A Legal Conception of Racism (Group Subordination) as Asymmetrical Market Imperfections

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A Legal Conception of Racism as Asymmetrical Market Imperfections
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Introduction
The existence of a free market depends on everyone being a profit maximizer, everyone having a perfect ability to enter and exit all markets, everyone having perfect information about goods, services and each other, and all transactions costs being at least evenly distributed. However, everyone is not a profit maximizer, everyone cannot enter and exit any market they so desire, information is not perfectly had or even available, and transactions costs like say environmental waste are unevenly distributed. Also, those imperfections relating to maximization, competition, information and transactions costs are asymmetrically imperfect between races. Blacks are encouraged less than whites to maximize profit, have less ability than whites to enter or exit markets, have less access than whites to accurate and useful information and endure more than whites false information about them, and are burdened by greater transaction costs like environmental waste, drug and violence zoning, etc. Asymmetrical market imperfections relate also to gender, sexual orientation, anti-subordination generally. Asymmetrical market imperfections relate also to subordination in the marketplace for ideas, legislation and other areas where competition ought to be fair or free. To the extent government justifiably interferes in the marketplace to address market failures, it is also justified in

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addressing imperfections in the market that are asymmetric with respect to race, gender, sexual orientation, etc.

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It must’ve been freshman macroeconomics at DePaul University when I learned that a capitalist, laissez-faire economy allows the market rather than the government to set prices for goods and services, i.e., the invisible hand. I learned that the meeting of the demand and supply curves tends to establish a price equilibrium. I was taught also that a price other than that equilibrium price would produce deadweight losses to society, fewer goods bought when prices are set too high or fewer goods produced when prices are set too low. And I was also taught that this was an accurate descriptive and predictive theory so long as four assumptions are made: all market participants are profit maximizers, all market participants can enter or exit all markets, all market participants have perfect information, and there are no transaction costs. If these factors—perfect rationality, perfect competition, perfect information and no transaction costs—are present, the invisible hand of the market will distribute goods and services efficiently, to those who value them most.

Clearly, these presumptions regarding the market are not true. Everyone is not a profit maximizer. Capital is needed to compete in most markets. No one can know everything, and our society provides more of the information that is known to those who can afford it. And transaction costs like taxes and unanticipated externalities can sometimes be huge. So from that point forward, economics became for me a fun and challenging intellectual exercise, a basis for making off-the-cuff observations and predictions, but clearly it did not perfectly reflect reality and major decisions affecting people’s social lives should not be based solely on an economic
construct. Even if it is true that the laissez-fair economic system is best amongst known
economic systems, it is also true that the free market is not and has never been entirely free.²
Nevertheless, I enjoyed economics as a subject, and so much more after courses at the University
of Maryland from economists Samuel L. Myers, T.C. Schelling and Rhonda M. Williams, who
applied economic theory to problems of race, crime and law enforcement and other aspects of
public policy. Still, I do not recall any of them ever suggesting that the economic or rational
choice model was THE means by which we understand the world.

When I got to law school some years later I, like many others, noticed that economics
and law are highly compatible, both as social systems and as intellectual constructs. Much of
legislation, development of the common law, expansion of the administrative state, and judicial
constructions of the law generally is designed to address market imperfections—almost as if the
U.S. Constitution says ‘towards a more perfect economy.’³ At the same time, I noticed that
those lawyers and academics supporting the express melding of law and economics were fairly
uncritical about the shaky foundations economic predictions are based on. They tended to ignore
the prevalence of so-called irrational behavior, the omnipresence of barriers to competition, the
cost of reliable information, and the significant social costs that commercial transactions
produce. And for my purposes as one interested in restoring Black people to a full humanity at
least within this country, I noticed that they tended to ignore the fact that these imperfections are
often more pernicious with respect to Black people. They refused to recognize that the inability

² Adam Smith, Wealth of Nations (1776) (“People of the same trade seldom meet together, even
for merriment and diversion, but the conversation ends in a conspiracy against the public, or in
some contrivance to raise prices.”).

of Black people to compete effectively within our commercial atmosphere can be explained by reference to an externally produced lesser commitment to profit maximization, inability to enter markets, paucity and unreliability of information available to and about Black people, and the transaction costs like environmental waste, crime and violence that are zoned into Black communities.

