, scholars of one discipline or another have sought to unearth structures of racial hierarchy in law and in political economy,<sup>7</sup> and to lay them bare against the global order to better make sense of continuing injustice.<sup>8</sup> The process has remained an ongoing one, as generations of scholars have sought to articulate a global paradigm of race relations at once starkly visible—one need only look at the plain correlation between skin pigmentation and economic inequality both within and across societies—and at the same time endlessly protean, internally contradictory, and everchanging in its particular manifestations.

This Article offers an account of the role of race in global political economy—in particular, how to understand racialization as part of the process by which institutions of economic hierarchy not only were created but continue to be legitimated. It offers the conception of race as a technology: the product of racialized forms of knowing which serve the practical goal of maintaining and legitimating hierarchy.<sup>9</sup> Part III explores the parameters of this concept in greater detail, in particular in the context of political economy.

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5. See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Kimberlé Williams Crenshaw, *Race to the Bottom: How the Post-Racial Revolution Became a Whitewash*, BAFFLER, Jun. 2017, at 40, <https://thebaffler.com/salvos/race-to-bottom-crenshaw> [<https://perma.cc/9T2Y-H5LN>].

6. See, e.g., Aziz Rana, *This Was the Decade the US's Self-Serving Myths Fell Apart*, GUARDIAN (Dec. 30, 2019, 8:28 AM) <https://www.theguardian.com/commentisfree/2019/dec/30/america-myths-exceptionalism-meritocracy-donald-trump> [<https://perma.cc/G5VK-76E3>].

7. Gayatri Spivak employs the Foucauldian concept of “epistemic violence” to argue that “the subtext of the palimpsestic narrative of imperialism be recognized as ‘subjugated knowledge,’ ‘a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.’” Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 281 (Cary Nelson & Lawrence Grossberg eds., 1988).

8. See Part I *infra* for literature reviews.

9. A common definition of technology is “the practical application of knowledge especially in a particular area.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/technology> [<https://perma.cc/Z99D-AEYK>]. A premise of the argument put forward here is that the “knowledge” in question reflects and serves an overall paradigm of racial hierarchy.

The Article begins by considering the monumental scope of related work that has gone before, both within the legal academy and in other scholarly disciplines (Part I). It then offers a few narratives of key dimensions of the contemporary global economy—commodity production and labor migration—and a reflection on the international legal doctrines and institutions that maintain these phenomena as indicia of economic inequality (Part II). It concludes by considering race as a technology of rule in global economic governance (Part III).

### **I. LITERATURES ON RACIAL HIERARCHY IN GLOBAL POLITICAL ECONOMY**

This project of this Article lies at the intersection of three broad social phenomena and scholarly foci: first, race relations and racial justice; second, political economy; and third, international inequality. The project, then, is to try to articulate how these three phenomena intersect in law, particularly international law and global governance.

This Part provides an overview and a stylized intellectual history of methodologies and literatures that have arisen to analyze racial hierarchy in global political economy. It begins by briefly recounting various strands of critical legal theory. It then considers discourses in other disciplines related to the economic histories and manifestations of racism.

#### **A. Literatures in Legal Scholarship: Critical Race Theory and Third World Approaches to International Law**

In 1995, leading scholars of Critical Race Theory (CRT) called for attention to the need to “generate an adequate account of the connections between racial power and political economy” within mainstream legal scholarship on globalization.<sup>10</sup> In the heyday of the various permutations of critical legal theory as focused efforts to advance broad movements in the academy, many scholars set about establishing the baseline for inquiry into a “race approach to international law.”<sup>11</sup> Important work was completed during this time, though the project remains incomplete.

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10. *Introduction*, *supra* note 3, at xxx. This quote was offered at the introduction of one such contribution by the late, dearly missed, and remarkable person and scholar Hope Lewis. See Hope Lewis, *Reflections on “Blackcrit Theory”*, 45 VILL. L. REV. 1075, 1075 (2000).

11. See Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (2000).

Hosting a landmark symposium volume at the turn of the millennium, Ruth Gordon set forth the “difficult task of discerning whether [Critical Race Theory] can assist in understanding, and possibly transforming, the international system, and ascertaining how an international dimension might enrich the Critical Race critique of race and rights.”<sup>12</sup> Gordon noted the main features complicating such an inquiry:<sup>13</sup> the question of whether an analysis formulated in the U.S. context could aptly capture international dynamics; the relative muteness of discourse on racial justice in international law scholarship up to that point; and yet the often

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12. Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 829 (2000). See also Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000); Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000); Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887 (2000) [hereinafter Anghie, *Civilization and Commerce*]; Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000); Nathaniel Berman, *Shadows: Du Bois and the Colonial Prospect, 1925*, 45 VILL. L. REV. 959 (2000); James Thuo Gathii, *Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000); Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000); Lewis, *supra* note 10; Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091 (2000); Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135 (2000); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000).

13. Gordon’s description of the challenge was as follows:

How the Critical Race critique facilitates an understanding of the *international system*, however, has yet to be established with any degree of certainty. Theories that explain and deconstruct America’s peculiar institutions do not necessarily clarify the international plane. Traditional international discourse is framed in terms of formal equality, and race appears to be an almost nonexistent factor. International legal theory rarely mentions race, much less employs it as a basis of analysis. Internationalists frame hierarchy in terms of economic strength, military power or technological advancement. Terms such as north/south, developed/developing or “Third World,” are the preferred terms of reference. Nonetheless, the southern, developing Third World is for the most part the colored world, and like the colored world in the United States, it is marginalized, disproportionately poor and relatively powerless. The critical question is the extent to which the divergence in wealth, technology, power, and indeed, voice are predicated on the contingent, fluctuating and very complex concept of race.

Gordon, *supra* note 12, at 829–31.

striking parallels between the political and economic marginalization of the “colored world” within the United States and on the international plane.<sup>14</sup>

For many, the connections were importantly illuminated in the context of the struggle against apartheid in South Africa, and for the liberation of Southern Africa more generally. The role of the international legal community, both formally in instruments of the United Nations and decisions of the International Court of Justice, and in broader civil society in the antiapartheid boycott and sanctions efforts, was crucial in condemning racial discrimination and pressing the cause for self-determination.<sup>15</sup> For scholars and activists focused on racial justice in the United States, the parallels between racial segregation in the U.S. and apartheid in South Africa were clear.<sup>16</sup> This moment in international law lent itself to the revival of a more general consideration of whether a Black American perspective on international law could be said to exist, and what it would entail if so.<sup>17</sup> Hank Richardson and others argued for a robust understanding of this perspective: not only could and should international law support claims for African Americans’ stronger minority rights in the United States through the prism of the international law of self-determination, but, conversely, the African American understanding of racial history in the United States enabled a perspicacious lens

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14. *Id.* The question of the status of racial analysis in international law and international legal scholarship has also gained renewed attention of late. *E.g.*, Invitation from Jim Anaya, Tendayi Achiume & Justin Desautels-Stein, *International Law and Racial Justice*, Univ. Colo. Boulder, [https://www.colorado.edu/law/sites/default/files/attached-files/ilrj\\_workshop\\_themes.pdf](https://www.colorado.edu/law/sites/default/files/attached-files/ilrj_workshop_themes.pdf) [<https://perma.cc/E28D-X9K8>]; RACE, RACISM, AND INTERNATIONAL LAW: CRITICAL RACE THEORY IN GLOBAL CONTEXT (Kimberlé Crenshaw, Devon Carbado, Justin Desautels-Stein & Chantal Thomas eds.) (forthcoming). I hope to contribute to this analysis as well in a forthcoming book chapter, *Race and International Law*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* (Khiara Bridges, Devon Carbado & Emily Houh eds.) (forthcoming).

15. See, e.g., SIBA N’ZATILOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 143–81 (1996) (discussing the development, though contested and limited by colonial and neocolonial powers, of the principle of self-determination in connection with questions of decolonization in Africa); Henry J. Richardson, III, *Constitutive Questions in the Negotiations for Namibian Independence*, 78 AM. J. INT’L L. 76, 108–20 (1984) (discussing how “the international legal history of Namibia as a territory,” and its struggle for independence, “illustrates the survival of fundamental legal principles,” including the principle of self-determination, “in the face of massive and continuing violation”).

16. See Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT’L BLACK L.J. 1, 2–3 (2003).

17. For a history of the challenges facing Black internationalism, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003).

on the liberation struggles of peoples of color globally and the ways in which international law could either support or suppress those struggles.<sup>18</sup>

The question of contemporaneous linkages between racial justice and international law alluded to and invoked a shared history. Chattel slavery distinguished the Americas from other regions of conquest in obviously foundational ways in terms of the legal frameworks required to enforce a production system based on human beings as a form of physical property, and to facilitate the trafficking of those human beings in the slave trade. Yet, the broadly shared characteristics of labor coercion, land transfer, and resource extraction described production across the colonial world, whether in settler states or elsewhere.<sup>19</sup>

If postcolonial and other critical theorists had long noted the linchpin role that cultural differentiation played in legitimating systems of imperial domination,<sup>20</sup> the project for legal scholars now became to articulate how that differentiation was enacted through legal institutions and practices. Considering racialization in the global legal and historical context allowed for a foregrounding of its richness and depth—how constructs of racial difference reliably traveled with assertions of cultural difference across a myriad of categories, even as the particulars of racialization varied widely in each context, and how those constructs played a key role in the colonial project. As in U.S. settler colonialism, the “modern discourse of racial difference and hierarchy” mediated and obfuscated “the exclusions built into modern notions of citizenship, sovereignty, representation, and the rule of law.”<sup>21</sup> Elaborate systems of “racialized classifications” facilitated

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18. Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 45–51 (1993); see generally HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008).

