

LIBERALISM’S IDENTITY POLITICS:  
A RESPONSE TO PROFESSOR FUKUYAMA

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INTRODUCTION

Francis Fukuyama in his new book, *Identity: The Demand for Dignity and the Politics of Resentment*,<sup>1</sup> argues that over the past decade the main axis of politics globally has shifted from a focus on economic issues to a focus on identity politics—from *issues of distribution to ones of recognition*.<sup>2</sup> He suggests that with this shift the world has seen the emergence of a new populist nationalism that threatens democracy around the world. It is this new nationalism, he posits, that is responsible, in part, for the election of Donald Trump in the United States and Brexit in the United Kingdom.<sup>3</sup>

Fukuyama sees globalization as partially responsible for the rise in this nationalism, a form of identity politics. He argues that although identity politics grows out of the basic human need for recognition, its modern origins lie in part in the 1960s identity-based social movements against injustice. Fukuyama claims that the political Left subsequently adopted this form of politics, abandoning its historical aims of expanding economic wellbeing for large collectivities—for larger groups of people than identity politics allows. The adoption of this politics, he contends, spurred the political Right into also adopting and engaging in a politics of identity, manifest in the current

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<sup>1</sup> FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* (2018) [hereinafter *IDENTITY*].

<sup>2</sup> Fukuyama never uses this phrase “from distribution to recognition.” But he does contrast the two, noting that the “[t]wentieth-century politics had been organized along a left-right spectrum defined by economic issues . . . [but] that spectrum appears to be giving way in many regions to one defined by identity.” *Id.* at 6.

<sup>3</sup> Brexit is short-hand for saying the United Kingdom is leaving the European Union, the term merges the words “Britain” and “Exit” to get Brexit. Juha Raitio & Helena Raulus, *The UK EU referendum and the move towards Brexit*, 24 *MAASTRICHT J. OF EUR. & COMP. L.* 25, 25 (2017).

resurgence of nationalism, including white nationalism in the West—what Europeans refer to as fascism.<sup>4</sup> I disagree.

Fukuyama summarizes this line of argument in a more strident, less nuanced piece entitled, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*.<sup>5</sup> The piece appeared in the Foreign Affairs magazine in October 2018. In this essay I will refer to both the book and this piece.

There is much in Fukuyama's argument with which I agree. However, below, I argue his analysis is fundamentally flawed in that he incorrectly lays the blame for the rise of identity politics on the Left, and by implication on the movements for racial, gender, and sexual justice, among others. In doing so, Fukuyama ignores these movements' distributional claims and broad-based advocacy for economic justice, the opposition to which is deeply structured into the liberal democratic project itself. He accomplishes this by painting these movements as engaged primarily in a politics of recognition—identity politics. This leads him to recommend a politics and policies which are unlikely to alter the structures that generate either globalization-induced inequality or identity politics. Further these recommendations are likely to render the Left less politically successful. I focus on the African American experience in the United States, as he does in part,<sup>6</sup> by way of example.

Part I briefly outlines Fukuyama's argument and his suggestions for overcoming the ill-effects of nationalism on democracy. Part II explores the work of Nancy Fraser who wrote on the politics of distribution and recognition over twenty years ago. Fraser's work provides some definitional clarity, particularly with regard to the issue of economic distribution. Her work also provides one way of assessing the stakes involved in some of Fukuyama's suggestions. Part III provides another analysis and origin story for the rise of identity politics and its relationship to distributional injustice; locating these origins within the development of the liberal democratic project itself. This analysis further grounds a critique of Fukuyama's stance on multiculturalism and political correctness. In conclusion, the essay suggests that the voices Fukuyama seeks to silence in his critique of identity politics may be the very ones with the vision, willingness and commitment to advance the kind of broad-based economic justice coalition for which Fukuyama advocates.

#### I. FUKUYAMA'S ARGUMENT, BRIEFLY OUTLINED

Fukuyama suggests that the current emergence of nationalism (or growing neo-fascism<sup>7</sup>) is actually a "widespread populist revolt against globalization," with its attendant high levels of inequality, unevenly shared benefits and rapid pace of social change.<sup>8</sup> Although he believes that globalized capitalism is a positive good overall, lifting many people across the globe out of poverty,

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<sup>4</sup> IDENTITY, *supra* note 1, at 121 (noting that the white nationalism rising in the US has a long history in Europe and is referred to as fascism).

<sup>5</sup> Francis Fukuyama, *Against Identity Politics*, 97 FOREIGN AFF. 90 (2018) [hereinafter *Against Identity Politics*].

<sup>6</sup> He suggests that the 1960s type identity politics is now expressed in movements such as Black Lives Matter. *Against Identity Politics*, *supra* note 5.

<sup>7</sup> Wendy Brown argues that this growing nationalism is not a resurgence of the fascisms of old but one situated within the governing rationality of neoliberalism. She refers to these as neo-fascisms. See WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST (2019).

<sup>8</sup> *Against Identity Politics*, *supra* note 5, at 92–93.

he concedes that the benefits are uneven and that some people have suffered losses. People of the middle and working classes in the industrialized North are some of those who are suffering these economic losses, and thus pain and anxiety.<sup>9</sup> Nationalism is on the rise among these groups, according to Fukuyama, because this economic anxiety is often felt as a loss of status and thus perceived as a threat to these people's very identities.<sup>10</sup> This is particularly so in the context of what Fukuyama argues is the recent rise of identity politics and the current adoption of it by those on the political Right. In fact, Fukuyama argues that the worst part about identity politics is that the Right has now begun to frame its politics through this lens.<sup>11</sup> In addition, this perceived identity threat, especially from the perspective of those Fukuyama terms as "traditional national identities," has been made worse by globally-related high levels of immigration.<sup>12</sup>

Much of Fukuyama's book charts the developments leading to modern understandings of identity through the writings of both ancient and enlightenment scholars, as well as various events from around the globe. He notes that *desire* and *reason*, captured by the economic concepts of "preferences" and "rational maximizer,"<sup>13</sup> are components of the human psyche.<sup>14</sup> However, he argues, a third component of the human psyche exists; namely, the basic human need for recognition—or what Socrates called the thymos.<sup>15</sup>

Thymos has two forms: "isothymia is the demand to be respected on an equal basis with other people; while megalothymia is the desire to be recognized as superior."<sup>16</sup> Evolving notions of identity lie, in part, in thymos. Fukuyama suggests that by nineteenth century Europe, the social manifestation of this human need for recognition had developed along two different paths socially and politically—one focused on the individual, the other on the group.

The first path, Fukuyama insists, "led to the universal recognition of individual rights, and thence to liberal societies that sought to provide citizens with an ever-expanding scope of individual autonomy."<sup>17</sup> In fact, he believes that liberal democracies largely but imperfectly meet isothymia—human beings need for equal recognition of their inner worth—through mechanisms such as the

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<sup>9</sup> See, e.g., Aime Picchi, *Millennials are falling out of the U.S. middle class*, CBS NEWS (Apr. 10, 2019), <https://www.cbsnews.com/news/millennials-are-falling-out-of-the-u-s-middle-class/> [https://perma.cc/7UCK-KYTF] (noting that the share of people in the middle-class is falling across developed nations).