My disappointment continued as I later became a law professor, because just as I noticed that economists ignored race except to complain about having to deal with it, most Black scholars I encountered ignored economics except to complain about having to deal with it (or at least the neoclassical capitalist version if it). But, thanks to the works of Derrick Bell and some others, I continued to believe that an economic or rational choice conception of race within the law was useful. I became more committed to this ideal as I read more critical race scholarship and became increasingly concerned about the absence of a useful form or framework to talk with other scholars about issues of race. While there are very good reasons for keeping a discussion of race frameless—concern for not subordinating those who disagree with the form, humility and hesitation with respect to defining anything, etc.—the absence of a framework or form renders discussion of race and the law largely unproductive and over-theoretical. This is especially true with respect to racial phenomena outside of so-called racial hatred or intentional discrimination. Forms and frameworks provide a means for disparate peoples to come to the same conclusion

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based on the same facts. Thus, the absence of a framework or form means non-academics, especially legislators and judges, will be unable to come to more precise agreement on the existence and degree of racist circumstances and the means by which one addresses them.

Meanwhile, legal institutions are increasingly adopting law and economics’ frameworks, while at the same time increasingly ignoring racial disparities. Racism itself can explain this. However, the absence of form is likely a contributing factor. Purpose being the dominant jurisprudential technique, it requires judges when making deliberative choices over law to consider the consequences a legislature expects them to consider. And according to Bob Jones v. U.S., Congress expects judges to consider the effect statutes have on racial equality. However, a judge who sees herself as Vietnamese-American might lack the confidence to discuss the effect a statute has on Black people due to the unavailability of an exportable framework for talking about it. And a judge who seeks to avoid the command of Bob Jones can declare the absence of an intelligible and usual means of doing so. Therefore, the point of a legal conception of race which incorporates economic theory is to provide academics, lawyers, legislators, administrators and judges a workable method for considering race and racism within the law that will produce consistent results regardless the deliberator. Discussions within a legal context of race and racism will bear more fruit to the extent they refer to the degree with which

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5 The example I use in law school classes concerning the usefulness of form as an epistemic method is the requirement of four 90 degree angles for a square. However, since we can never get closer than an nth degree to 90 degrees, we can never have a real square, unless we accept that some things are to be considered squares due to the untoward consequences of not considering it so.


profit maximization, competition, information and transactions costs are asymmetrically imperfect.

Also, discussing racism by reference to asymmetrical market imperfections converges with the interests of Whites and non-Whites. According to Derrick Bell, Whites will attack racism only when it is in their interests to do so. I would reform that statement to say that whites will attack racism only when the benefits of racist circumstances benefit only a few whites while burdening others. Racial apartheid in America was broken because it benefitted only a few whites while burdening the majority with the perception that the United States was far from being the meritocracy it touted itself to be to the rest of the world. The interest of non-Whites in addressing racism is simply economic and cultural advancement towards a full humanity. The interests of Whites in addressing racism include efficiency, maximization of GNP, and the perception of America as a meritocracy. Towards satisfaction of these interests, the government has a responsibility to ameliorate asymmetrical imperfections in the market relating to race.

**The Path Towards Describing Racism in Law as Asymmetrical Market Imperfections**

The path towards describing racism in law as asymmetrical market imperfections begins in the early 20th century with contributions from two Europeans, Gunnar Myrdal and Albert Einstein, winds through the works of Gary Becker in the ‘70s Derrick Bell in the ‘80s and Richard McAdams in the ‘90s, and turns towards a definitive form as Daria Roithmayr produces her concept of Locked-In Segregation appropriately at the beginning of the 21st century. Each of

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these theorists link racism to economic theory, and each comes closer one after the other towards describing racism as asymmetrical imperfections in the structure of the would-be free market. This article attempts to take it to an operative level and suggests that government is justified if not required to address those asymmetrical market imperfections relating to race.

