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Introduction: Is America the Paragon of the Rule of Law?

THE UNITED STATES presents itself to the world and to its own citizens as the global paragon of the rule of law. Its Supreme Court has been among the most trusted parts of the federal government for decades.¹ Day to day political debate features near-constant appeals to the Constitution and close watching of the courts. Abroad, the American government as well as private nonprofits have vigorously promoted American legal institutions as a model for the world.

Yet the United States has always fallen short of its own vision. Even as the framers claimed to be building a state modelled after Montesquieu's republican ideals, they held thousands of humans in a bondage that placed them utterly outside the regard of the law. In the nineteenth century, it ignored its treaties with Native American nations with abandon – it violated one within two weeks of negotiating it.² For decades in the beginning of the twentieth century it permitted a regime of mob domination to operate in the South in which Black Americans received not the protection of the law but the terror of the noose. Since the start of the War on Terror, the United States has operated legal black holes in which those accused of terrorism are held without trial. And its immigration system locks up and deports countless noncitizens with the barest pretence of judicial process. The 45th President of the United States took to Twitter to publicly threaten to have his political opponents arrested for treason and to scold his own Attorney General for having the temerity to enforce the criminal laws against his political allies in advance of an election.³

¹ S Sinozich, 'The Polls – Trends: Public Opinion on the US Supreme Court, 1973–2015' (2017) 81 *Public Opinion Quarterly* 173.

² CF Wilkinson and JM Volkman, 'Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth – How Long a Time is That' (1975) 63 *California Law Review* 601, 611.

³ DJ Trump, (*Twitter*, 30 September 2019) twitter.com/realdonaldtrump/status/1178643854737772545 [perma.cc/S42N-XRUZ] ('Rep. Adam Schiff illegally made up a FAKE & terrible statement, pretended it to be mine as the most important part of my call to the Ukrainian President, and read it aloud to Congress and the American people. It bore NO relationship to what I said on the call. Arrest for Treason?'). DJ Trump, (*Twitter*, 3 September 2019) twitter.com/realdonaldtrump/status/1036681588573130752 [perma.cc/3Q47-EU8V] ('Two long running, Obama era, investigations of two very popular Republican Congressmen were brought to a well publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job Jeff '). (NB: Since Twitter's ban of Trump's account, the original links for those two tweets are no longer available, but have been archived at the two perma.cc locations noted; the archive URLs were last accessed on 20 April 2021.)

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This book attempts to make some sense of this mixed record. American legal and political institutions, and their development through its history, represent a kind of aspirational rule of law ideal – but an aspiration that the United States has yet to meet. Hence, I try to draw out the paradoxes embedded in the American rule of law – how have our claims to lawful government carried within them both the ambition to genuinely deliver equal justice under law and the seeds of lawlessness and terror?

The account revolves around two ideas. First, the US rule of law has been marked by a history of conflicts over inclusion within the protections of legal order, conflicts which continue to the present. Those conflicts have revolved around race, and around race-adjacent categories such as ethnicity and nationality. At the founding, the enslaved were completely outside the ambit of the law – prohibited from testifying in court, holders of no rights. Likewise, Native Americans were represented as foreigners rather than members of the legal community and, until 1871, the objects of treaty rather than regulation (although the Native American case is somewhat more complicated, as, of course, the independence of the Native American nations was valuable to them as well, whereas the outlawry of the enslaved was a pure disadvantage). Both Black Americans and Native Americans ultimately became at least partially included in the legal community as the American rule of law has progressed.

Over time, the Black struggle for inclusion has built the foundations of our rule of law – it is that struggle for legal membership that has brought us the Fourteenth Amendment, our most direct textual representation of the ideal of the rule of law, as well as the rules of constitutional criminal procedure that are the foundations of such protections as we have from arbitrary police action. But, even today, the lack of full legal inclusion of Black Americans has persisted through egregious disparities in criminal justice. Moreover, the full-fledged exclusion of a class of people from the legal community persists in immigration law's plenary power doctrine, whose origins are in the openly racist Chinese Exclusion period, but which has recurred as recently as 2018 to permit Donald Trump to enforce his infamous Muslim ban.

Conflicts over membership are inextricable from the United States interpreted as an *empire*. In the early days of the United States, the lawless treatment of the Native American nations was occasioned by the imperial drive to expand its territory. Today, the consequences of this imperialism remain in the second-class legal status of Native Americans, who are the only substantial group of people born on American soil whose citizenship is not constitutionally guaranteed but merely a creature of statute, and whose capacity to engage in collective self-governance as well as to make decisions entrusted to other citizens such as the management of their own property has been subject to erratic federal supervision. Native American nations are also addressed by the plenary power doctrine, and in that domain it traces back to Chief Justice Marshall's open

acknowledgement that the United States courts stood with respect to those nations as ‘the courts of the conqueror’.⁴

At the same time, the United States runs a system of global political and economic hegemony in which it pressures other nations to adopt forms of economic liberalisation that permit the free movement of capital – and rule of law institutions meant to preserve the security of multinational investment – while aggressively restricting the movement of labour through its immigration laws. This is so even though many migrants are fleeing nations whose devastation is partly attributable to the United States’ own military adventures – such as its destabilising Middle East warfare – or its economic hegemony. In the future we are very likely to be required to add refugees from the climate change caused in part by its irresponsible environmental policy to the list.