<sup>10</sup> Fukuyama argues economic income is linked to status. He notes that economic "distress is often perceived by individuals not as resource deprivation, but as a loss of identity." IDENTITY, *supra* note 1, at 89. He explains:

While the economic inequalities arising from the last fifty or so years of globalization are a major factor explaining contemporary politics, economic grievances become much more acute when they are attached to feelings of indignity and disrespect. Indeed, much of what we understand to be economic motivation actually reflects not a straightforward desire for wealth and resources, but the fact that money is perceived to be a marker of status and buys respect.

*Id.* at 10–11.

<sup>11</sup> *Against Identity Politics*, *supra* note 5, at 101. See *infra* note 83 and accompanying text.

<sup>12</sup> IDENTITY, *supra* note 1, at 17.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.* at 85. Fukuyama explains, however, that these components cannot adequately explain the soldier falling on the grenade. *Id.* at 15.

<sup>15</sup> *Id.* at 17.

<sup>16</sup> *Id.* at xiii.

<sup>17</sup> *Id.* at 65.

universal franchise, formal equality, and the rule of law. At the same time, he believes the market economy provides an outlet for megalothymia through which people who require exceptional recognition might find it.

But the second path manifesting the human need for recognition socially, politically and economically “led to assertions of collective identity,”<sup>18</sup> and a demand for recognition of the group. Fukuyama argues that the two major manifestations of this path were nationalism, fascism, and politicized religion (here he focuses on modern day Islamism).<sup>19</sup> These arise in contexts in which modernization and rapid social change alter or disrupt formerly stable shared forms of identity. The move from agrarian to industrial lifestyles occasioned by the industrial revolution exemplify this process. The resulting crisis of identity often “leads [people] . . . to the search for a common identity;”<sup>20</sup> and a demand for the recognition of this separate common identity—identity politics.<sup>21</sup>

Fukuyama suggests that the human demand for recognition is a master concept and explains much of what is going on globally today.<sup>22</sup> That is, he suggests that behavior, often characterized as economically motivated, is actually motivated by a need for recognition and for maintaining, restoring or bestowing status.<sup>23</sup> He argues that “much of what we understand to be economic motivation actually reflects not a straightforward desire for wealth and resources, but the fact that money is perceived to be a marker of status and buys respect;”<sup>24</sup> while economic “distress is often perceived by individuals not as resource deprivation, but as a loss of identity,”<sup>25</sup> or indignity.

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<sup>18</sup> *Id.* at 56–57.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 56.

<sup>21</sup> He notes however, that modern notions of identity were not culturally salient until well into the twentieth century. Identity politics, which grew out of this sense of identity, arose in the 1960s with the emergence of the civil rights, feminist, and other “identity” based movements. These movements, Fukuyama suggests, were presented with a choice. They “could demand that society treat [their] members the same way it treated the members of dominant groups, or [they] could assert a separate identity for [their] members and demand respect for them as different from the mainstream society.” Separate identities often won. The political Right, Fukuyama argues, now plays on this platform. They manifest in a resurgent nationalism in which the loss of status, by groups and the middle class in particular, is perceived as an attack on their dignity and identity. *Against Identity Politics*, *supra* note 5, at 97, 101–04.

<sup>22</sup> *Against Identity Politics*, *supra* note 5, at 92.

<sup>23</sup> IDENTITY, *supra* note 1, at 8–11.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 89. Fukuyama seems correct in this assessment. However, in focusing on class as status, he may be ignoring, or perhaps rejecting, the conception of class as deeply structured and relational with class relations as a source of the growing inequality within countries, including the shrinking of middle classes. The notion of structured economic class relations, where my wealth is structurally related to your poverty, better captures a U.S. economy where the economy is growing and productivity continues to increase. In this economy, the wealthiest Americans through their control or association with corporations (or because the means of production are privatized), are taking the vast majority of these productivity increases either through higher wages or capital gains. Importantly, they are doing so in relation to and at the expense of the middle and working classes upon which their associated corporations depend to both produce and consume their goods and services. *See, e.g.*, Aime Picchi, *supra* note 9 (noting that middle classes are shrinking across developed countries). For a discussion of class structures *see, e.g.*, Erik Olin Wright, *From Grand Paradigm Battles to Pragmatist Realism: Towards an Integrated Class Analysis*, UNDERSTANDING CLASS 1, 1–19 (Erik Olin Wright ed., 2015) (seeking to integrate various notions of class and the way in which they operate); Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 859–914 (2008) (discussing relational understandings of class drawing on Marx and Weber and citing, among others, Martha R. Mahoney, *Class and Status in*

This idea is supported, Fukuyama suggests, by the fact that middle class people, those who appear to be losing their status, rather than the outright poor, are driving the nationalist movements.<sup>26</sup>

To address these problems, Fukuyama recommends that the political Left return to a focus on economic policies, to a politics of distribution; instead of its current focus on identity politics.<sup>27</sup> That is, he argues the Left should return to advocating for economic policies, such as the U.S. Affordable Care Act (ACA), which seek to expand economic wellbeing and benefits to large collectivities.<sup>28</sup> The ACA is a near universal health insurance plan that meets people's economic needs, he says, regardless of their previous condition, race or other identity, etc.<sup>29</sup> Presumably, policies like the ACA would not only begin to address some of people's real economic needs, but also their felt (status) needs as well. Fukuyama also suggests that countries build and/or strengthen their commitments to a national creed. This creed should be one on which a wide range of people can agree, immigrants can "assimilate" into, and about which nationals can be both reminded and educated.<sup>30</sup>

He notes that France and the U.S. have national creeds.<sup>31</sup> France, he suggests, has a creedal commitment to liberty, equality, and fraternity. While the U.S. creed, he argues, is based on a "belief in the common political principles of constitutionalism, the rule of law, democratic accountability, and the principle that 'all [people] are created equal.'"<sup>32</sup> However, he admits that the U.S. creed has developed through struggle over decades and "to this day [is] not accepted by all Americans."<sup>33</sup> I would suggest the creed is inspirational and possibly aspirational at best. At its worst, it simply masks practices meant to perpetuate elite control of society, as well as, white racial domination and privilege.<sup>34</sup>

Nevertheless, in many ways I agree with Professor Fukuyama that we need to return to a more honest and robust discussion of our economic circumstances and the structures and policies that shape them. Further, I believe he is correct in suggesting that European citizenship be

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*American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 845 (2003)). Though Fukuyama situates his analysis within creative-destructive global capitalism, his notion of class as a politics of recognition or felt status does not seem to do justice to both the actual material harm these lower classes experience at the hands of wealthy and elite corporate decision makers or the processes that in part generate that harm. Fraser's notion of class may get closer to capturing these relations. See *infra* notes 37–40 and accompanying text.

<sup>26</sup> IDENTITY, *supra* note 1, at 87 ("noting that the perceived threat to middle-class status may then explain the rise of populist nationalism in many parts of the world in the second decade of the twenty-first century"). It is important to note here that a majority of those earning under \$50,000 a year did not vote for Trump; rather, those earning more than this and thus situated in the middle class more solidly supported him. See Jon Henley, *White and Wealthy Voters Gave Victory to Donald Trump, Exit Polls Show*, THE GUARDIAN (Nov. 9, 2016), <https://www.theguardian.com/us-news/2016/nov/09/white-voters-victory-donald-trump-exit-polls> [<https://perma.cc/F6HD-7MS2>] (noting that 52% of those who earned under \$50,000 voted for Clinton while 41% voted for Trump).