19. A growing literature has rejected historical interpretations of “American exceptionalism,” and the narrative of U.S. political history as broadly anti-imperial, that would distinguish U.S. settlers and colonists from the contemporaneous framework of conquest. See, e.g., Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720 (2021) (critically exploring “the naturalized space of the nation—shaped by histories of white settlement, native elimination, racial subordination, exclusion, and the strenuous avoidance of those same histories.”); see also AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 3, 99–175 (2010) (elucidating how U.S. founders’ “ideal of freedom entailed imperial frameworks,” including genocide and chattel slavery).

20. Foundational sources of postcolonial critique include EDWARD W. SAID, *ORIENTALISM* (1978); EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993); ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASSE: LES IDENTITÉS AMBIGUËS* (1988); PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993); *NATION AND NARRATION* (Homi K. Bhabha ed., 1990).

21. Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIA. L. REV. 1219, 1219 (1999).



“legally sanctioned regimes of discipline and control.”<sup>22</sup> Undergirding the particulars lay the “racialized concept of a ‘standard of civilization.’”<sup>23</sup>

From the early modern, preindustrial period of the sixteenth century to the late modern, postindustrial moment of today, critical scholars of international law showed how norms of governance changed over time and yet legitimated the same hierarchy of European over non-European peoples. Francisco de Vitoria, one of the early jurists of international law, asserted both the validity of a universal natural law, and the natural hierarchy of the Spanish conquerors over indigenous peoples.<sup>24</sup> In the nineteenth century, “when colonialism approached its apogee and European states competed among themselves to amass the largest Empires,” international law shifted to a positivist orientation, forming state sovereignty as a basis for international law; now colonial hierarchy was justified not as a result of universal natural law but rather of the attributes that distinguished “civilized states” that rightly could claim and exercise sovereignty from other territories and peoples whose autonomy could not be protected by international law.<sup>25</sup>

The civilization standard that justified colonialism metamorphosed into different standards through different epochs of global governance. Civilization became modernization, with the distinction between developed and developing countries often carrying the subtext of racialized difference.<sup>26</sup> Modernization then became “good governance.”<sup>27</sup>

Within international legal scholarship, the critique of international law’s reinforcement of colonial and neocolonial power dynamics found powerful expression in the development of Third World Approaches to International Law

22. *Id.*; see also JUDITH SURKIS, *SEX, LAW, AND SOVEREIGNTY IN FRENCH ALGERIA, 1830–1930* (2019) (detailing how the development of French colonial law in Algeria constructed indigenous identity in racial and sexual terms).

23. RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* 317 (2008).

24. Anghie, *Civilization and Commerce*, *supra* note 12, at 897; see also ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007) 13–31 [hereinafter ANGHIE, *IMPERIALISM*].

25. Anghie, *Civilization and Commerce*, *supra* note 12, at 900; see also ANGHIE, *IMPERIALISM*, *supra* note 24, at 32–114 (examining the role of international law in constructing nonWestern peoples as lacking sovereignty and therefore legitimately subject to imperial rule).

26. See Thomas, *supra* note 12, at 1215–18 (providing a typology of characteristics attributed to peoples and institutions of the developed versus developing world that track with the subtextual differentiation between white and nonwhite).

27. See Anghie, *Civilization and Commerce*, *supra* note 12, at 893–95, 900–03; Gathii, *supra* note 12; Chantal Thomas, *Does the “Good Governance Policy” of the International Financial Institutions Privilege Markets at the Expense of Democracy?*, 14 CONN. J. INT’L L. 551 (1999).

(TWAIL) as a school of thought.<sup>28</sup> Although the racialization of difference was clearly present in much of early TWAIL analysis of colonialism in international law, it tended not to be foregrounded.<sup>29</sup>

Elsewhere in the academy, important contributions have accumulated over the years to understanding the connections between racial justice, political economy, and international law. The LatCrit movement centers the connections between racial identity and hierarchy in the domestic United States and internationally.<sup>30</sup> A literature has emerged within Critical Race Theory on how legal rules and institutions shape economic inequality so central to racial hierarchy in the United States.<sup>31</sup> Finally, a related literature is emerging on law and political economy, which seeks to consider both racial hierarchies and global dimensions of inequality.<sup>32</sup>

#### **B. Literatures in Economics and Economic History: Racial Capitalism and Dependency Theory**

Racial formations have integrally shaped political economy in the United States, though the nature of the relationship has remained a perennial question. A stock debate within critical histories of capitalism and imperialism has turned on the causality of economics versus racism. This has held significance in important

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28. See generally ANGHIE, *IMPERIALISM*, *supra* note 24; James Thuo Gathii, *Rejoinder: Twining International Law*, 98 MICH. L. REV. 2066 (2000) (arguing for the importance of engaging with colonial history and its legacies for international law and for the developing world); BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017) (providing multiple perspectives on the 1955 Bandung Conference, which formed an important moment in shaping discourses of Third World solidarity); Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, *Reshaping Justice: International Law and the Third World: An Introduction*, 27 THIRD WORLD Q. 711 (2006) (exploring critical perspectives on international law in relation to the priorities of countries, peoples, and regions of the Global South).
  29. Luis Eslava, Michael Fakhri & Vasuki Nesiah, *The Spirit of Bandung*, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES, *supra* note 28, at 3, 17; see E. Tendayi Achiume, *The Postcolonial Case for Rethinking Borders*, DISSENT (2019) <https://www.dissentmagazine.org/article/the-postcolonial-case-for-rethinking-borders> [<https://perma.cc/W7DR-LNFS>].
  30. See, e.g., Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33. U.C. DAVIS L. REV. 751 (2000).
  31. See generally EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS: CASES AND MATERIALS* (2d ed., 2011); DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).
  32. For an example of this emerging literature, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

part because the diagnosis of the social problems of racialized structural inequality has been essential to social and political organization around reforming and transforming it. Thus, the conventional socialist or Marxian position would see anti-Black racism, and, for example, slavery, as a manifestation of capitalist domination. On this view, the socioeconomic afflictions of Black communities were mostly economic problems. Establish a living wage, eradicate exploitative housing, and so on, and those ills would dissipate. Opposed to this was a civil rights perspective that saw the key issue related to racial equality to be not but the eradication of racism as a structuring factor in social life more broadly rather than economic reform. The same set of social problems had to be understood as primarily a product of racial animus. Eradicate that animus—or at least regulate it so that its outward socioeconomic manifestations became trivial—and Black people would be granted access to the opportunities for advancement that were otherwise denied them.

Cedric Robinson's formulation of racial capitalism, published in 1983, responded to this false dichotomy by presenting capitalist exploitation as an economic formation that neither caused, nor resulted from racial hierarchy, but rather flowed through and with it, so that ideas of racialism, and the practices of capitalism, were co-constitutive.<sup>33</sup>

Robinson's account asserts not that the particular racial categories that we use today preexisted capitalism and then became repurposed for capitalist expansion and exploitation; but, rather, the practice and sensibility of racialism and racializing was already deeply an aspect of European culture.<sup>34</sup> Robinson understood the racial formulation of the "Negro" to be merely one of a myriad in European culture, whose racial precedents could be found in the Slavs, the Irish, and other groups.<sup>35</sup> When capitalists became cognizant of the need—or at least the perceived need—for labor at its absolute and utmost conceivable level of coercion, at the level of the utmost extraction with the minimal possible recompense—for "dumb, animal labor"—the "'Negro' was conceived."<sup>36</sup>

Slavery then was organic to capitalism,<sup>37</sup> as one of a wide variety of forms of labor exploitation, including indentured servitude and waged labor. This

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33. CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 9 (1983).

34. For a philosophical account of the impact of white supremacy as an "historical actuality" on "political, moral and epistemological" modernity, see CHARLES W. MILLS, *THE RACIAL CONTRACT* 9, 19 (1997).

35. ROBINSON, *supra* note 33, at 4.

36. *Id.* (internal citation omitted).

37. Important accounts of slavery and capitalism can also be found in EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014);

understanding is a rebuke, not only of the dominant conception and celebration of capitalism—among liberal or, today, neoliberal proponents of it—but also of important modes of resistance to and critique of it on the left—socialists in general and Marxists in particular.<sup>38</sup> Robinson condemned Marx not only because Marx “consigned race, gender, culture and history to the dustbin,” but because Marx had to engage in a stylized mode of seeing and unseeing in order to do so, and a mode that reproduced existing hierarchies by understanding European men as at the vanguard, not only of exploitation in the form of capitalists, but of the revolution against exploitation as the mainstays of the proletariat. Marx had to dismiss the “constant place women and children held in the workforce” and relegate these groups to the status of a proletarian “reserve army.”<sup>39</sup>

Robinson’s understanding of capitalism as ingrained in social forces—most crucially for his analysis of “the particularistic forces of racism and nationalism”<sup>40</sup>—resonates deeply with other thinkers in economic history, both within and outside the study of race. First and foremost, Robinson’s account responded to and built upon foundational accounts of slavery and post-slavery in the Americas by earlier thinkers, especially those of W.E.B. Du Bois on the United States,<sup>41</sup> and C.L.R. James on Haiti.<sup>42</sup> Robinson’s synthetic view of the social bases for capitalism also finds resonance with other economic historians, such as Karl Polanyi’s understanding of the market as necessarily embedded in social

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SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (First Vintage Books 2015) (2014); WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* (2013).