Nor are the international and the domestic independent. The techniques and habits of arbitrary imperial power have a tendency to leak into the domestic sphere through phenomena such as police militarisation.⁵ We can see this in, for example, the revolving door that one torturer passed through between the Chicago Police Department and the lawless War on Terror black hole at Guantanamo Bay, and in the deployment of Border Patrol units among federal officials sent by the Trump administration to beat protesters in Portland.⁶ In the economic sphere, the legal subordination of foreigners supports the domestic availability of noncitizen workers in jobs considered undesirable by citizens. That, in turn, is the same mechanism that was used to impose undesirable ‘dependent’ types of labour on legally subordinated groups including the enslaved, and, to a less dire degree, women, at the dawn of the republic.⁷

That point leads into the second theme of this book’s account: the idea of property (and with it, economic independence) has a kind of propulsive force in the American rule of law; but also a contradictory force, sometimes serving as the foundational basis for other legal rights-claiming, but other times

⁴ *Johnson v M’Intosh* 21 US 543, 588 (1823).

⁵ CJ Coyne and AR Hall, *Tyranny Comes Home: The Domestic Fate of U.S. Militarism* (Stanford University Press, 2018).

⁶ S Ackerman, ‘Bad Lieutenant: American Police Brutality, Exported from Chicago to Guantánamo’ (*The Guardian*, 18 February 2015) www.theguardian.com/us-news/2015/feb/18/american-police-brutality-chicago-guantanamo; E Pilkington, ‘“These Are His People”: Inside the Elite Border Patrol Unit Trump Sent to Portland’ (*The Guardian*, 27 July 2020) www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac; S Olmos, M Baker and Z Kanno-Youngs, ‘Federal Agents Unleash Militarized Crackdown on Portland’ (*The New York Times*, 17 July 2020) www.nytimes.com/2020/07/17/us/portland-protests.html; J Ismay, ‘A Navy Veteran Had a Question for the Feds in Portland. They Beat Him in Response.’ (*The New York Times*, 20 July 2020) www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html; T Jawetz, PE Wolgin and C Flores, ‘5 Immediate Steps To Rein in DHS in the Wake of Portland’ (*Center for American Progress*, 2 September 2020) www.americanprogress.org/issues/immigration/reports/2020/09/02/489934/5-immediate-steps-rein-dhs-wake-portland/.

⁷ A Rana, *The Two Faces of American Freedom* (Harvard University Press, 2014) 163, 188, 340–42.

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as the signal of a person's status as beyond or beneath the protections of law. At its dawning, we can fruitfully see property as both the core legal right of an American and as the legal face of the tension between liberal and republican conceptions of the political community popularised by historians such as Gordon Wood. Yet the idea of property was also the legal foundation for the subordination of the enslaved, and one of the chief post-emancipation struggles of the freed was to acquire property, and with it republican independence.

Property is also the face that the American rule of law presents to the outside world. The so-called 'Washington Consensus' school promotes the free movement of capital in part by insisting that a conception of the rule of law that revolves around the security of property for foreign investors is a key component of the normative path of economic development.⁸ This conception has been central to American foreign relations ideology for longer than the Washington consensus has had a name – its roots can be seen, for example, in the US government support for Augusto Pinochet combined with the 'Chicago Boys' economists' development plan adopted by Chile during that period – an entirely investor-focused conception of what the rule of law might be and do.

Placing property in the driver's seat imposes inegalitarian pressure on a legal system: if property is a fundamental legal interest to be protected, then reforms that might give the poor a stake in the system start to seem like affronts to the rule of law itself. However, over time, property began to reveal the potential to serve as a liberating role – first abortively, as the potential basis for inclusion of the freed slaves into the ranks of full-fledged republican independent citizens under the failed 40 acres Reconstruction land distribution plan, and then more firmly in the Warren Court's due process revolution, when the economic interests of the poor were for the first time treated as legitimate property interests just like the economic interests of the rich.

Nonetheless the foundational dichotomy between the rule of law interests of individual persons and the rule of law interest in capitalist property persists. For example, harsh policing policies are often motivated by the desire to protect property, but such policies have also driven America's racial disparities in criminal justice and the segregation at its foundation. On the theoretical level, the most visible criticism of excessive discretionary executive power in the American context today is dominated by libertarians, who focus on the failure of the United States to provide fair hearings in cases involving things like patents and securities regulation.⁹ At the same time some of the same scholars claim that the

⁸ B Tamanaha, 'The Dark Side of the Relationship Between the Rule of Law and Liberalism' (2008) 3 *New York University Journal of Law & Liberty* 516, 537–41.