<sup>27</sup> *Against Identity Politics*, *supra* note 5, at 112.

<sup>28</sup> *Id.*

<sup>29</sup> IDENTITY, *supra* note 1, at 178.

<sup>30</sup> *Against Identity Politics*, *supra* note 5, at 104–08.

<sup>31</sup> *Id.* at 109.

<sup>32</sup> IDENTITY, *supra* note 1, at 158.

<sup>33</sup> *Id.* at 154.

<sup>34</sup> Fukuyama would no doubt disagree. But he admits that there is another deep-rooted tradition and understanding of American society based on an exclusionary, ethnic, cultural and racial vision. *Id.* at 156–62.

determined by birth in a country instead of ethnicity, in addition to naturalization.<sup>35</sup> I am also intrigued by his suggestion of requiring national service for all youth. And finally, I agree that multicultural and multi-racially diverse countries must build and/or strengthen their commitments to a national, if not a transnational, creed.<sup>36</sup>

Although Fukuyama suggests that we have more honest discussions about our economic circumstances (including globalization), both his theory and his own commitments to a liberal democracy seem to limit that discussion. That is, he largely remains committed to maintaining current market arrangements under capitalist relations (with some regulation), a feature of liberal democracy.

## II. RECOGNITION V. DISTRIBUTION (ECONOMIC) CLAIMS

Both Fukuyama and Nancy Fraser are concerned about the displacement of economic justice advocacy on the Left by the advocacy of increasingly fragmented group-based justice projects. Fraser wrote on the politics of distribution and recognition over twenty years ago in her book, *Justice Interruptus: Critical Reflections on the Postsocialist Condition*.<sup>37</sup> However, Fraser is committed to a more egalitarian political economy, one that may be prohibited by Fukuyama's commitment to capitalism.

Fukuyama frames identity politics, ultimately, as a struggle for dignity as against invisibility. But he would likely agree with Nancy Fraser's definition of identity politics as a *cultural politics of recognition*. In her words, cultural "injustice is rooted in social patterns of representation, interpretation, and communication."<sup>38</sup> Cultural injustice includes practices of cultural domination, nonrecognition or invisibility, and disrespect, among others. In short, Fraser suggests that politics of recognition are projects that seek to address misrecognition. Sexuality, as an ideal type, is an example of a mode of social differentiation that is rooted in the cultural valuation structures.<sup>39</sup> The injustice that people who identify as LGBTQ+ suffer is heterosexism, the

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<sup>35</sup> *Against Identity Politics*, *supra* note 5, at 106–07.

<sup>36</sup> A transnational creed might entail something similar to the international human rights corpus but with a more robust commitment (and mechanism to meet this commitment) to economic and social rights. For a critique of the current international human rights corpus, see e.g., Makau W. Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 56 *BUFF. L. REV.* 1027 (2008), Makau W. Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 *HARV. INT'L L. J.* 201, 201–245 (2001) (also summarized in EVE DARIAN-SMITH, *LAW AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES* 84–96 (2013), and Makua W. Mutua, "The Ideology of Human Rights: Toward Post-Liberal Democracy?," in *GOVERNANCE AND LEGITIMACY IN AFRICA* 109–164 (Kofi E. Quashigah and Obiora C. Okafor, eds., 1999).

<sup>37</sup> See NANCY FRASER, *JUSTICE INTERRUPTS: CRITICAL REFLECTIONS ON THE POST SOCIALIST CONDITION* (1997).

<sup>38</sup> *Id.* at 14. In explaining these examples, Fraser elaborates: "Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one's own); non-recognition (being rendered invisible by means of the authoritative representational, communicative, and interpretative practices of one's culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions)."

<sup>39</sup> *Id.* at 32. Fraser in this discussion is using ideal types. She later complicates this analysis by noting that cultural ideas and practices have distributional consequences, distributional structures have cultural explanations and rationalizations, and these are mutually reinforcing. For instance, the cultural demeaning of LGBTQ+ people plays out in economic discrimination and the social creation of structures to exclude them.

“authoritative construction of norms that privilege heterosexuality.” This requires a change in social valuation.<sup>40</sup> It should be noted that LGBTQ+ people are spread across all classes in society.

Though Fukuyama advocates for the Left to return to a politics of economics, class, or distribution, he never defines or concretely engages with what a politics of distribution is given the ills of globalization. This results in part because he understands identity politics to include economic status or status claims related to income and wealth.<sup>41</sup> Recall that Fukuyama argues that much of what appears to be individuals’ economic motivation is about access to resources as a marker of status (not about access to resources to counter outright deprivation).<sup>42</sup> As a result, he does not define distribution. Rather, he simply proposes the Affordable Care Act as an example of an appropriate economic policy. This example is meant to demonstrate that people can often compromise on economic issues, while issues of dignity are non-negotiable.<sup>43</sup> Yet given the Cold War and current wars around resources, the assertion that people can more easily compromise on economic issues is debatable.

Nevertheless, Fraser provides a definition of a politics of distribution.<sup>44</sup> In doing so, she affords us at least one way to assess Fukuyama’s suggestions and their ability to address the economic problems that threaten identity and give rise to nationalism.

Fraser suggests that a politics of distribution is meant to remedy the maldistribution of resources and argues that “*socioeconomic injustice . . . is rooted in the political-economic structure of society.*”<sup>45</sup> These injustices typically include structures of exploitation, economic marginalization, and deprivation.<sup>46</sup> Using an ideal type, she suggests that class is the paradigmatic example of “a mode of social differentiation that is rooted in the political-economic structure of society.”<sup>47</sup> A class “exists as a collectivity only by virtue of its position in that structure”<sup>48</sup> and in relation to other classes. Thus, the injustices that arise in these social arrangements are generally matters of distribution.

Finally, Fraser posits two types of remedies that are or can be used to address both maldistribution and misrecognition. These are “*affirmation*” and “*transformation.*”<sup>49</sup> Affirmative remedies are meant to correct “inequitable *outcomes* of social arrangements without disturbing the underlying framework that generates them.”<sup>50</sup>

Fraser suggests that the “*liberal welfare state*” is an affirmative remedy that establishes income subsidies, for example, as a remedy for maldistribution of incomes.<sup>51</sup> “*Mainstream multiculturalism*” is the affirmative remedy for misrecognition and seeks to re-allocate respect.<sup>52</sup>

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40 *Id.* at 18.

41 IDENTITY, *supra* note 1, at 92.

42 *Id.*

43 *Id.* at 176.

44 FRASER, *supra* note 37, at 13.

45 *Id.* at 13 (emphasis added).

46 *Id.*

47 *Id.* at 17.

48 *Id.*

49 *Id.* at 23–26.

50 *Id.* at 23 (emphasis added).

51 *Id.* at 24–25.

52 *Id.* at 24.