In 1944, Gunnar Myrdal, a Swedish economist, famously called out racial apartheid in the United States as a serious impediment to America’s economic development. Less known is Albert Einstein’s contribution to the NAACP’s Crisis magazine, in which he posited that majority groups tend to oppress minority groups and especially those with immutable characteristics. Both Myrdal and Einstein utilize a dispassionate approach towards describing racism and its effects. Neither suggested, nor do I, that racism is undeserving of emotional or moral investigation and repudiation, or that emotional or moral investigation and repudiation is worth less than a dispassionate or economic approach. However, to the extent our legal practice

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9 Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944)

10 Jerome & Taylor, Einstein on Race and Racism (2005) (“It seems to be a universal fact that minorities, especially when their individuals are recognizable because of physical differences, are treated by majorities among whom they live as an inferior class. The tragic part of such a fate, however, lies not only in the automatically realized disadvantage suffered by these minorities in economic and social relations, but also in the fact that those who meet such treatment themselves for the most part acquiesce in the prejudiced estimate because of the suggestive influence of the majority, and come to regard people like themselves as inferior. This second and more important aspect of the evil can be met through closer union and conscious education and enlightenment among the minority, and so an emancipation of the soul of the minority can be attained. The determined effort of the American Negroes in this direction deserves every recognition and assistance.”
has greater respect for dispassionate approaches--economic ones, especially--Myrdal and Einstein begin a discussion of race outside the construct of racial hatred.\textsuperscript{11}

After Myrdal, there is sparse discussion of the economics of racism until Gary Becker practically invents the field of behavioral economics, in part on the strength of his description of racism as an economic preference to disassociate with blacks. In the Economics of Discrimination, Becker advances two correlated ideas towards the integration of blacks into the United States mainstream: 1) black separation will hurt black workers economically, and 2) since racism is inefficient, the market will drive it of existence, and civil rights laws are thusly unnecessary.\textsuperscript{12} He argues that firms that forego transactions with black people for want of disassociating with them will be displaced from the market by firms that haven’t that taste for discriminating. Becker’s work strongly supports the ideas of black conservatives in the mold of Booker T. Washington and Justice Clarence Thomas. Becker received a Nobel Prize for his pioneering work, but his ideas relating to race would be challenged and retired by Derrick Bell and Richard McAdams.

Like Einstein, Bell sees racism as a particular form of group-ism, which as a seemingly natural tendency of humans is, for Bell at least, likely to be permanent even in spite of the

\textsuperscript{11} The Black discussion of race and economics had by Booker T. Washington, W.E.B. Dubois and Marcus Garvey focused on internal black strategies for dealing with racism, and was not truly a public discussion. See Tommie Shelby, We Who Are Dark: The Philosophical Foundations of Black Solidarity (2006). One might argue that Myrdal and Einstein’s discussion was not a public discussion, but a white one. To that I would offer Einstein’s submission to Crisis Magazine as evidence that at least his was intended to be part of a global discussion.

\textsuperscript{12} Gary Becker, The Economics of Discrimination (1971).
tendency of trade to transcend race. Bell and Becker are in agreement that shared economic interests tend to reduce the value of race and racism. Bell’s Interest Convergence Theory argues that the United States has never addressed racial subordination—from slavery to segregation—because it was right and just to do so, but instead because certain racial phenomena was found detrimental to the economic interests of a majority blacks and whites (especially if wealth is a proxy for population). However, Bell argues that the market will never eliminate all racial phenomena. Theories from the likes of Richard Epstein supported Bell’s view that racism was permanent by showing that so-called statistical discrimination was efficient—that it saves time and money for businesses to exclude one race from hiring decisions where statistics show that race has in the aggregate a low percentage of persons qualifying for a particular occupation. Bell imagined creative devices towards a pluralistic society that acknowledges the perpetual presence of lingering racism, like his Racial Preferences Licensing Act, where Epstein’s statistical discriminators would purchase a license to engage in the practice Epstein describes (with proceeds from the license presumably used towards ameliorating other forms of racial subordination).