⁹ eg, G Lawson, 'Appointments and Illegal Adjudication: The America Invents Act through a Constitutional Lens' (2018) 26 *George Mason Law Review* 26; RA Epstein, 'Structural Protections for Individual Rights: The Indispensable Role of Article III – Or Even Article I – Courts in the Administrative State' (2019) 26 *George Mason Law Review* 777.

idea of treating welfare benefits like property and hence amenable to the protections of procedural due process is 'quite laughable and wrong'.¹⁰

Ultimately, the two lodestar features of the American rule of law come together in the idea that the possession of secure property rights is a core attribute of legal inclusion itself: those whose economic interests get counted as property and protected are, for that reason, shielded from much of the arbitrary power that American government as well as powerful private entities might inflict. Those who are the subjects of arbitrary power often experience it in the form of unstable property rights. But the inequalitarian implications of America's property-first conception of the rule of law are its greatest weakness. The rule of law requires the support of the community as a whole if it is to be maintained; but a legal system which consistently attaches the core of its protections to the kinds of legal interests held primarily by its richest and its most powerful members is one which is continually under pressure from both the top and the bottom. The rich have continual incentives to capture legal institutions to reinforce their own supremacy. The poor have continual incentives to abandon them or seek extra-legal change. The result is a legal order that is permanently vulnerable to, well, precisely what the United States saw in the recent presidency of Donald Trump: a demagogue who in many ways personified the rejection of law as a way of organising American public life.

THE METHODOLOGICAL PROBLEM: WHAT IS THE RULE OF LAW, ANYWAY?

The rule of law, much like democracy, is a complex normative concept, frequently invoked by scholars as a criterion for a morally legitimate state, but which is the subject of little academic consensus – indeed, it has been described as an 'essentially contested concept'.¹¹ Still, most rule of law scholars and practitioners accept a few core claims, such as that the relevant contrast against which we might judge the rule of law is the rule of persons, and particularly, the arbitrary

¹⁰G Lawson and S Calabresi, 'The Depravity of the 1930s and the Modern Administrative State' (2018) 94 *Notre Dame Law Review* 821, 865. This view is defensible, but only if one grants broad deference to the history of American conceptions of property, according to which it feels perfectly natural that a government-granted monopoly (ie, a patent) can be a real kind of property, but a government-granted annuity (ie, welfare) cannot. Thus Lawson's (n 9) argument revolves around an analogy between intellectual property patents and land patents dating from the era of Westward Expansion. RE Zietlow, 'Giving Substance to Process: Countering the Due Process Counterrevolution' (1997) 75 *Denver University Law Review* 9, insightfully contextualises the background and aftermath of the expansion of due process rights to welfare benefits as a kind of brief moment of 'communitarian' as opposed to an individualist (or liberal, we might say) reading of the scope of constitutional rights which had the never fully realised potential to promote the poor to full constitutional membership.

¹¹J Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 *Law and Philosophy* 137.

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will of those persons; as well as that inherent in the rule of law is a kind of neutrality, in which a person may not be judge in her own case and the application of law is independent of private passions and interests.

Another fairly well-accepted description of the basic conceptual core of the rule of law is Lon Fuller's eight principles of legality.¹² While Fuller saw those principles – which focus on what we might think of as operational criteria of a legal system, such as the prospectivity, publicity, and stability of laws, their rule-like (as opposed to command-like) character, and the extent to which what officials enforce is the same as what is written down – as the basic criteria for a legal system to be functional, they are also widely seen as closely related to the idea of the rule of law itself.

These abstract ideas also come associated with some concrete institutional commitments that are fairly well-accepted, at least as a baseline. Rule of law scholars and advocates typically are committed to, for example, legal rules that do not leave excessive room for official discretion in their application, and fair trials with neutral judges especially (but not exclusively) in the criminal law.

Beyond that uncontroversial core, however, there is little consensus about what the rule of law is. And I do not come to the task of elucidating the (or a) American conception of the rule of law from a blank slate: in my previous work, I've defended several positions about the concept of the rule of law.¹³ For present purposes, the key claims are as follows. First, the rule of law consists in principles requiring procedural legal justice and the control of state power (what I have called 'regularity' and 'publicity') and in a principle requiring substantive legal equality ('generality'). Secondly, it is conceptually possible to have a state that achieves the rule of law as procedural legal justice/control of power but not substantive legal equality, but such a legal order is unstable: the lack of legal equality undermines the ability to achieve the more formal principles. Thirdly, the rule of law is an egalitarian principle but it is distinct from the demands of egalitarian justice as a whole: it is possible for there to be an unjust rule of law state. Finally, in the face of the ineluctable controversy about what the rule of law is, the correct way to give an account of the concept is to draw on the experiences of actual rule of law states and of the people who have fought to achieve the rule of law in real-world politics.¹⁴

Apart from the final methodological claim, this book does not assume the theoretical framework elucidated in my prior work. Quite the contrary: consistent with the methodological claim, the prior work rested in substantial part on

¹² LL Fuller, *The Morality of Law*, revised edn (Yale University Press, 1969) 39; see discussion in C Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239.

¹³ P Gowder, 'Equal Law in an Unequal World' (2014) 99 *Iowa Law Review* 1021; P Gowder, 'The Rule of Law and Equality' (2013) 32 *Law and Philosophy* 565; P Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016).