An example of a multicultural remedy might be policies that include more people of a disrespected group in public broadcasts. Like Fukuyama, she suggests that these affirmative actions tend to support and reinforce group differentiation.<sup>53</sup>

Transformational remedies, in contrast, seek to correct “inequitable outcomes precisely by restructuring the underlying generative framework.”<sup>54</sup> These, she suggests, are represented by *socialism* as a distributional remedy and *deconstruction* as a remedy for misrecognition.<sup>55</sup> *Socialism* and other transformational distributional remedies seek to restructure the relations of production by combining “universalist social-welfare programs, steeply progressive taxation, macroeconomic policies aimed at creating full employment, a large nonmarket public sector, significant public and/or collective ownership, and democratic decision making about basic socioeconomic priorities.”<sup>56</sup>

*Deconstruction* “would redress disrespect by transforming the underlying cultural-valuational structure . . . [b]y destabilizing existing group identities and differentiations.”<sup>57</sup> For example, to deconstruct the gender system, a politics of recognition would seek to dismantle “androcentrism by destabilizing gender dichotomies.” This process may be underway due in part to LGBTQ+ activism, particularly Trans activism.<sup>58</sup> Or in the U.S. racial context, the goal would not be simply to seek respect for a particular group but to dismantle “Eurocentrism by destabilizing racial dichotomies.”<sup>59</sup>

Fraser’s framework provides not only firmer evidence about what is at stake in distributional claims but also at least one way of assessing different policies. For instance, ACA-like plans—policies that Fukuyama suggests the Left undertake—are affirmative distributional remedies under Fraser’s framework. The ACA is a social welfare mechanism and regulation meant to address the excesses and failures in the United States’ health care market. The ACA does not deal with the underlying structures that make health insurance unaffordable for many, whether because these underlying economic structures render large groups of people financially vulnerable or because they simply render health care far too expensive. Rather, the ACA’s purpose is simply to rearrange or redistribute players or money once the inequitable outcomes are generated.<sup>60</sup> And it

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 23.

<sup>55</sup> *Id.* at 25.

<sup>56</sup> *Id.* at 25–26. The idea of democratizing basic socioeconomic priorities tends to call for expanding democracy all the way down to the economic level at a time when the political Right appears to be moving away from even political democracy and toward authoritarianism.

<sup>57</sup> *Id.* at 24.

<sup>58</sup> *Id.* at 29. LGBTQ+ rights, including Trans rights, problematize gender (male/female) dichotomies and roles. See, e.g., Eleonora Lamm, *Gender identity and reproductive autonomy. Deconstructing sex, gender and roles*, GATE (2019), <https://transactivists.org/wp-content/uploads/2019/04/Gender-Identity-and-Reproductive-Autonomy-GATE-2.pdf> [<https://perma.cc/5WD8-9MKJ>].

<sup>59</sup> *Id.* at 31.

<sup>60</sup> Fukuyama would likely agree with the opinions of Roger Lowenstein and Peggy Noonan who, within two days of one another in the Washington Post and Wall Street Journal respectively, argued that capitalism is the goose that laid the golden egg of aggregate wealth growth and thus must be saved. The way to save it is through ensuring that the felt economic needs of people be met through programs like ACA, increased taxes, even money for mental health, etc. These arguments were made in response to the release of a plan for New Green Deal by a diverse group of freshman U.S. Congress people. In other words, Fukuyama, Lowenstein, and Noonan argue that the structures that generate the outcome of inequality



must do so over the objections of the classes of people structured by and who help structure the capitalist health-care market and thus benefit from its inequitable and thus profitable provision.

### III. ORIGIN STORY: LIBERALISM'S IDENTITY POLITICS

Both Fukuyama and Fraser agree that identity politics are a recent phenomenon and that the shift occurred on the political Left. I disagree; at most the current politics are simply a new phase in an ongoing struggle for human freedom against oppression, one at the heart of liberalism.

I believe that Fukuyama inappropriately blames the rise of identity politics on the political Left. The story he tells is that the white Left first shifted from “building solidarity around large collectivities such as the working class or the economically exploited” to identity politics.<sup>61</sup> These identity politics focus on smaller groups and narrower experiences of marginalization and injustice. In the U.S. this arises, according to Fukuyama, against the backdrop of a therapeutic movement meant to address the human longing not just for material security, but for self-esteem and dignity.<sup>62</sup> And it occurred, he suggests, when the Left's dreams of a large welfare state met the fiscal constraints and stagflation crises of the 1970s, when the U.S. civil rights and feminist movements, which he sees as a politics of recognition, were well underway, and when socialist experiments in various countries began to fail.<sup>63</sup> The Right, which is overwhelmingly white, he suggests, has now followed the Left's lead.<sup>64</sup>

Yet another story could be told here: one that starts at the beginning of the story instead of the middle of it. This other story locates the modern emergence of identity politics in the economic ascent and imperialism of Europe (in practice if not in name). In this version of the story, identity politics arise when Native Americans are marked for ethnic cleansing and genocide so that their land can be taken and used for the benefit of Europeans, and African knowledge and labor are exploited for the benefit of the same.<sup>65</sup> European and American enslavement and later colonization of Africans, among other transnational practices, aid in spurring three related socioeconomic phenomena: the industrial revolution, the cultural ideology of white supremacy, and the institutionalization, through law and practice, of the economic (distributional) and cultural (recognition) imperatives engendered by these first two developments.

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also create growth, and thus should be maintained with redistribution occurring after capitalism has worked its growth magic. The question is whether the political right will allow this redistribution. A deeper question, I would submit, is whether growth is sustainable in the long run. See, e.g., Roger Lowenstein, *A lesson for the Democratic left from Adam Smith*, WASH. POST (Feb. 15, 2019), [https://www.washingtonpost.com/business/a-lesson-for-the-democratic-left-from-adam-smith/2019/02/15/00925d14-308b-11e9-86ab-5d02109aeb01\\_story.html](https://www.washingtonpost.com/business/a-lesson-for-the-democratic-left-from-adam-smith/2019/02/15/00925d14-308b-11e9-86ab-5d02109aeb01_story.html) [https://perma.cc/6NDB-YVZE]; Peggy Noonan, *Republicans Need to Save Capitalism*, WALL ST. J. (Feb. 14, 2019), <https://www.wsj.com/articles/republicans-need-to-save-capitalism-11550189297> [https://perma.cc/3AUY-WLYS].

<sup>61</sup> IDENTITY, *supra* note 1, at 96.

<sup>62</sup> *Id.* at 112.

<sup>63</sup> *Id.* at 110–112.

<sup>64</sup> *Id.* at 121.

<sup>65</sup> *Id.* at 137. Fukuyama recognizes this process but sees these practices as (simply) paths to nationhood. *Id.* at 141–42. It might be that he sees these as the negative practices of nationalism. For instance, he refers to these practices as ethnic cleansing. *Id.* But the discussion is not framed as practices of nationalism or identity politics. Further, these processes of ethnic cleansing and slavery structure the very modernization process that Fukuyama discusses as a cause for nationalism. *Id.* In this way, his historiography of the rise of nationalism seems problematic.