According to John Donahue, even if the market would eventually eliminate racism or at least that racism which is inefficient, civil rights laws can accelerate the process. But even

13 But see Stephen Garcia

14 Derrick Bell, Faces at the Bottom of the Well (1992).


16 Derrick Bell, Faces at the Bottom of the Well (1992).

more damaging to Becker, Richard McAdams demonstrates that whites, even avowedly racist whites, do not have a universal preference for disassociating with blacks, as some slave holding whites forced black women to breastfeed their babies.\textsuperscript{18} The key to racism, then, is the placement of whites in supreme positions and blacks and other as subordinates. In a similar vein, Cheryl Harris analogizes whiteness to property, without which blacks and others are at an economic disadvantage.\textsuperscript{19} McAdams has gone on to be perhaps the leading scholar on group-ism, i.e., how members gain intra-group esteem through inter-group competition. However, McAdams’ deconstruction of Becker rendered economics of racial discrimination rudderless.

At the turn of the century, Daria Roithmayr resurrected the discussion of racism in economic terms. In Locked-In Segregation, she shows how racially discriminatory housing laws not only prevented blacks from competing for quality housing in the early twentieth century but it shut blacks out from decades of substantial real estate appreciation and contributes heavily to the inability of blacks to compete here in the 21st century.\textsuperscript{20} She proves that even if racial hatred or any type of racial preference for disassociation or subordination were completely eliminated, asymmetrical imperfections in the market will continue and perhaps exacerbate white economic supremacy.


\textsuperscript{19} Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709 (1993). A discussion for another day is whether race, rather than whiteness, is property; and whether as property it has a diminishing marginal utility with respect to income. In other words, it seems as if wealthy whites and blacks minimize their race while poorer whites and blacks emphasize it.

While Roithmayr focuses on the asymmetrical ability of blacks to compete in the market because of a lack of savings and lesser access to capital otherwise, the market’s imperfections are also asymmetrical with respect to information which neoclassical theory assumes everyone has perfectly, and transactions costs which neoclassical theory assumes is at least evenly distributed, and even with respect to whose sense of utility is worth maximizing and who should be encouraged towards profiteering. In other words, where the existence of a free market depends on everyone being a profit maximizer, everyone having a perfect ability to enter and exit all markets, everyone having perfect information about goods, services and each other, and all transactions costs being at least evenly distributed, we know that everyone is not a profit maximizer, everyone cannot enter and exit any market they so desire, information is not perfectly about goods and services or each other, and that transactions costs like say environmental waste and drug violence are unevenly distributed, and we also know that those imperfections relating to maximization, competition, information and transactions costs are asymmetrically imperfect between race, that blacks are encouraged less than whites to maximize profit, have less ability than whites to enter or exit markets, have less access than whites to information and endure more than whites false information about them, and are burdened by greater transaction costs like environmental waste, drug and violence zoning, etc., and that these asymmetrical market imperfections also relate to gender, sexual orientation, etc.

It is time now to pull together all of the scholarship relating to race and recast it in terms of asymmetric imperfections in the market relating to profit maximization, competition, information and transaction costs. Roithmayr does almost as much with respect to asymmetrically imperfect competition. In a 2005 study, researchers including Stephen Garcia, a behavioral psychologist from the University of Michigan, surveyed many challenges to the
rational choice model assumption that everyone is a profit maximizer, and added their own
criticism, that self-categorizing individuals will forego profit for the sake of protecting the
relative position of their group.\textsuperscript{21} Their study suggests that whites will not enter into some
profitable transactions if it means Blacks will benefit more than they, and vice versa.\textsuperscript{22} Plenty of
legal scholarship discusses disparities in the information available to Blacks and faulty
information about Blacks. And plenty of legal scholarship discusses the asymmetrical nature of
transactions costs, environmental hazards, crime and drug violence, for example. Thus, the time
is ripe for adopting a framework for discussing all racist phenomena in a legal context. A
follow-up project to this paper is to re-characterize the works contained in Emma Coleman
Jordan’s Race and Economics, and other anti-subordination scholarship like Dorothy Brown’s
Critical Tax Theory, in terms of asymmetrical market imperfections.