¹⁴ On this last claim, see also P Gowder, 'Institutional Values, or How to Say What Democracy Is' (2014) 30 *Southwest Philosophy Review* 235.

having reflected on the American system; this book fills out the reflections that grounded the theoretical claims I previously made on their basis. For example, the theoretical claim that procedural justice goes together with substantive legal equality in part responds to the fact that in the American tradition, their constitutional instantiations live side-by-side in the Fourteenth Amendment, frequently coincide in real-world constitutional litigation, and indeed have been made explicitly to depend on one another when the Supreme Court ‘reverse incorporated’ the Equal Protection Clause as an aspect of due process.¹⁵ It also responds to much of the historical and present experience with legal caste recounted in this book, in which legally-enforced subordination repeatedly finds itself accompanied by procedural injustice – as when the rightslessness of the enslaved was implemented in the kangaroo courts of the Fugitive Slave Act of 1850 and the contemporary rightslessness of immigrants is implemented in kangaroo immigration courts and ‘expedited removals’ – and then that procedural injustice in turn leaks out to people who are putatively outside the subordinated caste – as when the Fugitive Slave adjudications facilitated the kidnapping of free Black Northerners, or when citizens get deported in expedited removals.

The work of this volume also rests on a refinement of the methodological claim noted above. I have previously argued that what we might call our abstract concept of the rule of law depends on reality from a general perspective, ie, on our observations of the variety of societies with and advocates for the rule of law across history; here I further contend that the same point applies in elucidating a particular country’s conception of the rule of law. When attempting to say what the American rule of law is, it is not correct merely to look at the country’s formal institutions as they’ve been written down in legal documents – and this book does very little of that. Rather, what really matters are the boundaries where the rule of law has been tested and contested in that country: where some have been denied access to the forms of law to vindicate their claims to rights and status, and how they have understood that denial as contrasted with how those who did the denying understood it. In those interstices, the ‘law on the books’ and the ‘law in action’ meet one another, as state and society are forced to resolve a conflict over the scope of the legal system’s protections, and, in doing so, more fully articulate for themselves what those protections mean.

Such an account – we might call it critical Hegelian – is a natural fit for the United States, which is distinctive both for having begun with a set of very broad stated ideals about things like human equality and inalienable rights and for having violated those ideals with vigour for all of its history. By examining how those ideals played out from the standpoint of contestation over their boundaries, we can see both the value and the victories of those ideals – with respect to the rule of law, the way that American institutions have genuinely provided the basis to deliver something like legal justice – and the way in which those

¹⁵ *Bolling v Sharpe* 347 US 497 (1954).

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victories are compromised, and in which the American rule of law continues to be surrounded by a core of lawlessness. Only in that way can an honest account of the American rule of law be given.

These claims are not to exclude the possibility of a coherent and useful account of the American rule of law more focused on its formal institutions, the statements of its constitutional founders, and the like. While this book is not that account (although the founders receive substantial attention in the first two chapters), such an account would also have value. The material of the constitutional framing period contains numerous references to classic formulations of identifiably rule-of-law oriented ideas. Madison's declaration in *Federalist* 47 that the accumulation of legislative, executive, and judicial power in a single branch is the 'very definition of tyranny,' for example, is an obvious reference to Montesquieu's rule of law-centric theory of republican liberty.¹⁶ The 1780 Massachusetts Constitution, written by John Adams, declares that its establishment of the principle of separation of powers is done 'to the end it may be a government of laws, and not of men'.¹⁷ In *Federalist* 10, Madison gives a nod to that other early modern rule of law paragon, John Locke, and his principle that '[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity'. In *Federalist* 78, Alexander Hamilton argues for judicial independence and judicial review 'to secure a steady, upright, and impartial administration of the laws'. And a Pennsylvania judge in 1786 argued against judicial discretion in punishments on the ground that 'It is a distinguishing mark of a free government, that the people shall know before hand, the penalty which the laws annex to every offense; and, therefore, such a system is called a government of laws, and not of men'.¹⁸ That sentence could just as well have been written by a rule of law scholar today.

But I am more interested in what the American government did than what its framers said, and for that we must attend to the voices of those other than James Madison.

THE BLACK LIBERATION RULE OF LAW

One of the key organising principles of this book is an emphasis on the role of subordinated groups in American society in the development and articulation of the American conception of the rule of law. This includes discussions of the US

¹⁶ The source of all quotations to the *Federalist Papers* in this volume is Yale University's Avalon Project, at avalon.law.yale.edu/subject_menus/fed.asp.

¹⁷ Massachusetts Constitution (1780), Part I, Art 30; cf SB Benjamin, 'The Significance of the Massachusetts Constitution of 1780' (1997) 70 *Temple Law Review* 883.

¹⁸ MJ Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) 12.

legal system's treatment of immigrants and of those within the criminal justice process, as well as some attention to US legal colonialism with respect to Native American nations. But the primary conflict around which this book revolves is the Black American struggle for inclusion.