Regarding industrialization, many scholars have now accepted the milder form of Eric Williams' argument about slavery and industrialization, acknowledging that European enslavement of Africans helped spur the English industrial revolution and thus was part and parcel of the processes that initiated modern sustained growth under capitalist relations.<sup>66</sup> Further, new findings suggest that enslavement was essential to American industrialization and capitalist development, fueling its accumulation of wealth on the assets of Native and African Americans, among others.<sup>67</sup> Thus, from the beginning, to use Fraser's phrasing, "race" structured the transnational capitalist division of labor: first structuring the economic division and distribution of work between free and enslaved, and then between high paid, high status and low paid, low status work, as well as access to official employment. Whites occupy the former and have much greater access to official employment in the modern moment.<sup>68</sup>

White supremacy, on the other hand, may have started off as simply the cultural rationalizations of the economic practice of genocide and enslavement.<sup>69</sup> But it soon developed into a self-perpetuating structure of cultural representation that inhered in Western politics of recognition. This interpreted and misrecognized white and whiteness as superior. In this sense, megathymia appears not as an individual trait, but a collective or group trait, nourished more by supremacist ideology than by psychological innateness. At the same time, Native and African Americans were seen as both inferior and degenerate. Thus, race combined with economic class status in the structure of class relations.

In this way, race for the subordinate in particular, is bivalent, as Fraser explains, encompassing both issues of misrecognition and maldistribution.<sup>70</sup> And it may be this bivalence (or the intersection of race and class)<sup>71</sup> that provides a more complicated, but more accurate explanation

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<sup>66</sup> ERIC WILLIAMS, *CAPITALISM AND SLAVERY 170–71* (1944). See also, Nicholas Draper, *The Price of Emancipation: Slave-ownership, Compensation and British Society at the End of Slavery*, in *STUDIES IN ECONOMIC HISTORY* 11 (Paul Johnson et al. eds., 2010) (noting that acceptance of a mild form of Williams' thesis is wide-spread). Draper summarizes Williams four theses as follows:

Racism was a result, not a cause, of slavery; that Britain's Industrial Revolution was heavily dependent on the slave-economy; that the slave economy suffered a decline after the American Revolution; and that the slave abolition of the slave-trade and of slavery itself was motivated not by disinterested humanitarianism but by rational economic calculation.

*Id.*

<sup>67</sup> See generally EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 19 (2014); WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 254 (2013); Sven Beckert & Seth Rockman, *Slavery's Capitalism*, in *SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 5–6 (Sven Beckert & Seth Rockman eds., 2016).

<sup>68</sup> FRASER, *supra* note 37, at 20–21

<sup>69</sup> Fraser states as follows:

Most material economic institutions have a constitutive, irreducible cultural dimension; they are shot through with significations and norms. Conversely, even the most discursive cultural practices have a constitutive, irreducible political-economic dimension; they are underpinned by material supports. Thus, far from occupying two airtight separate spheres, economic injustice and cultural injustice are usually imbricated so as to reinforce each other dialectically.

FRASER, *supra* note 37, at 15 (noting that economic justice and cultural justice are intertwined).

<sup>70</sup> Fukuyama might agree in that the claim for dignity for him includes distributional claims in part.

<sup>71</sup> This is not a perfect interpretation of the bivalent idea. But to the extent people understand race as status,

for the re-emergence of nationalism/neo-fascism today. That is, though nationalism by definition is exclusory, bivalence may better explain the increased animosity toward specific immigrants (e.g., Mexicans in the U.S.) and groups, as well as the hostility toward their concrete distributional claims; distributional claims which Fukuyama's philosophy inadequately theorizes.

Finally, these two phenomena (industrialization and white supremacy) were institutionalized, for example, in the U.S. Constitution, in which elite (property owning) white males crafted liberal government and social arrangements that they controlled and of which they were the primary beneficiaries. That is, they assured that those sharing the identities of elite white maleness would reap the benefits of leadership, control and access to the lions' share of the country's resources. In contrast, those marked and identified as something other than rich, white and male would bear the burdens of maldistribution and misrecognition through oppression, suppression, exploitation, marginalization, deprivation and disrespect in mutually reinforcing ways. This was identity politics at its finest!

Fukuyama does not like this story. He complains that its narrators' intimate that the problems this process generated are written into the country's DNA.<sup>72</sup> Be that as it may, this is the history of the liberal democratic project in the UK and U.S. and, with varying details, that of the West.<sup>73</sup> Fukuyama attempts to elude these foundational arrangements and their consequences in the U.S. by making three related arguments. First, he situates his preferred story about the United States in a post-Civil War frame. Second he ignores the distributional claims and advocacy of subordinated groups and thus paints, in this case, black resistance, as primarily a politics of recognition. Third, he then advocates against the affirmative remedy for these misrecognition claims—multiculturalism.

The result is twofold. First this group's concrete distributional (economic justice) claims and advocacy are dismissed in part because they are subsumed under a politics of recognition. This is so, even as a commitment to current economic arrangements might prevent their accomplishment in any case. But second, then the primary remedy for rectifying their misrecognition claims—multiculturalism (under Fukuyama's preferred approach—affirmative rather than transformational)—is also viewed as inappropriate. Taken together Fukuyama's recommendations re-impose invisibility on black claims and social justice visions while letting stand and prioritizing, as currently manifest, the understandings, goals, resentments, prerogatives and privileges of "traditional nationals."

#### *A. A Post Civil War Frame?*

Fukuyama tries to evade the foundational arrangements of white privilege and black oppression codified in the U.S. Constitution by emphasizing the creedal commitment to "equality" found in the U.S. Declaration of Independence and established in constitutional law in the passage of the Fourteenth Amendment after the Civil War.<sup>74</sup> This then supports his preferred American story

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this more modern formulation—the intersection of caste status and class—may capture pieces of it.

<sup>72</sup> *Against Identity Politics*, *supra* note 5, at 108; *IDENTITY*, *supra* note 1, at 170.

<sup>73</sup> *See generally* CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (using social contract theory to argue that the social contract of liberal philosophers was a racial contract, one which was limited to white men).

<sup>74</sup> *Against Identity Politics*, *supra* note 5, at 97. One gets this impression more from the essay than the book. In his book, Fukuyama recognizes that it takes almost one hundred years before the promises of the Fourteenth amendment are even implemented at the level of law. That it is embraced at the level of law appears to forward his story of a country

of an ever expanding embrace of wider groups of Americans initially excluded. In preferring this story, he diminishes the black struggle and its identity politics in general as simply a cry of “victimization” instead of a critique, in part, of “crimes against humanity” and restitution for stolen wealth.

But the post-Civil War frame does little to get Fukuyama around the continuing economic and cultural oppression of African Americans in the immediate aftermath of the Civil War. First the creed of equality and the Fourteenth Amendment themselves were undermined in a host of violent and legally-blinked practices.<sup>75</sup> These culminated in the Supreme Court decision of *Plessy v. Ferguson*, which itself enshrined in legal doctrine and social practice the apartheid system of racial segregation and triggered the formal legal institution of Jim Crow. This institution was not overturned at the level of law until the *Brown* decision in 1954 and the 1960s Civil Rights Movement. Rather than initiating identity politics, it was this movement that instead midwived the birth of legal changes in the United States—a movement waged in reaction to the identity politics and maldistribution of resources put in place by the foundational documents, laws and practices of

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increasingly embracing and extending wider groups of people beyond the “traditional national majorities.”