38. Robinson observes that both classical liberalism and conventional Marxism understood capitalism to constitute a negation of feudal relations. ROBINSON, *supra* note 33, at 10. In fact, capitalism did nothing of the sort. If one separates away from the profound effects of capitalism’s own ideology, it, of course, seems entirely logical that capitalism might not radically overturn preexisting social relations, but rather build upon them in some way even while transforming them in others. Instead of negating feudal relations, capitalists effected an “extension of those social relations into the larger tapestry of the modern world[.]” *Id.*

39. *Id.* at xxix, xxxiii.

40. *Id.* at 9.

41. See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* (Transaction Publishers 2013) (1935).

42. See generally C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* (Vintage Books 2d ed., rev. 1989) (1938).

relations,<sup>43</sup> and Max Weber's notion of ideas as the switchmen through which material interests flow.<sup>44</sup>

This point is also deeply relevant to our day—that a platform for economic justice must understand that economic inequality is profoundly shaped by and inclusive of identity categories. This requires correcting narrow or hierarchical frameworks for economic justice that had traditionally prevailed, for example, in the context of labor justice. That the labor movement had at its core the traditional formal industrial workplace, while failing both to understand and to respond to the myriad other forms of labor exploitation in which nonwhite, nonmale and—and in the United States, (both under slavery and now)—noncitizen groups of workers constituted the majority, such as domestic (waged and unwaged) labor, agricultural labor, the informal economy, and so on—represented this central failing, this inability to perceive or overcome a central myth of the very social frame of domination that the aspiration was to vanquish.<sup>45</sup>

In global political discourse beyond the Anglo Americas, elsewhere in the African diaspora, the integrative moves in the analysis of capitalism and racism made by Cedric Robinson, and his antecedents in Du Bois and James, find multiple parallels. In *Discours sur le colonialisme*, by the Martiniquais thinker Aimé Césaire, the argument against compartmentalizing tendencies, particularly of the European political left, asserted that the capitalist problem of the proletariat was integrally linked to the atrocities of colonialism.<sup>46</sup> The work of Césaire and others influenced writers in Black Britain, such as Stuart Hall<sup>47</sup> and Paul Gilroy,<sup>48</sup> who challenged the old school British Marxist left to abandon a purely class based

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43. See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (Beacon Press 2d ed. 2001) (1944) (providing a historical account of the development of market society and arguing that the historical development of markets and societies was inextricably interlinked).

44. See FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 280 (H.H. Gerth and C. Wright Mills eds., trans., reprinted 1998) (explaining that ideas and material relations are both necessary to explain the direction of historical change).

45. See generally RE-IMAGINING LABOUR LAW FOR DEVELOPMENT: *INFORMAL WORK IN THE GLOBAL NORTH AND SOUTH* (Diamond Ashiagbor ed., 2019) (examining the significance of nonformal work environments as a site for labor law and policy).

46. AIME CESAIRE, *DISCOURS SUR LE COLONIALISME* (1950).

47. See, e.g., STUART HALL, *THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT* 34–36 (1988) (explaining how the rise of contemporary conservatism in the United Kingdom was connected to a series of moral panics about social decay, including perceived threats from Black immigrants).

48. See, e.g., PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993) (providing a sociological history of the rise of a distinctive Black Atlantic culture that synthesizes elements from Africa, the Americas, and Europe).

analysis as insufficient to understanding not only the history of colonialism, but also the rise of neoliberalism as a form of “authoritarian populism.”<sup>49</sup> In Hall’s terms, this rise was fueled by ingrained white supremacy provoked by evocations of “moral panics” that cast peoples of color, whether British citizens or immigrants, as targets of “law and order” politics.<sup>50</sup>

With decolonization came a set of critiques focusing on how practices of empire maintained economic inequality in an international community now formally defined by sovereign equality across the developed and developing worlds.<sup>51</sup> Structuralist economists and dependency theorists showed how colonialism established a center periphery relationship. This critique of the international order asserted that, though seemingly resting on liberal ideals of equality, it entrenched global hierarchy by perpetuating the economic relationships arising from colonialism. Theorists of economic structuralism and economic dependency, including Samir Amin,<sup>52</sup> Andre Gunder Frank,<sup>53</sup> Raúl Prebisch,<sup>54</sup> and Walter Rodney<sup>55</sup> mounted these critiques. Their work argued that colonial powers transformed the economies of the Global South into satellites of the Global North. These colonial relationships displaced previous patterns of production in the South and enabled Northern actors to accumulate capital through the provision by Southern economies of raw materials and markets, leading to a large scale transfer of resources from the South to the North. The colonial order not only failed to develop the Global South, but actually underdeveloped it by extracting its resources and transforming its economies

49. HALL, *supra* note 47, at 17–92 (describing the rise of authoritarian populism as a form of the “capitalist state” that maintains the “formal representative institutions” of democracy while also valorizing a “law-and-order society” that prioritizes authoritarian state practice, and is legitimated through the manipulation of “populist sentiment”).

50. See, e.g., STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978).

51. See SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011) (analyzing efforts within international law and institutions to achieve substantive autonomy for developing countries after their formal decolonization).

52. See generally SAMIR AMIN, *LA NATION ARABE: NATIONALISME ET LUTTES DE CLASSES* (1976); SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* (Brian Pearce trans., 1974).

53. See generally ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA: HISTORICAL STUDIES OF CHILE AND BRAZIL* (2d ed. 1971); Andre Gunder Frank, *The Development of Underdevelopment*, *MONTHLY REV.*, Sept. 1966, at 17.

54. See generally RAÚL PREBISCH, *CHANGE AND DEVELOPMENT—LATIN AMERICA’S GREAT TASK: REPORT SUBMITTED TO THE INTER-AMERICAN DEVELOPMENT BANK* (1971); Raúl Prebisch (Secretary-General of the United Nations Conference on Trade and Development), *Towards a New Trade Policy for Development*, U.N. Doc. E/CONF.46/3 (1964) [hereinafter Prebisch, *New Trade Policy*].

55. See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972).

from self-reliant (albeit subsistence) to dependent on both imports from, and exports to, Northern markets. Formal independence, these thinkers asserted, left this underlying organization largely unchanged. As such, the economic dependence of the Global South persisted, as did the dominance of economic actors from the Global North.

### C. Conclusions on Critical Perspectives

Despite the differences in focus, all of the theorists discussed above sought to show how a population once formally excluded from a putatively universal and liberal legal system and relegated to a formally separate and subordinate system—nonwhites in the United States and other metropolises of the center; and Third World states in the international, interstate community—had been failed by a subsequent formal inclusion that ignored deep rooted structural inequities.

These literatures also show how formal and identity based differentiation provided the backdrop for the early formations of capitalism and colonialism that continue to generate effects today. And, though the specifically racialized aspect of such identity based differentiation was often more implicit than explicit in theorizing about the Third World context, the totality of writings in postcolonial literatures make unmistakable the historical linkages between ideational matrices of racial differentiation and mechanisms of economic exploitation across global center-periphery axes.

While the notion has long been in place that racial subordination produced persisting structural economic inequalities, these literatures contest a prevailing view that racialized subordination has operated as a mere aberration or deviation from the inherent features of markets that would otherwise be driven by race neutral logics. Instead, these literatures establish that racial differentiation constituted a crucially important mechanism for accumulating profit and for structuring global networks of production, for example by justifying practices of forced labor and by pressing populations and territories into service in the production of cheap raw materials and of markets.

To this historical analysis must be added an analysis of the continual reinstantiation, and reinscription, of racial differentiation as a fulcrum of political economy. In other words, it is not the case that racial inequality today is an unfortunate legacy of practices that, though wrongful, lie in the distant past. Rather, racial markers continue to provide great explanatory power to show how and why contemporary practices of suppression, subordination, and dispossession, reinforce and perpetuate those historical inequalities. An extensive body of both journalistic and scholarly work has elucidated the web of

economically discriminatory practices continuing into contemporary times, from the dispossession of slavery to redlining, foreclosures, and subprime mortgages.<sup>56</sup> Other work has shown how those processes have in turn intensified vulnerability in racial minority communities to the transformative effects of economic globalization.<sup>57</sup>

## II. AN ANALYSIS OF KEY SECTORS IN GLOBAL POLITICAL ECONOMY

In the international law context, the questions discussed above become the following: What is the connection between law's co-constitution of racialization, and global economic inequality, both in historical formations and in contemporary manifestations? Drawing from the panoply of interventions discussed above, one could consider both historical and contemporary institutions of global economic production from the perspective that understands that this production has occurred, not just alongside, but crucially intertwined with, practices of racialized differentiation and hierarchization.