This emphasis has a sound historical and structural basis. Black enslavement was the original and most drastic failing of America's rule of law. Enslavement also operated as a pivot around which debates about what the rule of law meant turned: Black Americans and abolitionists claimed (rightly, in my view) that slavery was inherently lawless, but, at the same time, slaveholders argued that something like the rule of law with its central American focus on the protection of property against expropriation justified (indeed, required) infamies like the Fugitive Slave Acts and *Dred Scott v Sandford* – the fight to end slavery can be usefully interpreted as in part a fight over what it might mean to operate government under law in the American sense.

There is also a broader methodological point to this focus. The American legal realists largely punctured the notion that the legal domain can ever be wholly autonomous from politics early in the twentieth century. In the late twentieth century, scholars in the tradition of critical legal studies (CLS) and critical race theory (CRT) attempted to take the next step and puncture the notion that the law can be independent from broader structures of social and economic power – but those puncturings, unlike the legal realist one, didn't so fully take over the broader academic community. Of the two modern puncturings, CRT is far more vital, and has heavily influenced this book.

The conversation between CRT and the rule of law has been particularly fruitful because leading scholars within the CRT tradition have articulated sophisticated conceptions of the relationship between the social standpoint of people of colour and liberal legalism. Polemicists on the right have frequently run critical legal studies and critical race theory together, and accused both of sharing a disdain for the rule of law.¹⁹ It is true that many CRT scholars do count CLS as one of their intellectual influences, and CRT scholars such as Derrick Bell have made extremely productive use of the CLS insight that many supposedly neutral legal rules contain deeply embedded political and social hierarchies. It is also true that CLS scholars have typically rejected the rule of law as an ideal worth pursuing.²⁰ But it's a serious mistake to think that CRT scholarship necessarily rejects the rule of law. Quite the contrary, one of the most important intellectual moves made early on by some (though not all) of the most prominent scholars in the tradition was to reject the CLS abandonment of the rule

¹⁹ eg, DE Bernstein, *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law*, 1st American edn (Encounter Books, 2015) 5–6.

²⁰ eg, MJ Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 *Yale Law Journal* 561; D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and JE Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002); M Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363.

of law. Most influentially, Patricia Williams argued that the CLS and Marxist dismissal of the rule of law and legal rights itself represents a privileged white standpoint: only those who have sufficient reserves of social power to draw on can abandon the protections of law, and it's no coincidence that CLS scholars tended to be people who had never had to rely on thin legal protections as their only shield against social oppression.²¹ Sometimes, some critical race scholars, like some Black liberation activists, have taken a cynical stance toward American legal institutions.²² But even a kind of 'cynical legalism' is still a legalism, that recognises at least the rhetorical power of law and hence its capacity to serve as a tool for liberation.

Simultaneously considering the United States through a critical race theory lens and through a rule of law lens allows us to see how the rule of law as rhetoric can be used to promote lawless ends while simultaneously seeing how the institutions that rhetoric built represent a genuine ideal to which our legal system can aspire. This is a 'dual consciousness' strategy long associated with critical race theory, and with Black Americans more generally.²³

Moreover, the conjunction of rule of law ideology with extreme inequality – which is most vividly manifested in the United States on the dimension of race, and on race conjoined with class – can help us see the unavoidable dependence of rule of law ideals on genuine social equality.

The warping of a legal system in the face of race-class inequality can be seen even at its most granular implementation levels. I recall my own first job out of law school, as a low-income legal services lawyer in a community in rural Oregon that was starkly divided along socioeconomic as well as racial grounds, with a substantial mostly-Latino underclass of agricultural workers and other labourers and a dominant middle-class of mostly-white business owners and social service providers. My job was essentially to represent the former against the latter, but the social positioning of a lawyer in the face of such inequality meant that I was largely perceived by both sides as an ally of the powerful – the welfare office staff and the business owners routinely tried to demand that I work with them to regulate the workers, while my clients often feared and distrusted me. One pro se business owner whom I was suing demanded to *speak to my manager* after settlement negotiations were insufficiently conciliatory for his tastes. Both sides of the class/racial divide recognised that, given the underlying inequality, the position of a legal aid lawyer forced me to resist endless incentives and temptations to serve the underlying power structure of the community rather than my clients.

²¹ P Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401.

²² DE Roberts, 'The Meaning of Blacks' Fidelity to the Constitution' (1997) 65 *Fordham Law Review* 1761.

²³ MJ Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 *Women's Rights Law Reporter* 7.

My positioning in Oregon as a lawyer was merely a manifestation of a broader power-contingency of the implements of American legal order. The distortion of the function of the lawyer is probably most widely noticed and decried in the large literature on the ‘access to justice’ gap, perceived at least in substantial part as an access to legal representation gap.²⁴ But it has many other manifestations. Consider, for example, the notion of a ‘contract’, conventionally understood as a tool of individual autonomy. In reality, scholars have observed that contract serves to undermine autonomy in the face of vast economic power disparities: corporations use the form of contract to impose what Radin calls ‘rights-deletion’ on consumers and employees.²⁵ Or consider LaToya Baldwin Clark’s research on the Individuals with Disabilities Education Act as an exemplar of a broader phenomenon in which groups lacking social, economic, and cultural capital experience disparate legal outcomes in contexts where individual initiative is required to make use of legal entitlements.²⁶ The focus on subordination in this book is in part consciously chosen to make visible the contingency of American legal institutions on social inequality.