<sup>75</sup> Consider for instance, the case of *United States v. Cruikshank*, 92 U.S. 542 (1876). The case arose out of the Colfax Massacre in which whites killed over a hundred African American Freedmen in a contested election in a majority black parish in Louisiana. Of the hundreds involved, only three white men were convicted of violating Section Six of the 1870 Enforcement Act, which together, with the indictment, raised First, Second and Fourteenth Amendment issues including issues of “privileges or immunities,” due process and equal protection. The Supreme Court overturned the convictions holding the indictments insufficient and the constitutional issues, in short, inapplicable to private actions. James Pope has argued that this case is one of the most important cases decided by the Supreme Court and yet it is not a part of the legal canon. See James Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 385 (2014). It is important because it was one of the first cases to propound a number of significant Fourteenth amendment doctrines and it did so in troubling ways and in the violent context of Reconstruction. Pope posits that the Court in refusing to punish white anti-black violence in this case helped to unleash the violence that brought Reconstruction to an end. *Id.* at 412. On interpreting the Fourteenth Amendment, Pope suggests, that it is in: (1) *Cruikshank* rather than the *Civil Rights Cases* which the Fourteenth Amendment was interpreted as not applying to private action and requiring (affirmative) state action; (2) *Cruikshank* rather than *Slaughter-House* where the Court resolved that the Bill of Rights did not apply to the States (absent evolving incorporation); (3) *Cruikshank*, not the *Civil Rights Cases* or *Boerne* that the Court cut back on Congress’s discretion to choose the means of implementing the Constitution; and (4) *Cruikshank* rather than *Washington v. Davis* that first articulated a standard requiring proof of racial intent. *Id.* at 385. Pope argues that the Court established these standards in the context of extreme racial violence where such intent was obvious and against the specific purposes for which the Enforcement Acts were enacted—the purposes of halting white violence and protecting African American citizenship rights. *Id.* at 411.

Pope further postulates that the usual “state rights v. federal rights” argument fades in importance when *Cruikshank* is added to the canon because here the national government was actually trying to support a duly elected state government in exercising its authority as against white anti-black violence, an effort undermined by the *Cruikshank* Court. *Id.* at 391. The problem was that the state government involved was not all white, as had been previous state governments but rather a duly elected *multiracial* state government. *Id.* Finally, for the larger purposes of this essay, Pope suggests that omission of *Cruikshank* from the legal canon allows the canon, as currently constructed, to paint black advocacy as simply middle class demands for access to public accommodations such as theaters, as opposed to issues around labor, power, and resources, much as Fukuyama paints black struggle as a politics of recognition. *Id.* at 392–93. Pope notes in contrast, that much of what was going on during Reconstruction was primarily about labor control; emancipated Freed people were predominately laborer workers. *Id.* at 419–20. And it is worth remembering that they were producing one of the most important commodities in the world at the time—cotton.

white colonial settlers—those who Fukuyama deems the “traditional national identity.”<sup>76</sup> And it is this story that may well be the reality of liberal democracies: As they historically rest on oppressive dominant ethnic groups, they can only be made less “imperfect” by redistribution, recognition and coalitional politics in favor of those who bear the brunt of their exclusions.

*B. Distributional Claims & Advocacy, Multiculturalism & Colorblindness*

Second, Fukuyama ignores the distributional claims and advocacy of black resistance. Having done so, he is free to paint this resistance as primarily a politics against misrecognition.

Though enforced economic degradation and violence is a form of disrespect, the distributional claims embodied in black struggle run to the core of the American political and economic arrangements, arrangements Fukuyama largely supports. To be fair, Fukuyama concedes that there is nothing wrong with identity politics per se and that such politics on the part of historically disadvantaged groups are meant to improve the material conditions of the group.<sup>77</sup> Further he concedes that the realization of racial and gender justice is incomplete and must somehow be continued.<sup>78</sup>

Nevertheless, his analysis stymies these efforts by painting them as simply a politics of recognition. He ignores the fact that race in the form of black struggle is deeply bivalent and that blacks are not only culturally demeaned, stereotyped and disrespected but also economically subordinated. Further, the black struggle has always been about exploitation, marginalization and deprivation.

For instance, he ignores the fact that schools are more segregated today than they were when Brown was decided in 1954, with attendant disparities in resource allocation. He blinks the fact that blacks today still fare significantly worse than whites on almost all economic indicia of well-being. And he appears unaware of the fact that the current Movement for Black Lives' Platform,<sup>79</sup> is reminiscent of the Black Panthers' 1966 Ten Point Plan, the 1948 Declaration of Negro Voters and even Garvey's 1920's “Beliefs of UNIA” and “Declaration of Rights of the Negro Peoples of the World.”<sup>80</sup> These platforms often included demands for concrete resources, such as power, land, reparations, employment, housing, education, and cessation of police brutality. Police abuse, also referred to as modern-day lynching,<sup>81</sup> is simply one form of violence, employed by both

<sup>76</sup> IDENTITY, *supra* note 1, at 149. The phrase “dominant culture and people” might be the more appropriate phrase. Fukuyama sometimes uses this phrase in the book. Otherwise, one would think that both Native Americans and African Americans, as well as perhaps Mexican Americans among others, arguably as part of original stock of the country, should be seen as “traditional nationals” and inheritors of the country's wealth. Further, they should be part of the group defining the contours of American policies (particularly Fukuyama's view that nations must be able to define their borders). But when framed from this perspective of traditional nationals, notions of “assimilation” seem even more problematic. Fukuyama would argue that this dominant group is the progenitor of the current “liberal democracy” of which he is so fond.

<sup>77</sup> *Against Identity Politics*, *supra* note 5, at 108.

<sup>78</sup> *Id.*

<sup>79</sup> *See Platform*, THE MOVEMENT FOR BLACK LIVES PLATFORM, <https://policy.m4bl.org/platform/> [<https://perma.cc/LXJ6-MZUR>].

<sup>80</sup> *See generally* Athena D. Mutua, *Restoring Justice to Civil Rights Movement Activists?: New Historiography and the “Long Civil Rights Era*, Buffalo Legal Studies Research Paper No. 2008–12 (2008) (discussing the Black Panther Platform and citing these other platforms.)

<sup>81</sup> MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY*

the state and some white people, meant to keep current allocations of distribution and recognition in place. Further Fukuyama ignores that the March on Washington was a “March for Jobs and Freedom,” and that it was Martin Luther King, Jr., and the Southern Christian Leadership Conference (SCLC) that led the multiracial Poor People’s Campaign effort, begun just before King’s assassination.

These omissions allow Fukuyama to not only paint black movements as primarily cultural but then both to mourn the group differentiation effects of “mainstream multiculturalism,” and to pretend that policies such as colorblindness actually work. Said differently, Fukuyama argues that the Left should abandon identity politics generally and multiculturalism in particular because it reinforces group identity and separateness, as well as, provokes (white) resentment (neither he nor Fraser attempt to figure out how countries such as Sweden and Canada appear to engage affirmative remedies without generating the same high level of group differentiation or resistance from privileged groups).