\textbf{A Legal Conception of Racism as Asymmetrical Market Imperfections Relating to Race is
consistent with Economic Fairness Justifications for Legal Interference.}

Describing asymmetrical market imperfections is consistent with economic fairness
justifications for legal interference. John Rawls’ concept of justice as fairness attempts to
reconcile the concept of equality with a prohibition against governmental redistribution of
wealth.\textsuperscript{23} It settles on a public commitment towards meritocracy, where government is justified
in attempting to provide equality of opportunity and not when it attempts to ensure equality of

Making, 18, 187-198.

\textsuperscript{22} Dorothy A. Brown, Class Matters in Tax Policy, 107 Colum. L. Rev. 790 (2007) (makeing the point
that whites tend not to support the Earned Income Tax Credit because they perceive it as
helping Blacks while whites tend to support farm subsidies because they help other whites.)

\textsuperscript{23} John Rawls, A Theory of Justice (1971).
outcomes. Allowing the free market—one where everyone maximizes profit, is able to enter and exit all markets, has perfect information and bears an equal share of transaction costs—to produce social order is consistent with Rawls’ concept of justice and fairness, i.e., meritocracy. Towards this ideal, there is consensus that government interference in the marketplace is justified when it addresses so-called market failures, particularly those failures that represent degradations in the structure of the free market, i.e., phenomena that prevents people from maximizing profit, competing in the market, acquiring information, and avoiding burdensome transactions costs. Since government interference is justified when it attempts to correct market imperfections, it is also justified in attempting to correct asymmetrical nature of market imperfections relating to race.

Since the beginning, most of our most important laws have addressed imperfections in the structure of the would-be free market. Rather than consider the entire body of public law, let us consider first the U.S. Constitution. As to profit maximization, the Constitution protects against governmental deprivations of property. As to perfecting competition, it protects against governmental deprivations of economic liberty and Congress has since passed the anti-trust laws to provide for a more competitive marketplace. As to perfect information, the First Amendment to the Constitution is designed to produce a robust marketplace of ideas, and consider that judicial interpretation of the amendment allows most liberally for governmental interference on phenomena that is useless or detrimental to that market, like fraud. The Constitution even addresses the equal distribution of transaction costs in the Direct Tax Clause, which requires that all taxes be uniform and direct taxes apportioned. As for sub-Constitutional law, consider Justice Breyer’s administrative law casebook, in which the authors—some of the most prolific and revered in the game—present market imperfections as legitimate objects of governmental
It is hardly a stretch then to require or at least defend governmental interference against racial subordination on the grounds of addressing asymmetrical imperfections in the would-be free market.

Most of our most important governmental interferences with respect to racism have addressed asymmetric market imperfections relating to race. Obviously, slavery was designed to deprive slaves of the will, ability, and information to compete in any marketplace, and to resist the strictures of slavery could mean death. Thus, the Civil War Amendments represent one of the grandest enhancements to the American would-be free market in the nation’s history. Section 1981, protecting the right of non-whites to contract, is designed towards equality in the ability of all to compete. Brown v. Board of Education is designed towards equality of information held by all market participants. Other major civil rights laws, like Title VII, are also obviously designed towards equality of opportunity, by making whatever imperfections that remain in the structure of the marketplace equally applicable to all.\(^\text{25}\) By enhancing the claim that the American economy is a free market, civil rights laws and other governmental interferences against racial subordination increase the ability of the American market to efficiently distribute goods and services, thus helping to maximize GNP while also enhancing the moral claim that America and its political and economic system represent the most meritocratic system in the world.