A focus on the subordinated also serves a more banal evaluative purpose. To the extent part of the task in a work such as this is to figure out the extent to which the United States actually meets its rule of law ideals, the place to look as a test for that achievement is to its treatment of those who are most vulnerable to failures of the rule of law – that is, to those who have been subject to discrimination and oppression.

A further theoretical reason to focus on Black liberation movements relates to the idea, which I have defended elsewhere, that the rule of law typically requires collective action, or the threat thereof, against powerful public officials to keep the legal constraint of power together.²⁷ For this reason, the movement-building activity of subordinated groups itself facilitates the rule of law for everyone. I contend that this has been true of Black organising: by expanding both Black organisational capacity and the scope of the people encompassed within American law’s orbit (and hence the scope of the people who have an incentive to defend the legal constraint of the powerful), the very fact of robust and successful Black social movements that have won victories for themselves creates positive legal externalities in supporting the preservation of the legal protections enjoyed by others.

There is also an epistemic reason for focusing on Black agency. As Anderson has persuasively argued with respect to moral discourse in the abolitionist movement, abstracted moral critique of social injustice by members of groups

²⁴ RL Sandefur, ‘Access to Civil Justice and Race, Class, and Gender Inequality’ (2008) 34 *Annual Review of Sociology* 339.

²⁵ MJ Radin, *Boilerplate* (Princeton University Press, 2012).

²⁶ L Baldwin Clark, ‘Beyond Bias: Cultural Capital in Anti-Discrimination Law’ (2018) 53 *Harvard Civil Rights-Civil Liberties Law Review* 381.

²⁷ Gowder, *The Rule of Law in the Real World* (n 13) chs 6, 8.

privileged by that injustice has a built-in efficacy disadvantage because of the way that power and privilege introduce bias into moral reasoning.²⁸ By contrast, concrete political contestation rooted in a claim of right by the subordinated can unsettle pre-existing power relations and provide room for genuine engagement with the moral claims at issue.

Finally, constitutional theory itself, properly understood, recommends specifically emphasising the Black role in the development of the American rule of law. To the extent the US Constitution is democratically legitimate, it is so because the Constitution is rooted in the authorial autonomy of the people. Thus, for example, the flavour of originalist constitutional interpretation known as ‘original public meaning’ posits a public whose linguistic understandings are the source of constitutional meaning – which to me seems to rest on the democratic claim that the people are the lawmakers. More broadly, the tradition of appealing to history to fill out American constitutional doctrine, which has been around much longer than some articulated scholarly concept called ‘originalism’, has also often rested on an implicit public whose understanding of the law they were making and the social environment in which their law was made was relevant to understanding the meaning of the Constitution. Yet until all too recently constitutional law has rested on an implicit presupposition that the views and interests of the public are exclusively the views and interests of whites.

By emphasising the agency of Black Americans – of those who were members of the community from the get-go but excluded from formal recognition of legal personality – part of the project of this book is to unsettle those assumptions of white constitutional authorship. This is a longstanding project of a tradition of Black scholarship that begins with WEB Du Bois’s *Black Reconstruction in America*, which pioneered the understanding of emancipation as Black self-liberation. And as I have argued at length elsewhere, Black Americans have always been constitutional authors.²⁹

In recent years, scholars have done substantial, though incomplete, work to remedy the neglect within the academy of the role of the histories of Black and Brown people, the enslaved, Native Americans, and migrants in our legal doctrine.³⁰ But this work needs to continue, and this book aims to contribute to remedying at least some of the longstanding erasure of subordinated groups in American law. This goal is an element of the critical Hegelian methodological approach of this book, as applied both to our legal doctrines and to the concepts underlying them. In this, I am inspired by Neil Roberts, who brilliantly asks

²⁸ E Anderson, ‘Moral Bias and Corrective Practices: A Pragmatist Perspective’ (2015) 89 *Proceedings and Addresses of the American Philosophical Association* 21.

²⁹ P Gowder, ‘Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation’ (2019) 114 *Northwestern University Law Review* 335.

³⁰ K-S Park, ‘This Land Is Not Our Land’ (2020) 87 *University of Chicago Law Review* 1977, 1992–2004.

what our concept of ‘freedom’ would be if we began with the experience of the enslaved in seizing it.³¹

It seems to me to be a disastrous form of intellectual negligence – and a form of institutional racism – to operate a system of law under the assumption that those whose oppression has been foundational to its creation have not said or done anything relevant to its meaning. Consider, for just a single example, the following passage from the (truly poorly-named) *Civil Rights Cases* – a collection of consolidated Supreme Court cases which held that Congress did not have authority, under the Fourteenth Amendment, to regulate private discrimination:

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments.³²

The unwillingness to think about the role of Black Americans as constitutional co-creators begins with the very first sentence, which declares that the legislation passed during Reconstruction to regularise the civil and political condition of Black Americans was some kind of ‘beneficent’ gift from whites, rather than something that the freedpeople had fought for. It then acknowledges the legal inequality to which free Black Americans were subjected prior to the Civil War, but asserts that ‘no one at that time thought that it was any invasion of his personal status as a freeman’. To this proposition, one must ask: ‘who is in the no one?’ Maybe white people didn’t think that, but Black people certainly did. But there is no evidence that the Court thought it necessary to examine any record of the numerous assertions of legal, political, social, and economic rights made by antebellum free Black Americans.³³

³¹ N Roberts, *Freedom as Marronage* (The University of Chicago Press, 2015).