In drawing out these aspects from a critical race perspective, one could demonstrate these phenomena through a range of critical methods. First, external critique highlights the actual harm that legal rules and institutions reflecting racial hierarchies generate in creating and perpetuating economic inequality. Second, internal critique demonstrates that such outcomes are not the inevitable result of the applicable rules and institutions, but rather reflect a choice to adopt a particular set of applications in the context of a range of possible approaches. Third, ideological critique argues that the external harm and internal indeterminacy of the status quo is obscured and justified by reference to prevailing political commitments to putatively liberal legality (legitimate-ideological critique). Fourth and finally, an additional mode of ideological critique argues that this legitimation and mediation occurs not only via justificatory practices arising from liberal legality, but also arises in the context of historical commitments to white supremacy that, though no longer generally avowed, nevertheless operate to suggest that racial hierarchies result from innate superiorities and inferiorities,

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56. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/2PZ4-QX34>]; MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017); KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019).
57. Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000).



rather than as a result of ongoing law, policy and practice (illegitimate-ideological critique).<sup>58</sup>

The next Part considers the global economic order in two of its dimensions linked closely with slavery and colonialism: the production of commodities, and the procurement of labor. Labor is discussed here as an element of economic production, even though a social justice perspective would deny a commodified view of labor,<sup>59</sup> because understanding the political economy logics at play is a crucial aspect of understanding the injustice that has resulted in treating labor as a commodity.

These Subparts look at the international legal norms, instruments, and organizations that shape global economic governance in these realms. They then identify the critiques of international law with respect to their reinforcement of inequality. They end with a consideration of the critical perspectives discussed above to illuminate the dynamic of racialization in global political economy. The contours of this analysis are necessarily presented in broad strokes, and should be understood as a call to further research and study.

#### A. Commodity Production

The international law governing commodity production arises primarily from the treaty regimes established at the end of World War II, reflecting a general commitment within leading states in the international community of the importance both of coordination and of liberalization of economic activity across borders.<sup>60</sup> With respect to international trade, the General Agreement on Tariffs and Trade (GATT) established a set of basic principles and practices in 1948, and formed the basis for the creation in 1995 of the World Trade Organization (WTO), the overarching body for multilateral trade law. The International Monetary Fund and the World Bank also played a role in determining trade policy, particularly in their role as advisors to countries seeking financial assistance, by in some cases conditioning that assistance on borrower countries' willingness to adopt liberalizing reforms.

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58. For an early version of this framework, see Thomas, *supra* note 12.

59. See, e.g., Int'l Lab. Org. [ILO], *International Labour Conference: Declaration Concerning the Aims and Purposes of the International Labour Organisation*, at 4 (May 10, 1944) [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/normativeinstrument/wcms\\_698995.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/normativeinstrument/wcms_698995.pdf) [<https://perma.cc/3KVM-NMNR>].

60. For an overview, see JOHN HOWARD JACKSON, *THE WORLD TRADING SYSTEM* (1989).

The self-conception of the international trade regime is that its central objective is to maximize market openness: Hence, both the GATT and WTO Preamble set out as purposes “the substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international commerce.”<sup>61</sup> GATT/WTO law establishes several legal mechanisms towards these ends.<sup>62</sup> For example, all member states must make commitments to nondiscriminatory treatment of other members. Additionally, the treaties provide for members to negotiate reciprocal trade barrier reductions. The prevailing narrative of contemporary international economic law is that it has been largely successful in achieving market liberalization—so much so that the same successes have provoked a backlash against globalization in recent years.

This narrative was key to the triumphalism that prevailed in the 1990s and 2000s with the fall of the Soviet bloc and the end of the Cold War. The narrative featured two key aspects: one about the nature of markets and the other about the nature of the laws and institutions that facilitated their expansion.<sup>63</sup> Markets, so the narrative went, could only function if supported by good institutions: the rule of law was key to sustaining economic growth. Such conventional wisdom was reflected in the tenets of development policy as articulated in international economic institutions: The reason for the success of the West, and the stagnation of developing countries, lay in a twin failure of markets and institutions. Markets were not sufficiently open, and not sufficiently supported by the rule of law.

In some ways, this narrative fit what was happening in international economic law. The establishment of an enhanced multilateral trade regime (the WTO), the rise of strong regional trade regimes (NAFTA, the EU), and the proliferation of international investment treaties and the institutions that supported them: All these spoke to a strong political commitment to the promotion and growth of market economies and the need for laws and institutions to do so.<sup>64</sup>

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61. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

62. For a comprehensive introduction to GATT/WTO law, see PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* (2005).

63. For an intellectual and political history of this era, see Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV. 967 (2011).

64. See QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018) (arguing that neoliberalism can best be understood as a project, not to abolish economic regulation, but to reconstitute it in the service of particular market practices and ideals).

Yet at the same time, the prevailing narrative covered over glaring flaws and contradictions that threw its viability into deep question. With respect to the narratives surrounding the economic impact of “the rule of law,” the premise that good governance or the rule of law promoted economic growth was never satisfactorily proven, and instead operated as a stunning example of ideology.<sup>65</sup> From a TWAIL/CRT perspective, this ideology reproduced and echoed earlier narratives of the civilization standard.<sup>66</sup> Instead of civilization, it was now governance and rule of law, but the clear implication or subtext was that an innate difference in culture, as marked by ethnic and racial difference, had yielded more corrupt, less effective institutions and thereby generated lower levels of economic growth.

The premise that economic growth depended on market openness was perhaps even more crucial than the questionable premise that economic growth depended on good governance.<sup>67</sup> Again, this notion spoke to an underlying ideology of liberal legality that configured freedom not only in political but also in economic relations—freedom of contract, freedom in markets—as a marker of evolution. This in turn, from a TWAIL/CRT perspective, played on a subtext of racial and cultural difference that explained and legitimated the unequal economic relationship between the Global North and South.

The critique of the normative emphasis on market openness, as implemented through international economic law, encompasses a range of arguments from the postcolonial perspective. First, there is the argument that formal legal equality perpetuates structural inequality. In this case, a principle establishing formal equality among states, in respect of their economic regulations, would only serve to perpetuate dominance of the more powerful states over others.<sup>68</sup> Accordingly, during the period of decolonization, a primary focus of newly independent states was to procure international recognition of the importance of special and differential treatment of weaker economies in order to

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65. Thomas, *supra* note 63.

66. See Gathii, *supra* note 12, at 981; Anghie, *Civilization and Commerce*, *supra* note 12, at 897.

67. See Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV. 967, 984 (2011).

68. Critics like Raúl Prebisch argued that this formal concept assumed “an abstract notion of economic homogeneity which conceals the great structural differences between industrial centres and peripheral countries with all their important implications.” Prebisch, *New Trade Policy*, *supra* note 54, at 6.

allow them to benefit from policies designed to correct for substantive inequality between themselves and stronger economies.<sup>69</sup>

Second is the argument that the focus on market openness in international economic law ignores the historical reality that industrialized states achieved development not by engaging in free trade but rather by engaging in highly strategic and protective trade.<sup>70</sup> When rich countries were developing, they benefited from policies which provided their growth industries with substantial protection, and sought liberalization only when their economies had strengthened to the point that they could be more competitive. The economist Ha-Joon Chang has called this “kicking away the ladder.” The economically powerful states, in insisting on global norms of market openness, were seeking to prevent economically weaker states from employing the same policies that they themselves had used to achieve growth.<sup>71</sup> And in contemporary economic times, the developing states that have most successfully industrialized, for example in East Asia, have done so while maintaining significantly protective domestic trade policies.<sup>72</sup>

Third is the argument that, not only was market openness not the norm at the time when developed countries were industrializing, but also it has not been the norm in the current trade regime with respect to the sectors that are of greatest

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69. See Kevin Kennedy, *Special and Differential Treatment of Developing Countries*, in *The World Trade Organization: Legal, Economic and Political Analysis* (Macrory P.F.J., Appleton A.E., Plummer M.G. (eds), 2005). The principle of special and differential treatment encompassed policies of both developed and developing countries. For developing countries, it meant special entitlements to maintain higher trade barriers than would otherwise be permitted. An example is the special rule for developing countries on quantitative restrictions. See GATT, *supra* note 61, at art. XVIII. For developed countries, it meant committing to providing developing countries with especially favorable market access in certain categories. See Decision, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 2(a), n.3, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 203 (1980).

70. BS Chimni, *Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 21, 24–28 (Chantal Thomas & Joel P. Trachtman eds., 2009).

71. HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2003).

72. See, e.g., ALICE H. AMSDEN, *THE RISE OF “THE REST”: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* 125–60 (2001) (explaining that late industrializing developmental states employed numerous strategies of economic management that involved only selective market opening); DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* 3 (2018) (observing that countries that have successfully navigated globalization have employed mixed strategies involving some export promotion and market liberalization and some domestic protectionism, whereas those that relied on “free trade alone” have generally proven less successful).

economic importance for developing countries. For most of the post–World War II trade regime, the international trade rules on agriculture and textiles were blatantly in violation of the GATT rules.<sup>73</sup> Developed states maintained domestic trade policies that openly contravened GATT law. For example, GATT Article XI prohibits the general use of quantitative restrictions, such as import quotas, to protect domestic industries.<sup>74</sup> While there were some limited exceptions, developed countries maintained broad quota systems for textiles and agricultural products that were not permitted by those exceptions, in order to protect their domestic industries. Additionally, while GATT/WTO law disallows subsidies favoring a particular industry, developed countries have maintained generous subsidies, for example, for their domestic farmers.<sup>75</sup>

This occurred even though the same states, in the context of establishing the GATT, pledged fealty to the principle of free trade under which developed countries should have ceded market share in these types of products to developing country producers that could produce them more cheaply. Not only did developed countries maintain these domestic market protections, but they also established and maintained international agreements in textiles<sup>76</sup> and in a range of agricultural commodities.<sup>77</sup> Only with the advent of the WTO in 1995 did developed countries agree to dismantle these protections;<sup>78</sup> however, in many instances that process has not occurred satisfactorily.<sup>79</sup>

73. See generally BS Chimni, *Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 21, 30 (Chantal Thomas & Joel P. Trachtman eds., 2009).

74. General Agreement on Tariffs and Trade art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

75. For discussions of agriculture in international trade law, see MELAKU GEBOYE DESTA, *THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE* (2002); MICHAEL FAKHRI, *SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW* (2014).

76. Agreement Regarding International Trade in Textiles, Dec. 20, 1973, GATT B.I.S.D. (21st Supp.), at 3 (1975).

77. International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203; Second International Tin Agreement, Sept. 1, 1960, 403 U.N.T.S. 3.

78. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 14; Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

79. Carmen G. Gonzales, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENV'T L. 433, 453 (2002). The WTO's Doha Development Round attempted to correct some of these issues with only modest success. See, e.g., Kevin C. Kennedy, *The Doha Round Negotiations on Agricultural Subsidies*, 36 DENV. J. INT'L L. & POL'Y 335 (2008).

In sum, the ideal of market openness that flowed from liberal legality as expressed in international economic law operated to perpetuate the dominance of developed countries over developing countries. In its implementation through commitments to formal nondiscrimination, it allowed for more powerful economic actors to dominate less powerful actors.<sup>80</sup> In its historical and contemporary non-implementation, it reflected a clear bias towards more powerful economic actors.

Although the critique of international economic law from a developing country perspective has been well established, the additional analysis of this set of arrangements in respect of racial justice has not explicitly ever really been addressed. But a consideration of the critical legal theory and economic history literatures referenced above can surface such considerations in both historical and contemporary respects.

It is no historical accident that agricultural production was located in the Global South and in countries that were formally colonies of the Global North. The use of these territories for the production of raw materials needed to fuel industrialization was an explicit and overridingly vital purpose of colonialism.<sup>81</sup> Cotton, sugar, cocoa, bananas, oil, tin, rubber, tea, coffee, minerals, and so many other commodities made the colonial world a source of vast wealth accumulation for developed economies and the industrialists within them. These economies were organized in order to explicitly incorporate them into chains of wealth production that would benefit those in the developed world. They were not intended to produce any level of self-sufficiency nor local profitability, but were designed to be dependent on and peripheral to the Global North. When these territories won recognition as independent states—as equal sovereigns—the rules and practices shaping international economic relations did not adjust so as to them to achieve substantive economic independence or equality.

The biases of international economic law against developing countries lend themselves, in consideration of the critical methods discussed above, to external critique in that they lead to the perpetuation of economic inequality. They also reflect particular and contingent applications of the underlying norms—for example, a substantive rather than formal interpretation of the normative imperative to eliminate discriminatory treatment would have yielded much

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80. Note the parallels between equal protection in U.S. constitutional law and nondiscrimination in GATT/World Trade Organization (WTO) law. For a comparison and contrast of these two, see Ari Afilalo & Sheila Foster, *The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 GEO. INT'L ENV'T L. REV. 633, 646–60 (2003).

81. The analyses here were developed by the structuralist and dependency theorists discussed above. See *supra* n. 52–55.

different rule arrangements in respect of developing countries. These predispositions support a legitimate-ideological critique because the presentation of the system as committed to liberal legal objectives of market openness disguises the ways in which the system contravenes those objectives and how those objectives, in and of themselves, also perpetuate inequality. And they support illegitimate-ideological critique in that white supremacy—whether avowed or operating at an unconscious or implicit level—allows for a hierarchy in which peoples of color remain stratified in the bottom seems natural and reasonable.

## B. Labor Migration

The international law of sovereignty entails the right to exclude noncitizens. It is this fundamental tenet of international law that shapes the framework of labor migration in today's economy. Because states maintain their territorial prerogative over immigration, workers who wish to travel across borders must submit to the border controls and police controls of the destination country. While these systems themselves are products of domestic law, the right of states to maintain such law is recognized under international law.

From at least a couple of perspectives, the presumptive exclusion of nonnationals appears uncontroversial. To begin with, if one thinks about labor as a commodity, the presumptive exclusion of workers would be no different than the presumptive exclusion of goods—neither sea vessels bearing shipment containers (carriers of goods) nor airplanes (carriers of people) may cross a territorial border without permission of the destination state.

But people are not goods.<sup>82</sup> Under liberal legality, humans are endowed with rights through which they exercise individual agency. International law, in endorsing this conception, has struggled with the tension it induces between law as articulating the will of states exercised over people, and law as articulating the will of individuals exercised against states.<sup>83</sup> With respect to the movement of people across borders, that dichotomy itself represents a conceptual border that has shifted over time. In earlier eras, states were more concerned with preventing people from leaving their territories (for reasons of national security and monetary policy, among others) than with preventing their entry.<sup>84</sup> Thus, international

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82. For a general discussion of this contrast, see Jennifer Gordon, *People Are Not Bananas: How Immigration Differs From Trade*, 104 NW. U. L. REV. 1109 (2010).

83. See Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999).

84. Martin Lloyd, *The Passport: The History of Man's Most Travelled Document* (2003).

lawyers in the nineteenth century advocated for the human right to freedom of movement as centering around the right to leave any given territory as a reform of then-prevailing state practice. This normative battle was ultimately successful: The right to “leave any country” is now enshrined in international human rights law.<sup>85</sup>

This is not so, of course, for the right of entry.<sup>86</sup> The right of territorial entry is tied to citizenship status.<sup>87</sup> Thus, the same instruments of international human rights law that protect individual rights of territorial exit also deny individual rights of territorial entry.<sup>88</sup> From the currently conventional point of view in international human rights law, then, the right to authorize territorial entry and so to exclude people also appears uncontroversial. Yet, because that premise contradicts the core commitments to equality and autonomy of the human rights corpus, it is increasingly contested.<sup>89</sup>

If sovereign borders generate moral harm through their contravention of tenets of liberalism, they also carry economic significance that reflects and reproduces global inequality. Cross border labor migration is a powerful tool for poverty reduction. For many developing countries, the volume of remittances received by their nationals working abroad exceeds the funding received through development aid from international organizations or other governments.<sup>90</sup> For this reason, many economists and international lawyers have stated that nothing would better contribute to global poverty reduction and a fairer global distribution of income than to establish broad based labor mobility.

Moreover, the logic of market openness would criticize national borders as restraints on trade.<sup>91</sup> Many trade experts have argued that migration flows should

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85. See, e.g., International Covenant on Civil and Political Rights art. 12(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Everyone shall be free to leave any country, including his own.”).

86. For a discussion of the paradoxical aspects of this point, see SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004).

87. See, e.g., ICCPR, *supra* note 85, at art. 12(4). (“No one shall be arbitrarily deprived of the right to enter his own country.”).

88. See Moria Paz, *The Incomplete Right to Freedom of Movement*, 111 AJIL UNBOUND 514 (2018).

89. See CHANTAL THOMAS, *DISORDERLY BORDERS: HOW INTERNATIONAL LAW SHAPES IRREGULAR MIGRATION* (forthcoming 2021).

90. OECD Development, *PERSPECTIVES ON GLOBAL DEVELOPMENT 2017: INTERNATIONAL MIGRATION IN A SHIFTING WORLD* 187 fig. 7.3, [https://doi.org/10.1787/persp\\_glob\\_dev-2017-graph60-en](https://doi.org/10.1787/persp_glob_dev-2017-graph60-en) (graphically showing the “remittances to developing countries far exceed official development assistance”).

91. The common law principle against restraint of trade has been expressed as follows: “The public have an interest in every person’s carrying on his trade freely: so has the individual. All



be directly incorporated into the globalization project.<sup>92</sup> If the justifications for trade liberalization are valid, this point of view goes, then they should apply to trade provided by workers in addition to other forms of commerce. Applying an economic perspective to national boundaries, one can see them as operationalizing a form of protectionism. The wealth of rich country economies is policed and enforced through borders and exclusion.

Yet international law reflects virtually the opposite: There is a striking absence of generally sanctioned work authorization, even in this era of concerted globalization. Even as, over the past few decades, international economic law has greatly (though not consistently) expanded governmental commitments to open domestic markets, as discussed in the preceding Subpart, the prevailing regime has very much reflected an “open markets but closed borders” dynamic, establishing freedom of movement for goods and capital, but not people.<sup>93</sup> This dynamic arises out of a politics of territorial exclusion that is deeply underwritten by international law, which enforces a conception of sovereignty that entails the right to exclude.