Further, according to Fukuyama, multiculturalism entails a request for, what he characterizes as, special consideration.<sup>82</sup> Fukuyama condemns this alleged request for special consideration noting that Martin Luther King, as opposed to the Black Panthers, only asked for black people to be treated the same as white people.<sup>83</sup> Of course, he simply ignores King’s appraisals that the cry of “‘Black Power’ [was], at bottom, a reaction to the reluctance of white power to make the kind of changes necessary to make justice a reality for the Negro;”<sup>84</sup> or that the “problems of racial injustice and economic injustice cannot be solved without a radical redistribution of political and economic power;”<sup>85</sup> or finally, that “the evils of capitalism are as real as the evils of militarism and . . . racism.”<sup>86</sup> That is, King did not simply want black folks to be treated like whites under the current unequal arrangements; rather, he apparently wanted transformational remedies that unified both the politics of distribution and recognition. He wanted the kind of distributional and recognitional changes that would ensure everyone’s wellbeing and dignity.<sup>87</sup>

At the same time, by ignoring these distributional concerns and supporting the idea that hierarchically structured social groups should be merely treated the same, Fukuyama can celebrate the governmental policies and the Supreme Court’s doctrine of colorblindness. He can celebrate it because it undermines multicultural awareness and consideration. However, as untold numbers of scholars and others have pointed out, colorblindness simply leaves the hierarchy in place; it cements and reinforces maldistribution, with its attendant racist rationalizations in the already racially

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60 (2003).

<sup>82</sup> IDENTITY, *supra* note 1, at 111 (discussing special consideration demanded by minority groups).

<sup>83</sup> *Against Identity Politics*, *supra* note 5, at 97; IDENTITY, *supra* note 1, at 108.

<sup>84</sup> Martin Luther King, Jr., *A Riot is the Language of the Unheard*, CBS NEWS (Sept. 27, 1966), <https://www.cbsnews.com/news/mlk-a-riot-is-the-language-of-the-unheard/> [<https://perma.cc/Z57D-76WN>].

<sup>85</sup> Martin Luther King, Jr., *The Three Evils of Society*, Address at the National Conference on New Politics (Aug. 31, 1967) (transcript available at SCRIBD (Sept. 21, 2019)), <https://www.scribd.com/doc/134362247/Martin-Luther-King-Jr-The-Three-Evils-of-Society-1967> [<https://perma.cc/2Q37-YBTT>].

<sup>86</sup> DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 551–2 (1986).

<sup>87</sup> Singh suggests the black civil rights movement was one of the few (presumably racial and ethnic) based group movements that advocated for policies broader than those that would simply benefit themselves. *See* SINGH, *infra* note 92. Fukuyama seems to suggest that all political identity groups have narrow and exclusive goals.

structured political economy.<sup>88</sup> Given that appreciating these outcomes is not rocket science, presumably policy makers are well aware of this dynamic and are indifferent to it, or they actually intend these outcomes.

And finally, even if the Left eliminated its support for multiculturalism as an affirmative remedy for misrecognition, this would likely do nothing to decrease the use of identity politics on the Right. According to Fukuyama, the proverbial cat of identity politics is out of the bag. Thus, it would seem that eliminating the Left's engagement with multicultural politics, even when coupled with liberal welfare state distribution remedies like ACA, would simply hobble the Left's various mobilization strategies.

For instance, recall that Senator Bernie Sanders, in his bid for the democratic presidential nomination in 2016, espoused policies that some viewed as a significant expansion of the U.S. welfare state (relatively free healthcare and college education). And yet he ran into significant problems in generating African American support—a significant force within the Democratic Party—in part because he initially had little to say about racism and its potential impact on the distribution of such goods to communities of color. In addition, he had no position on police violence, a historically used tool of oppression and economic subordination.<sup>89</sup> Consider police violence against striking workers.<sup>90</sup> He failed to even see, let alone address a significant and serious issue that not only affects black communities but is often used to stifle dissent against unjust social and economic policies.

Further, it is not clear that this kind of blindness on the Left would have the multicultural awareness to recognize that a healthcare insurance policy like ACA would need targeted provisions in addition to its universal application to make it useful for some disadvantaged groups. In targeting some of its provisions, policymakers would have to ask: will this provide real healthcare access to people in urban communities or rural areas that have limited access to clinics and hospitals? That

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<sup>88</sup> See, e.g., MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 236–44 (2012) (arguing that colorblindness “has proved catastrophic for African Americans”); IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 77, 102 (2014) (discussing the “allure of colorblindness” and discussing its development from an aspirational idea to a reactionary ideological tool that enhances and furthers the “new racism” that has enlivened prejudice and had a detrimental effect on the economy); see generally Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 *CONN. L. REV.* 1513 (2011); Sumi Cho, *Post-Racialism*, 94 *IOWA L. REV.* 1589 (2009); Girardeau A. Spann, *The Conscience of a Court*, 63 *U. MIAMI L. REV.* 431 (2009); Ian F. Haney-López, *A Nation of Minorities: Race, Ethnicity and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985 (2007) (tracing the history of colorblindness); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 *HOWARD L.J.* 1, 63–90 (1995) (discussing the fallacy of equating benign and invidious discrimination, a function of colorblindness reasoning); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 *N.Y.U. L. REV.* 162 (1994) (arguing that colorblindness allows the law to maintain its bias against racial minorities).

<sup>89</sup> See, e.g., John Wagner, *A day after being heckled, Sanders speaks out against police brutality in pair of Texas rallies*, *THE WASHINGTON POST* (July 20, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/07/20/a-day-after-being-heckled-sanders-speaks-out-against-police-brutality-in-pair-of-texas-rallies/> [<https://perma.cc/VQP9-H8VA>]; Jason Horowitz, *Bernie Sanders Courts Black Voters in South Carolina After Criticism on Racial Issues*, *NEW YORK TIMES* (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/us/politics/a-shift-in-tone-as-bernie-sanders-speaks-on-criminal-justice-in-south-carolina.html> [<https://perma.cc/WM87-ECAW>].

<sup>90</sup> See generally Kristian Williams, *Cops for Labor?*, *DOLLAR & SENSE MAGAZINE*, Sept./Oct. 2011; KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* (Rev. ed. 2015); RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014).

is, it would have to *recognize* that people are different and differently situated (for some because of that difference) in access to care. Some of this was done; but the question remains.

### C. *Same Ole Economics and White Supremacy*

If the 1960s movements spurred the Left toward identity politics, as Fukuyama argues, it had a similar effect on the Right, as exemplified in the Republican Southern Strategy. This strategy successfully accomplished the goal of luring southern whites away from their traditional allegiance to the Democratic Party by using references to “law and order” and “welfare” as socioeconomic dog-whistles of race.<sup>91</sup> Arguably, it was not the Left and its turn toward identity politics that spurred the Right’s turn, but black activism against racialized social and economic injustice that fueled the Right’s efforts to maintain white social and economic privileges.