³² *Civil Rights Cases* 109 US 3, 25 (1883). The ‘Fourteenth’ in the last clause might actually be ‘Thirteenth’ – there is some confusion, likely due to a typesetter’s error, however, the most plausible reading is ‘Fourteenth’, and this is, apparently, what the historical record should suggest. G Rutherglen, ‘Textual Corruption in the *Civil Rights Cases*’ (2009) 34 *Journal of Supreme Court History* 164.

³³ See eg MS Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge University Press, 2018).

There is copious evidence of Black Americans recognising that economic discrimination was inextricable from slavery. In the North Black abolitionists had long made it clear that ending exclusion from and segregation in churches, schools, restaurants, and transportation was part of the abolitionist quest.³⁴ Consider the following statements by two of the most prominent Black leaders. The first argument for affirmative action of which I am aware was made in 1852 by Martin Delany, who scolded white abolitionists for failing to employ Black Americans at high levels in their newspapers and the like, on the grounds that the abolitionist position entailed promoting the ‘elevation’ of Black people, including in the economic sphere.³⁵ And on 11 May 1858, Frederick Douglass gave a speech against race discrimination in New York City streetcar carriages in which he declared that this economic discrimination was part of ‘the cruel and malignant spirit of caste, which is at the foundation, and is the cause, as well as the effect of our American slave system’ and went hand-in-hand with ‘[t]he denial of our citizenship’, and with such core wrongs of slavery as exclusion from suffrage; Douglass went on to contrast the condition of Black men in the United States with those in Brazil, highlighting that the latter were truly free because they had access to high posts in law, medicine, the army, the church, and private business.³⁶

If the Court had been aware that Black Americans had been claiming all along that emancipation meant economic inclusion rather than merely having a status other than chattel, the argument of the *Civil Rights Cases* may not have been sustainable. At least the Court would have had to offer an argument about how the position of Black abolitionists didn’t entail permitting Congress to destroy private economic discrimination. But because the justices utterly failed to attend to the advocacy of Black Americans – failed to treat Black Americans as constitutional framers and as part of the people whose beliefs about the meaning of concepts like freedom, slavery, and citizenship bear on constitutional interpretation – the Court could just wave it away with a ‘no one at that time thought’, and, in doing so, hand down a pallid interpretation of the Fourteenth Amendment that buttressed generations of failure to defend the full access to property and contract, those foundations of American legality, for Black Americans.

As the *Civil Rights Cases* illustrate, to neglect Black constitutional authorship is to get one’s legal analysis wrong. And likewise, to neglect Black action in

³⁴ M Sinha, *The Slave’s Cause: A History of Abolition* (Yale University Press, 2017) 313–16, 325–30; see also M Peeples, ‘Creating Political Authority: The Role of the Antebellum Black Press in the Political Mobilization and Empowerment of African Americans’ (2008) 34 *Journalism History* 76, 80–82.

³⁵ M Robison Delany, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States Politically Considered* (Published by the Author, 1852) 26–29.

³⁶ F Douglass, ‘Citizenship and the Spirit of Caste’ in JW Blassingame (ed), *The Frederick Douglass Papers. Ser. 1 Vol. 3: Speeches, Debates and Interviews 1855–63* (Yale University Press, 1985) 208–12.

the building of the American rule of law is to leave aside key material that would help us understand what the rule of law means in this country.

However, the analysis in this book is still partially incomplete even with respect to that critical mission. In particular, emphasising the Black liberation movement through American history not only neglects the voices of other activists for liberation and constitutional authors – particularly the distinctive voices of Native Americans and of women – including Black women – speaking as women rather than or (intersectionally) in addition to as subjects of racial ascriptions – but also in a deeper sense provides a partial view even of Black liberation itself; for Black freedom movements have often adopted self-consciously solidaristic forms, both appealing to international freedom movements (starting at least since Haiti tore off the chains of slavery) and defending the rights of others who have been subject to American oppression. It is no coincidence, for example, that Douglass supported women's suffrage and opposed Chinese Exclusion, which he connected to the exclusion of Black Americans and Native Americans.³⁷ That solidarity was strategic as well as moral: consider that Delany advocated Black emigration to Central America in part on the basis of the recognition that those who currently lived in that region were natural allies, for both had been victims of American empire, and both had been disenfranchised on account of race.³⁸ I have done what I can to reflect this broader framework of liberation constitutional authorship, but there is more to be done.

WHERE WE'RE GOING

The first several chapters are broadly historical in orientation, although not in methodology. Chapter one begins with the intellectual framework of America's rule of law at its origins, offering a reading of the founding-era rule of law through the idea of property rights as the fulcrum around which legal personality and membership turn and of slavery as the foundational paradox of property rights and the rule of law. Chapter two continues the discussion of slavery through an interpretation of the Fugitive Slave Acts as defiance of the American rule of law ideals of judicial independence, due process, and empowered juries, but also as inevitable consequences of the incentives created by a system of legal caste.