The argument here is not that a pro-market perspective should be more pervasively adopted. Rather, it is that careful attention should be directed to how and when market controls—such as borders—are imposed, and what their effects are. Immigration controls do not deter migration in a world which is both highly unequal and highly interconnected. Rather, those controls make it more likely that some people’s movements across borders will be unauthorized, and that those people will then be vulnerable to exploitation. Immigration controls constitute the single most significant legal determinant of “modern-day slavery”—that is to say, highly precarious and oppressive exploitation that is primarily borne today by migrants with nontraditional documentary status.<sup>94</sup>

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interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.” *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.* [1894] AC 535 (HL) 565 (appeal taken from Eng.).

92. Howard F. Chang, *Migration as International Trade: The Economic Gains From the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 371–414 (1998); Sungjoon Cho, *Development by Moving People: Unearthing the Development Potential of a GATS Visa*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 457–74 (2009); Joel P. Trachtman, *The International Law of Economic Migration: Toward the Fourth Freedom* (2009).

93. Chantal Thomas, *Migration and International Economic Asymmetry*, in WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR INCLUSIVE GLOBALIZATION 241, 242 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

94. Chantal Thomas, *Immigration Controls and “Modern-Day Slavery,”* in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 212 (Prabha Kotiswaran ed., 2017).

In the previous Subpart on commodity production, the postcolonial critique noted the ways in which formal equality can perpetuate substantive inequality. In that Subpart, the focus was the set of rules that establish free trade under international economic law discussed in Subpart II.A. Similarly, with respect to labor migration discussed in this Subpart, we see the operation of a formally neutral rule in a way that reinforces global inequality. Rather than establishing a norm of openness, however, in this case the principle in question is one of closure—the right of territorial exclusion of nonnationals. Because this presumptive exclusion occurs against a backdrop of economic hierarchy across nations, it protects and reinforces it.

A postcolonial critique of international law on migration, then, would note that the economic effects of the current arrangement in international law is to perpetuate inequality and hierarchy between rich and poor countries, and among their citizens. It would also emphasize that the status quo differs significantly from the international law that prevailed at the very beginning of the modern era—the period of conquest—in which jurists proclaimed a natural law that recognized rights of travel and hospitality, establishing presumptive admissibility rather than exclusion.<sup>95</sup> From this perspective, the pursuit of movement across borders by peoples of the Global South towards the Global North represents an equitable claim in addition to an economically redistributive one.<sup>96</sup> This historical critique acts as a mirror image to that of the changes in international trade law over time.

Subpart II.A looked at the substantive inequality arising from formal equality; the historical contingency of the currently prevailing norm; and the ways in which the currently prevailing norm is often contradicted by actual practices. One can see something of this same unevenness, too, with respect to labor migration. Although noncitizens are presumptively excluded, the reality is that citizens of richer countries enjoy far greater effective mobility than citizens of poorer countries.

If the postcolonial critique of migration law and policy demonstrates how the status quo perpetuates inequality, the question then becomes how this analysis relates to the racial justice perspective. Much of the critical theory discussed above in Part I noted the mutual constitutiveness of “race” and “nation.”<sup>97</sup> Racial

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95. See James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT'L L. 392 (2013).

96. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

97. See also BALIBAR & WALLERSTEIN, *supra* note 20; STUART HALL, *THE FATEFUL TRIANGLE: RACE, ETHNICITY, NATION* (Kobena Mercer ed., 2017).

formations, as many of these thinkers demonstrated, have played an important role in structuring global economic inequality. It follows then, that these racial formations also shape the landscape of citizenship and migration in global political economy. Birthright citizenship in affluent society, as Ayelet Schachar observes, should be thought of as a form of property inheritance, as a valuable entitlement transmitted by law.<sup>98</sup> This argument forms a striking parallel to Cheryl Harris's work on racial privilege as a form of property.<sup>99</sup>

Racial privilege and national citizenship are deeply interlinked: Conceptions of statehood have been deeply tied to ethnonational identity.<sup>100</sup> This analysis requires a consideration of the effects, in political economy, of the legal framing of citizenship as a mechanism for exclusion. Categories of slavery and citizenship are integrally connected to political economy and economic inequality, both historically and contemporaneously. From this perspective, it is hardly coincidental that forms of precarious and exploitative work that were done historically by individuals marked by the legal status (accompanied often by a racial designation) of slave or servant have been taken up today by those marked by the legal status of noncitizen.

Returning to the four methods set forth above, external critique applies to the principle of sovereign territorial exclusion because of its perpetuation of inequality. Internal critique applies because the status quo is historically contingent, and only one of many possible arrangements even under its own principles. Legitimate ideology critique applies because references to norms of sovereign equality as well as to certain conceptions of citizenship obscure the harmful global impact and internal contingency of the status quo. And illegitimate ideology critique applies because of the essential work that white supremacy in its xenophobic manifestations does to neutralize or justify the pervasive cruelty and severity of the current framework.

### C. Conclusions on International Law and Political Economy

International law maintains presumptive norms establishing "open markets but closed borders."<sup>101</sup> That arrangement reinforces global inequities.<sup>102</sup> It not

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98. AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

99. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

100. See, e.g., Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005).

101. Compare *supra* Subpart II.A (Commodity Production), with *supra* Subpart II.B (Labor Migration).

102. See *supra* note 101.

only contradicts both actual practices today, in many cases, but it also departs from the presumptions of earlier eras, further revealing its normative contingency.<sup>103</sup> Today's international law reflects "open markets but closed borders," but earlier international law reflected "closed markets, open borders." Each juxtaposition has mirrored the interests of powerful over less powerful global actors.

The contours of the international law and policy that effectuate these outcomes take varying forms. At times, the prevailing norm rejects formal differentiation, and embraces formal equality, and yet does so in a way that reproduces substantive inequality. In this category, one can place the ideal of liberalization and nondiscrimination of international economic law, and its effects on economic production; and the ideal of sovereign prerogative over the territorial entry of noncitizens in international human rights law, and its effects on labor migration.

Moreover, in many instances, the discourse of such international norms acknowledges differentiation in ways that are nonracial, but that nevertheless carry a subtext that reflects and reinforces racialized power.<sup>104</sup>

### III. RACE AS A TECHNOLOGY OF GLOBAL ECONOMIC GOVERNANCE

Based on the discussions of the previous Parts, a critical race perspective would argue that racial formations both justified early practices setting up the cognizable modern economy, and continue to perpetuate and legitimate practices of exclusion to this day. These contemporary effects are significantly mediated by laws and institutions.

The puzzle for the current project is to articulate how that analysis plays out in the global context. In what ways has race served as more than a mere correlative variable alongside other determinative metrics of hierarchy? How has the function of racialization structured economic relations both in historical background and in modern day practice? In thinking about these practices of material subordination and ideological legitimation, the concept of race, more precisely of racialization, as a technology proves useful.

The term technology as used here goes beyond the concrete artifact.<sup>105</sup> It extends to the set of knowledge practices involved in the construction,

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103. See *supra* note 101.

104. See *supra* note 3 and Subpart I.A.

105. This concept as used here arguably features a broader scope than the way the term is deployed, for example, in Radhika Mongia's brilliant work on the passport as a technology for regulating migration. Radhika Vyas Mongia, *Race, Nationality, Mobility: A History of the Passport*, 11

legitimation, and enforcement of social categories—in this case, identity categories. The term is meant to bring attention to both the social construction of knowledge, and the active, practical application of that constructed knowledge, drawing insights from science and technology studies<sup>106</sup> as well as discourse theory.<sup>107</sup> The term highlights the active dimension of social

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PUB. CULTURE 527 (1999) [hereinafter Mongia, *Race, Nationality, Mobility*]; RADHIKA MONGIA, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE (2018) [hereinafter MONGIA, INDIAN MIGRATION AND EMPIRE]. Mongia's use of the term evokes the style of James Scott's *Seeing Like a State* in the discussion of statehood as significantly arising from a set of administrative practices. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998). The important insight of such works is that the enforcement of foundational concepts such as sovereign rule depended on the existence of a wide range of technologies and capacities. The development and enforcement of border control, for example, in the subject of Mongia's study, depended on the existence of mechanisms of governance that can detect valid and invalid entries and can mobilize resources of coercion and legitimation to effectuate exclusionary policy. See Mongia, *Race, Nationality, Mobility*, *supra*, at 528. As the Trump administration's focus on expanding the U.S. Southern border wall demonstrated, even powerful and technologically advanced countries have only partially achieved physical control of their borders. Borders, even of powerful countries bent on deterrence and exclusion of unauthorized entry, remain porous. The porosity of borders has in turn engendered a phalanx of ancillary and extraterritorial techniques of border control designed to prevent the physical arrival at the border of persons unauthorized for entry. But all of these practices must be politically and ethically justified—it is here that the scripts of nation, and the partially subtextual scripts of race and ethnicity, do their work. The passport in Mongia's analysis is "one concrete technology that harnesses this strategy to produce the 'nationalized' migrant body." MONGIA, INDIAN MIGRATION AND EMPIRE, *supra*, at 113. The term technology as I use it in the present analysis extends out of the concrete artifact of, for example, the passport, to refer to these larger "strategy," in Mongia's terms. *Id.*

106. The field of science and technology studies (STS) highlights how knowledge about the natural world is inescapably shaped by structures of social interaction and by the cultural and political formations that influence human understanding. A foundational work in this field is THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

107. The notion of technology I use here is influenced by the tradition of discourse analysis and in particular by the notion of the "*dispositif*" as a mode of structuring knowledge. Though often translated as device or apparatus, translating *dispositif* as "technology" emphasizes the continual need for the inscription and reinscription, for the practice of knowledge in addition to its reification. The concept of the *dispositif* was given illuminating discussion in an interview with Michel Foucault:

What I want to place under the rubric of the term *dispositif* is a heterogenous combination of discourses, institutions, . . . regulations, laws, administrative measures, scientific formulations, and precepts of philosophy, morality, philanthropy . . . in short, what is said as well as unsaid: these are the elements of the *dispositif*. The *dispositif* itself is the network, the interlinkage, that is established across these elements. [It is also] the nature of the linkage among these heterogenous elements. As such, it can appear both as an institutional program, and also on the contrary as an element that obscures a practice that itself remains invisible, or that functions as a reinterpretation of that

construction,<sup>108</sup> by analytically incorporating a role of strategic decisionmaking, expertise, and knowledge. In that sense, the term highlights somewhat different considerations than the term social construct: A social construct might be something we all live within, built at some point in the past; a technology emphasizes the practice of continual use and application.