America’s claim to meritocracy is more important now than it has been since the confluence of the Cold War and the Civil Rights Era, because of the world-wide energy crisis.


\(^{25}\) What about so-called minor civil rights laws? Fair Housing Act? What is a civil rights law? TANF?
At this time in history, nations must compete vigorously over those with the intellectual capacities to solve the worsening energy puzzle. It is similar to the confluence of the Civil Rights Era and the Cold War, when America had to change its image relating to race if it was to effectively compete with the Soviet Union for the hearts and minds of non-white countries. Rather than a megalithic Soviet Union, America’s larger competitors for brainpower include Europe, the Islamic Civilization and China. Success in recruiting intellectuals is crucial since American education in math and science continues to lag. Just as Martin Luther King surmised that America could not claim the moral high ground in the Cold War while it practiced apartheid, blacks and whites in America today should realize that maintaining white supremacy hinders America’s efforts to win the hearts and minds of non-white peoples in the time of the so-called War on Terror. Incorporating asymmetrical market imperfections within American legal theory would symbolically and programmatically foster greater meritocracy and greater standing for America in the world.

Incorporating Asymmetrical Market Imperfections into American Jurisprudence

Asymmetrical Market Imperfections fits within the realist camp of American Jurisprudence, either as a means of deliberating over objective legislative purposes or as a synthesis of two dynamic deliberation approaches, critical race theory and law and economics. This declaration rests upon the concept of judicial decision making as a deliberation over competing choices of proposed legal rules, the winner being that which is most consistent with

26 Derrick Bell, Faces at the Bottom of the Well (1992).
most of our most important legal and social principles. Legal principles are represented by formality, i.e., textualism and intentionalism. Social principles are represented by realism, i.e., purposivism and dynamism. Judges might deliberate over these principles singularly and chauvinistically or complementarily and pragmatically. While no technique described so far has been so fully elucidated as to provide actual instructions on how to accomplish the task, ambiguity and vagueness is complaint most distressing to purposivism and dynamism. On the other hand, law and economics has been gaining a strong foothold in realist jurisprudence and jurisprudence generally because it is a means of considering foreseeable consequences within a fairly rigid and recognizable construct. A legal conception of racism as asymmetrical market imperfections seeks the same traction for considerations of race in the law by providing a means for analyzing it within an already popular construct, neo classical economics.

Formalism has no respect for asymmetrical market imperfections, as neither textualism nor intentionalism require a judge to consider racial subordination. Textualism focuses on what the reader of a text thinks it means. Textualism is represented by two factors, plain meaning and statutory context, neither of which requires judges to consider the effect legal rules have on racial subordination. Roy L. Brooks argues that black people should support textualism because, at least theoretically, it provides the greatest constraint against judges who would use

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27 The choice that fits. See Ronald Dworkin, Law’s Empire 10 (1986) ("[W]hen judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief").


29 Stanley Fish, There is No Textualist Position, 42 San Diego Law Review 629 (2005).

their position to maintain white supremacy, by preferring legal rules that help whites while hurting blacks.\textsuperscript{31} Avoiding that possibility is for Brooks strategically better than allowing judges to consider consequences to help blacks.

Where textualism focuses on the reader, intentionalism, according to Stanley Fish, focuses on the author by privileging the meaning the author had in mind, regardless what the reader understood.\textsuperscript{32} Even between formalists, some, like Justice Scalia, find the search for intent problematic.\textsuperscript{33} They suggest that a group can’t have an intent, even if a group can have an intent it can’t form an intention on the yet unknown, even if it can its intent was not signed into law, and that judges select among indicia of intent that which supports their personal preferences. Hardly ever are laws of general application accompanied with legislative history requiring judges filling the interstices of a statute to consider the effect a legal rule proffered by an appellate litigant may have on racial subordination.