The next portion of the book turns to a close examination of the relationship between Black American constitutional agency and the American rule of

³⁷ N Knowles Bromell, *The Powers of Dignity: The Black Political Philosophy of Frederick Douglass* (Duke University Press, 2021) 159–60; J Hooker, "'A Black Sister to Massachusetts': Latin America and the Fugitive Democratic Ethos of Frederick Douglass' (2015) 109 *American Political Science Review* 690, 696–97.

³⁸ MR Delany, 'Political Destiny of the Colored Race on the American Continent' in RS Levine (ed), *Martin R. Delany, A Documentary Reader* (University of North Carolina Press 2003) 245–79, 268.

law. Chapter three focuses on the most significant innovation in the actual text of our Constitution driven by the Black struggle for inclusion: the Fourteenth Amendment's written guarantees of both the procedural/formal and the substantive sides of the rule of law. Chapter four discusses the failed promise of Reconstruction and the demands and achievements of the Civil Rights Movement through the lens of the rule of law.

The final two chapters focus on problems of the rule of law and executive power. Chapter five discusses the overall critique of executive power in the United States through the lenses of police and prosecutors and their arbitrary power in the criminal justice system – and its continuation of lawless Black oppression – and of the President's power arbitrary power over anything that might be characterised as 'foreign affairs' or 'national security'. Chapter six is an extended examination of immigration law and its reproduction of older patterns of legal exclusion from both slavery and Indian removal, as well as its status as a kind of limit case of arbitrary executive power.

This book's conclusion looks forward to the future. The United States also has a vigorous programme of promoting the rule of law abroad; can we view that programme as credible given its own struggles to achieve lawful governance? Can it even maintain such legal order as it has? This volume concludes by calling for egalitarian reforms to permit the United States to fulfil its own ambitions as well as its global image to truly become a community under law.

This book is simultaneously impossible and necessary. Impossible because it attempts to provide a panoptic view of that thing which we might call the American rule of law both in its contemporary instantiations and failures and in its historical roots – such a task can't be done right in a lousy couple of hundred pages, and I apologise to the reader who will be forced to fill in many gaps in the exposition. But necessary because only such an approach can throw a badly-needed bucket of ice water on a variety of mistaken ideas about the contemporary status of the United States as a rule of law state.

Most importantly, I hope this book can contribute to the end of a conventional narrative which represents prominent US failures of legality – most notably those associated with the post-2001 War on Terror – as a kind of aberrant departure from a long and consistent tradition of legal fidelity. In fact, the best understanding of the American rule of law recognises that it has long reflected contestations over the bounds of the legal community in which persons and associated places defined as outside the scope of American legality are not entitled to the protections of the rule of law at all.

For the most salient example of that continuity: in *Boumediene v Bush*, the Supreme Court rejected the government's argument that the writ of habeas corpus did not extend to accused terrorists held in Guantanamo Bay.³⁹ But the attempt to use Guantanamo as a legal black hole was no novelty: a decade

³⁹ *Boumediene v Bush* 553 US 723 (2008).

before 9/11, the government had successfully convinced the Eleventh Circuit to permit it to deprive Haitian refugees whom it had interdicted at sea and held at Guantanamo of any procedural rights under either immigration law or general administrative law.⁴⁰ A full century before the Bush Administration resorted to 'waterboarding', US soldiers were court-martialled for administering the 'water cure' in their occupation of the Philippines.⁴¹ The theory of 'unlawful combatants' used by the Bush Administration to justify deviation from the laws of war was pioneered by an American general in the Philippines who said that 'those who engaged in guerrilla warfare divested themselves of the character of soldiers, and if captured could be denied the privileges of prisoners of war'.⁴²

It's impossible not to think that the government took lessons from the legal exclusion of Haitian refugees and its colonial adventures in the Philippines when it violated the Constitution and detainees' fundamental human rights in the War on Terror; only a panoptic view of the American rule of law and its connection to the borders of membership can permit us to see the further debts that the legal tools for the exclusion of migrants like the Haitian refugees owe to the legacy of slavery and Indian removal.

⁴⁰ *Haitian Refugee Center v Baker* 953 F3d 1498, 1505-09 (11th Cir 1992); see GL Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197; W Kidane, 'The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo' (2010) 20 *Berkeley La Raza Law Journal* 89. Further illustrating the possibility for theoretical continuity between slavery, immigration, and the war on terror, Kato uses Neuman's theory of anomalous zones to characterise the South under lynch law. D Kato, *Liberalizing Lynching: Building a New Racialized State* (Oxford University Press, 2016) 124–31.

⁴¹ RE Welch Jr, 'American Atrocities in the Philippines The Indictment and the Response' (1974) 43 *Pacific Historical Review* 233, 235; G Mettraux, 'US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes' (2003) 1 *Journal of International Criminal Justice* 135, 143–46.

⁴² Mettraux (n 41) 145.