In considering race as a technology, we can think about the interlocking dimensions of racialization necessary to service the larger objectives of economic governance as the following: empirics (how the categories were themselves constructed, and how knowledge was used to substantiate those categories); legal rule (the role of law and lawmaking in helping to construct and police these categories); and economic allocation and production (the specific ways that racialization was then deployed in the service of global political economy), itself dependent on the first two forms of racialization (empirics and legal rule). These first two have received extensive attention in numerous literatures familiar to the legal academy; the last, on economic allocation and production, is the subject of renewed attention within literatures on racial capitalism. I will take each of these illustratively in turn. Before proceeding, I note again that this discussion is necessarily abbreviated, and should most properly be read as outlining an agenda for further research.

### A. Race as a Technology of Empirics

As applied to the concept of race, the phrase technology of empirics highlights how knowledge that purported to be about the natural world was deeply

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practice . . . [Finally, the *dispositif*] takes on a particular formation at a given historical moment and functions in response to the exigencies of that moment. The *dispositif* as such functions strategically. It for example was able to focus on the reabsorption of a free-floating population that an essentially mercantilist society would find burdensome: there, we see the strategic imperative, unfolding within the matrix established by the *dispositif*, becoming gradually a mechanism for the control and subjection of madness, mental illness, and neurosis.

D. Colas, A. Grosrichard, G. Le Gaufrey, J. Livi, G. Miller, J. Miller, J.-A. Miller, C. Millot, & G. Wajeman, *Le jeu de Michel Foucault*, ORNICAR? BULLETIN PERIODIQUE DU CHAMP FREUDIEN, July 1977, at 62 (translation my own) <http://libertaire.free.fr/MFoucault158.html> [<https://perma.cc/4UEM-PFBW>]. For further discussion of knowledge production through discourses and dispositifs as “flows of knowledge throughout time and space,” see Siegfried Jäger & Florentine Maier, *Analysing Discourses and Dispositives: A Foucauldian Approach to Theory and Methodology*, in *METHODS OF CRITICAL DISCOURSE STUDIES* 109, 111 (Ruth Wodak & Michael Meyer eds., 3d ed. 2016); JONATHAN POTTER, *REPRESENTING REALITY: DISCOURSE, RHETORIC AND SOCIAL CONSTRUCTION* (1996). See also MICHEL FOUCAULT, *LES MOTS ET LES CHOSES* (1966); MICHEL FOUCAULT, *L’ARCHEOLOGIE DU SAVOIR* (1969).

108. Thanks to Seth Davis for raising this question.

constructed.<sup>109</sup> Information presented as empirical was in fact imbued by racialized ideology, so as to render racial hierarchy seemingly natural, in accord with incontrovertible realities, and therefore inevitable. With respect to race, one begins, of course, with racial ideology presented as the science of biology. The conception of biological race experienced a heyday in the pseudoscience of the nineteenth century, which endorsed the sociopolitical categories that had by then arisen.<sup>110</sup> This was subsequently debunked: Scientists have demonstrated that there is more biological and genetic variation within racial categories than across them, exposing as spurious the notion that a single marker such as skin color could stand in for or reliably reference a larger set of traits.<sup>111</sup> Nevertheless, the concept of race as a biological or genetic feature continues to play a foundational role in shaping how people see the contemporary world—and crucially, how they

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109. Mahmud, *supra* note 21, at 1226 (“‘Scientific racism,’ which dominated European thought, saw itself as based on ‘science,’ the body of knowledge rationally derived from empirical observation, then supported the proposition that race was one of the principal determinants of attitudes, endowments, capabilities and inherent tendencies among human beings.”). Alexander D. Barder, *Scientific Racism, Race War and the Global Racial Imaginary*, 40 *Third World Q.* 207, 209 (2019) (“[A] global racial imaginary construed the world as profoundly hierarchical; it posited that races were intrinsically incommensurable . . . . These ideas about hierarchy . . . emerged out of the widespread acceptance of scientific racism and social Darwinism as the ‘scientific’ background of politics more generally.”).
110. See generally THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 54–83 (2d. ed. 1997) (providing an account of how nineteenth century medicine, natural history, ethnology, anthropology, and other disciplines developed assertions of racial superiority and inferiority); JOHN P. JACKSON, JR. & NADINE M. WEIDMAN, *RACE, RACISM, AND SCIENCE: SOCIAL IMPACT AND INTERACTION* 29–128 (2004) (describing the rise of scientific racism in the nineteenth century and its prevalence into the first half of the twentieth century).
111. See R. C. Lewontin, *The Apportionment of Human Diversity*, in 6 *EVOLUTIONARY BIOLOGY* 381, 396–97 (Theodosius Dobzhansky, Max K. Hecht & William C. Steere eds., 1972). Over the years the racial view of genetics has resurfaced periodically, see, for example, Armand Marie Leroi, Opinion, *A Family Tree in Every Gene*, N.Y. TIMES (Mar. 14, 2005), <https://www.nytimes.com/2005/03/14/opinion/a-family-tree-in-every-gene.html> [https://perma.cc/ZL8A-3ZM7]. For further discussion and affirmation of Lewontin’s essential conclusions in light of contemporary genetic science and technology, see John Dupré, *What Genes Are and Why There Are No Genes for Race*, in *REVISITING RACE IN A GENOMIC AGE* 39 (Barbara A. Koenig, Sandra Soo-jin Lee & Sarah S. Richardson eds., 2008). For a discussion of the complexities and continued significance of racial and ethnic categories in scientific research, see Pamela Sankar, Mildred K. Cho & Joanna Mountain, *Race and Ethnicity in Genetic Research*, 143 *AM. J. MED. GENETICS* 961 (2007). For discussions targeted to more popular audiences, see Heather L. Norton, Ellen E. Quillen, Abigail W. Bigham, Laurel N. Pearson & Holly Dunsworth, *Human Races Are Not Like Dog Breeds: Refuting a Racist Analogy*, 12 *EVOLUTION: EDUC. & OUTREACH* 12 (2019); Megan Gannon, *Race Is a Social Construct, Scientists Argue: Racial Categories Are Weak Proxies for Genetic Diversity and Need to Be Phased Out*, *SCI. AM.* (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue> [https://perma.cc/RTV9-X5QU].

understand race as an immutable, physiological phenomenon, as opposed to a social phenomenon.

Such notions supported the development of the one-drop and similar concepts of race.<sup>112</sup> More formally, the one-drop rule is a rule of hypodescent: “anyone with a known Black ancestor is considered Black.”<sup>113</sup> When considered afresh, the oddness of such a rule becomes immediately apparent, not only because it relies on the concept of race, but also because, for this rule to apply, there must be no such rule for any other racial group since, in the early U.S. paradigm, multiraciality was not permitted.<sup>114</sup> In this paradigm, Blackness was a marker transmitted through the blood that was both supremely potent<sup>115</sup> and fundamentally degrading. This hematological conception reflected scientific understanding of the time. As is well understood—and as enforced by the law discussed in the next Subpart—this was a supposedly biological designation that consigned its members to a subservient caste.<sup>116</sup>

The “master discourse of racial difference” took on varying incarnations in various localities.<sup>117</sup> In the United States, the racial division in its early formulation was essentially binary; in other societies, the spectrum featured additional gradations. Many other societies with a significant African descended population and strong racial classifications, like Brazil and South Africa, nevertheless differed from the United States in recognizing multiracial categories and situating them in the racial hierarchy.<sup>118</sup> Societies elsewhere in the settler colonial world without significant African descended populations, focused on language, caste, or other ethnic markers to differentiate groups. The result, as Tayyab Mahmud writes:

was a contextual construction of race, remarkable for its contingency, plasticity, and malleability. The structure of this construction involved: (i) slippage of classificatory categories, whereby “race,” “caste,” “tribe,”

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112. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997).

113. *Id.* at 1163.