Thus, formalism via textualism and intentionalism does not in any general sense require judges to consider racial subordination, and thus has no use for describing racial subordination as asymmetrical market imperfections. I maintain however that even formalists like Roy Brooks may appreciate describing the economic effects of racism as asymmetrical market imperfections towards legislative rather than judicial interference.

\begin{thebibliography}{99}
\bibitem{1} Roy L. Brooks, Structures of Judicial Decision Making from Legal Formalism to Critical Theory (2005)
\bibitem{2} Stanley Fish, Is there a Text in this Class? The Authority of Interpretive Communities 338 (1980).
\bibitem{3} Hon. Antonin J. Scalia, A Matter of Interpretation (1997).
\end{thebibliography}
Describing racism as asymmetrical market imperfections is designed to supply greater form, and thus consistency and predictability, to realist jurisprudence. While formalist jurisprudence is concerned most with divining meaning from text, realist jurisprudence considers the consequences legal rules are likely to produce. To date, realist jurisprudences have concentrated on justifying their approach as consistent with concepts of law generally and democratic legitimacy specifically, but have not produced a consistent method or framework for considering those consequences that answers the critique of nihilism. Closest so far are proponents of law and economics, like Richard Posner and Frank Easterbrook, who import into legal reasoning constructs from neoclassical macroeconomics and behavioral economics. Critical race theory as a strand of realist jurisprudence has gained less traction in not insubstantial part because it has little identifiable methodology or framework. This article contends that racism as asymmetrical market imperfections is an appropriate method by which judges can consistently and predictably consider not only racism, but sexism and any other pernicious form of group subordination.

Within realist jurisprudence, describing racism as asymmetrical market imperfections brings greater form to dynamism, but is most useful as a method for considering racism and other types of group subordination within purposive theories of legal deliberation. Both purposivism and dynamism consider consequences as part of judicial deliberation, the important distinction being that purposivists would limit judges to considering only those consequences the


35 Derrick Bell’s interest convergence theory represents something of a lasting heuristic, and Cheryl Harris’ whiteness as property has some staying power, but none has been developed which a judge could operate.
legislature expects them to consider whereas dynamism allows judges to consider whatever consequences the judges themselves deem important. Dynamism is defended most persuasively by William Eskridge’s Dynamic Statutory Interpretation and Richard Posner’s Law, Pragmatism and Democracy.36 Yet neither of those works provides a framework for considering consequences that could be deployed consistently throughout the federal judiciary. At one point, judges are simply asked to “do the best they can.” While the charge of nihilism is a clear exaggeration, it is this type of command that probably scares Roy Brooks away from dynamism and causes him to embrace the consistency and predictability of formalism, despite that jurisprudential style’s toothlessness against racism. Describing racism as asymmetrical market imperfections addresses this concern for form.

Whatever form describing racism as asymmetrical market imperfections can bring to dynamism, it has even greater utility in supplying purposivists with an appropriate method to consider racism, especially since US v. Bob Jones requires as much. Purpose is the way by which realist jurisprudence claims democratic legitimacy. Even if the judicial consideration of consequences in addition to meaning can be squared with the concept of law, it was for a time still considered problematic in terms of legislative supremacy and judicial modesty and subordination.

Hart and Sacks were successful in proposing purpose as a compromise between formalist and realist forces: Judges may consider the consequences of proffered legal rules but only after the text has run out and only those consequences a legislature intends for judges to consider.

Since then, Aharon Barak’s Purposive Interpretation of Law stands as a fine description and defense of the purposive method. In it, Barak describes and justifies the consideration of both immediate and objective purposes. Immediate purposes are those which the enacting legislature expressly intended for judges to consider, while objective purposes are those concerns which can be attributed fairly to all legislatures. Ease or difficulty of government administration is a consequence fairly attributable to all legislatures, especially in a tax case. Judicial economy is another.

Law and economics types might argue that macroeconomic efficiency is always a consequence an objective legislature would have judges consider. In Bob Jones v. U.S., the Supreme Court held that a racially discriminatory school could not be considered a charity because Congress did not intend for tax exemption to support or worsen racial subordination. This objective purpose the Court identified—combating racism—has been in need of a framework like asymmetrical market imperfections ever since.

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