114. Hickman, *supra* note 112, discusses the law and politics of multiraciality in the U.S. context.

115. Judith Surkis has powerfully argued in another context how crucial the assertion of difference that was inherent and immutable was necessary component for the mediation of a social world that purported to be based on principles of universal equality, and yet maintained clear hierarchies and exerted domination and rule. SURKIS, *supra* note 22.

116. See *infra* Subpart III.C for a discussion of the role of legal rule and economic production. For a discussion of racial caste, see ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

117. Mahmud, *supra* note 21, at 1228.

118. ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF THE UNITED STATES, SOUTH AFRICA, AND BRAZIL* (1998).



“stock,” and “nation,” were used interchangeably; (ii) racialization of the constructs, whereby all these categories were posited as being essentially biological and hereditary, questions of blood and descent; (iii) a two-tier scheme of racial hierarchy, under which . . . all natives were deemed racially inferior to the colonizers’ race[.]<sup>119</sup>

The one-drop rule, marking all those in the United States with any African heritage as Black, worked alongside and reinforced the ancient Roman law of determining the status of children who were the issue of free men and enslaved women.<sup>120</sup> That rule, in the ancient Roman law, was that the status of the child followed the status of the mother (in contrast to other legal systems, such as Islamic law, in which a child borne of a slave mother would follow the status of the father and could be freed).<sup>121</sup> In the United States, the ancient Roman precept reemerged, supported by a hematological concept of race, and in particular, Blackness,<sup>122</sup> as a supremely powerful and potent marker transmitted through the blood.<sup>123</sup>

Beyond biomedical constructs, numerous other sources of knowledge arose to reinforce the precepts of white supremacy. It was “in the context of Europe’s colonial expansion that modern disciplines of geography, anthropology, history, and literature developed to make the expanding world intelligible and manageable.”<sup>124</sup>

## B. Race as a Technology of Legal Rule

The reinforcement of racialized difference historically depended on multiple tools of governance. In the antebellum United States, the constitutional law permitting chattel slavery and the state laws permitting recovery of fugitive slaves constituted only the most broadly applicable forms of racialized governance. Forcible and racialized difference was everywhere: in the criminalization of

119. Mahmud, *supra* note 21, at 1228.

120. See Paul Finkelman, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 105, 110–11 (Jean Allain ed., 2012).

121. For a discussion of the ancient Roman law, see YOUVAL ROTMAN, *BYZANTINE SLAVERY AND THE MEDITERRANEAN WORLD* 25–81 (Jane Marie Todd trans., Harvard Univ. Press 2009) (2004). For a discussion of this rule in Islamic law, see JONATHAN A.C. BROWN, *SLAVERY & ISLAM* (2019).

122. For work on the ontologies of Blackness, see Roger William Reeves, *Black Western Thought: Toward a Theory of the Black Citizen-Object* 1–62 (Dec. 2012) (Ph.D. dissertation, University of Texas at Austin) (on file with the University of Texas at Austin Library).

123. See THOMAS, *supra* note 114.

124. Mahmud, *supra* note 21, at 1226.

reading and writing by enslaved persons; in the evidentiary rules discounting their testimony; in the amnesty granted for the murder of enslaved persons who were declared runaways or who were undergoing punishment at the time of their death; and in countless other local and state laws.<sup>125</sup> Post Reconstruction, the “[B]lack codes” of the Jim Crow South transposed these aims into the elaborate regulatory infrastructure of racial segregation.<sup>126</sup> Discourses of Eurosupremacy in the U.S. settler colonial context shaped the legalized subordination not only of African descended peoples but also of other non-European peoples, from indigenous societies to Chinese and other non-European migrant workers.<sup>127</sup>

The administrative projects of colonialism elsewhere were no less complex. Colonial administrations in the Americas and Asia depended on the insistence of cultural/racial difference, and the cultural/racial difference in part grew out of the legal apparatus established by colonial administrations. In colonial India, for example, “vagrancy laws called for the deportation of whites whose deviant behavior undermined the mystique of their race; Cantonments Acts designed urban spaces to ensure segregation; Contagious Diseases Acts contained interracial sexual relations; and judicial procedures prohibited natives to sit in judgment over the colonizers.”<sup>128</sup> In colonial Mexico, the development of “*generos de gente*” (*españoles, indios, negros, mulatos, meztizos*, etc.) involved the entrenchment of ethnogeographic, ethnoreligious, and socioeconomic stereotypes into legal discourse, generating systems of institutionalized discrimination.<sup>129</sup> In colonial Brazil, categories of racialization bore the imprint of the imperial Portuguese “regulations for Purity of Blood (*Estatutos de Pureza de Sangue*)” aimed at identifying Europeans of non-Christian heritage as well as indigenous, African, and mixed categorizations.<sup>130</sup> Across vastly disparate colonial encounters, these master narratives and discourses of difference performed the same magic: to insist that social categories in any given context, so different from

125. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1988).

126. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (Icon Books 2012) (2008).

127. See NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 79–153 (2020) (examining how narratives of racial superiority have shaped U.S. law across these groups).

128. Mahmud, *supra* note 21, at 1225.

129. ROBERT C. SCHWALLER, *GÉNEROS DE GENTE IN EARLY COLONIAL MEXICO: DEFINING RACIAL DIFFERENCE* 48–49 (2016). Schwaller emphasizes that in their earliest formations in the sixteenth century, these categories reflected “incipient racial attitudes” rather than modern conceptions of race, in part because they had not yet incorporated the pseudoscientific conceptions of racial biology that arose in the eighteenth century. *Id.* at 49.

130. Hebe Mattos, “*Pretos*” and “*Pardos*” *Between the Cross and the Sword: Racial Categories in Seventeenth Century Brazil*, 80 *EUR. REV. LATIN AM. & CARIBBEAN STUD.* 43, 43 (2006).

the next, nevertheless reflected an inherent and immutable reality of natural and inevitable hierarchy, understood in racial terms.

### C. Race as a Technology of Economic Production

The racial caste system was profoundly related to structuring the means of economic production. Racialization constituted one technology of rule, of domination—not only by those actors with the formal authority to rule, such as governments, but also those with the capacity to exercise control—in this case, all those committed to particular modes of production. This is because its application was a means of denoting the boundaries of physical property—those who were subject to the laws of forced labor. As such, it also entailed access to preferable terms of labor that would profit capitalists in the slavery economy. Planters, traders, and investors—all who benefited from the slavery economy—had a stake in maintaining a racialized system of economic production in which racial caste enabled forced labor. As the abolitionist movement grew in the nineteenth century, capitalists invested in the commodity economy looked on askance. The *American Cotton Planter* declared in 1853: “The slave-labor of the United States, has hitherto conferred and is still conferring inappreciable blessings on mankind. If these blessings continue, slave-labor must also continue, for it is idle to talk of producing Cotton for the world’s supply with free labor. It has never yet been successfully grown by voluntary labor.”<sup>131</sup>

Racial differentiation served as a device for demarcating differential roles in production and consumption: forced labor versus indentured servitude, raw materials production versus industrial production, and so on. It served as a marker for sorting various individuals and groups into various roles in the global economy. In the era of formal slavery and colonialism, the production of commodities and the movement of labor formed two sides of the Triangular Trade: Enslaved Africans were shipped to the Americas; there, their coerced labor harvested the commodities of cotton, sugar, bananas, and so on; and these raw materials were then transported to industrial centers for manufacturing. Peoples of color from other parts of the world were designated particular economic roles as well. In colonial India, for example, the placement of Indians in indentured labor and movement of them to the Americas, where they often occupied “tertiary sectors of the economy” served as an essential building block in the “global

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131. BECKERT, *supra* note 37, at 119.

hierarchy of races.”<sup>132</sup> The practices of racial hierarchization in economic production, here as well, have survived their formal recognition.

The technology of race, of racialization, in global economic governance included the application of expertise and knowledge, as well as of mechanisms of enforcement and control, to harness the appearance of natural and inevitable hierarchy to legitimate profoundly unequal and exploitative systems of production. All three dimensions of racialization summarized here—the presentation of racialization as empirical and natural fact, the enforcement of racial caste through legal rule, and the organization of economic production according to racial caste—worked together and reinforced each other.

### CONCLUSION

The conception offered in this Article, of race as a technology of global economic governance, highlights multiple connections between racialization, law, and global political economy: race as a technology of empirics, in which racial categories purported to be based on empirical knowledge; race as a technology of legal rule, in which laws and institutions helped to shape, as well as enforced, the identity constructs purportedly rooted in empirical knowledge; and race as a technology of economic allocation and production, itself dependent on the knowledge and practice of the technologies of empirics and legal rule, in which one’s racial identity has directly influenced one’s place in global chains of production and consumption.

Racialization in political economy has constituted a social phenomenon of enormous historical and contemporary significance. Technologies of empirics, of legal rule, and of economic production served to establish and entrench racial hierarchies that are reflected to this day.<sup>133</sup> They have informed, at various levels of explicitness, the principles and practices that shape global economic governance.<sup>134</sup> The project of uncovering and articulating these dynamics has been shared across a range of scholarly disciplines.<sup>135</sup> This Article has endeavored to contribute to the formation of an analytical framework for this vast, and urgent, project. So much more remains to be done.

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132. Mahmud, *supra* note 21, at 1240.

133. *See supra* Part III.

134. *See supra* Part II.

135. *See supra* Part I.