That is, the difference between the Left and Right’s identity politics from the 1960s was that the Right’s politics were not against misrecognition of whites (why advocate against pretenses of superiority?); but rather, a politics to maintain white privileges and continue the economic disadvantage and misrecognition of blacks, among other oppressed groups. Today’s current “populist nationalism,” though focusing now on the “victimization” of whites, too, is simply old politics in a new frame. In other words, although the Right’s identity politics appear to have an anti-elite and anti-globalist frame, they remain a continuation of the white supremacist politics of the past in new form,<sup>92</sup> especially given the tendency toward white racial alignment.

Specifically, the Right’s current identity politics is advanced through a politics that claims that the aspirations of others for economic justice and dignity are requests for specialness both victimizing and made at the expense of white folks.<sup>93</sup> Consequently, these very same everyday

<sup>91</sup> See generally HANEY-LÓPEZ, *supra* note 88; ALEXANDER, *supra* note 88 at 43.

<sup>92</sup> This seems particularly true given the insight that the problem of the color-line is global and that the West verses the rest is a color-line constructed by Western colonialization, imperialism and ideology. NIKHIL PAL SINGH, *BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY* 219–20 (2004).

<sup>93</sup> In fact, the idea that blacks are getting special treatment is an old argument, one also made by Andrew Johnson in regard to the newly freed enslaved. Aaron Astor, *When Andrew Johnson Freed His Slaves*, THE NEW YORK TIMES (Aug. 9, 2013), <https://opinionator.blogs.nytimes.com/2013/08/09/when-andrew-johnson-freed-his-slaves/> [<https://perma.cc/86BE-5ZC8>] (Johnson on denying them “special treatment”). In fact, while the U.S. refused to provide “40 acres and a mule” to these people upon whose knowledge and labor the country was built, it distributed million acres of free (Native American) land mostly to whites in various Homestead Acts. See *Homestead Act*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/american-civil-war/homestead-act> [<https://perma.cc/HCS5-U37R>]. “The Homestead Act of 1862 excluded blacks because it was limited to persons who were American citizens or who had filed necessary documentation to become citizens. It was impossible for blacks to establish American citizenship because [the] Dred Scott [case] had held that blacks were not, and could not be citizens under the Constitution.” Jonathan K. Stubbs, *Implications of A Uniracial Worldview: Race and Rights in A New Era*, 5 BARRY L. REV. 1, 15 n.56 (2005). After the Civil War, the 1862 Act and later homestead acts on their faces included black people but in practice blacks were virtually excluded. Keri Leigh Merritt, *Land and the Roots of African-American Poverty*, AEON (Mar. 11, 2016), <https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty> [<https://perma.cc/7SG7-E2LX>] (noting that in the Southern Homestead Act of 1866 (SHA) “combined with the claimants of the original Homestead Act [1862], more than 1.6 million white families—both native-born and immigrant—succeeded in becoming landowners during the next several decades.”). Conversely, “only 4,000 to 5,500 African-American claimants ever received final land patents from the SHA.” Further, “the number of adult descendants of the original Homestead Act recipients living in the year 2000 was estimated to be around 46 million people, about a quarter of the US adult population.” See also, MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 13–15 (1997) (discussing the failure of the Homestead Act of 1866



“traditional nationals” continue to support a socioeconomic maldistribution of resources that, despite the ills of globalization, still disproportionately favors them . . . and even more so white elites, with whom everyday “traditional nationals” historically and currently have aligned themselves.<sup>94</sup> This alignment transfers every day whites’ economic resentments toward elites onto more vulnerable groups, allowing whites to engage in the age old practice of kissing up, while kicking down, as Fukuyama acknowledges.<sup>95</sup> And this is so even though, as he points out, everyday whites are angry because their very real problems are invisible to the white elite.<sup>96</sup>

Thus, while the Right’s politics are also bivalent, they actually support a politics of economic maldistribution and the cultural demonization of others *by reference to whites*. This makes building a broad coalition for remedying maldistribution difficult and is the kind of identity politics that Fraser correctly notes is unworthy of support. Identity politics worthy of respect and promotion, she suggests, are those that respect human rights, seek to address the problems of misrecognition, and actually seek to address the economic maldistribution of resources. In this vein, it is important to note that many of the cross-racial movements and coalitions that currently exist, including those seeking broad-based economic justice seem to be led or co-led by people of color with some white progressive support. Consider for instance the new Poor People’s Campaign, the Fight for Fifteen, the Women’s March and the Chicago Teachers Union; movements willing to include, rather than brush aside, what appear to be distinct group issues in addition to advocating for broad economic issues. In fact they center racial justice among other justice projects.<sup>97</sup>

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to make a notable change in the material conditions of black people).

<sup>94</sup> A good example of poorer whites’ willingness to align themselves with policies supported by white elites and their politicians is captured in Jonathan M. Metzler’s new book. In it he describes a Tennessee man named Trevor who is dying of liver cancer. *See* JONATHAN M. METZLER, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND*, 3–5 (2019). Metzler notes that if Trevor lived a mere 39-minute drive away in Kentucky where that state participated in ACA and expanded Medicaid, he would have had access to life-saving medical treatment for his ailment. *Id.* Tennessee officials refused such health-care expansion. *Id.* But as Metzler noted, Trevor was not angry with his elected officials. *Id.* Instead he emphatically agreed with them exclaiming: “Ain’t no way I would ever support Obamacare or sign up for it . . . [w]e don’t need any more government in our lives. And in any case, no way I want my tax dollars paying for Mexicans or welfare queen.” *Id.* at 4. Metzler explains he met many such people across the American heartland and argues that they were willing to die to protect their whiteness. *Id.* at 5.

<sup>95</sup> IDENTITY, *supra* note 1, at 102–04.

<sup>96</sup> *Id.* at 102. This has quite some truth in it. It may be however, that white elites see the problems but simply do not care, particularly where the white poor are concerned. *See, e.g.,* NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* (2017) (arguing that the U.S. has always been a classed society and that the white elite think little of poor whites). On the other hand, more economically vulnerable whites may be persuaded that white alignment is in their interests because they are making distinctions among elites, directing their anger only toward a small group of “eastern liberal elites,” who they believe have betrayed their cultural and economic interests. *See, e.g.,* HANEY-LOPEZ, *supra* note 88, at 31 (discussing the Southern Strategy and noting that strategists also targeted northeastern intellectual and cultural elites).

<sup>97</sup> *See, e.g.,* Greg Kaufmann, *How the Poor People’s Campaign Is Building a ‘New Electorate,’* THE NATION (Jan. 21, 2019), <https://www.thenation.com/article/poor-peoples-campaign-2019-liz-theoharis/> [<https://perma.cc/5CAY-RKXH>]; *Workers head to Washington, D.C. to share their stories and win Gamechanger award!*, Fight for \$15, <https://fightfor15.org/workers-head-to-washington-d-c-to-share-their-stories-and-win-gamechanger-award/> [<https://perma.cc/DJW7-VPTD>]; Sarah Jaffe, *The Chicago Teachers Strike Was a Lesson in 21st-Century Organizing*, THE NATION (Nov. 16, 2019), <https://www.thenation.com/article/chicago-ctu-strike-win/> [<https://perma.cc/HT7F-Z7ZY>] (explaining the Union “fought for much more than raises and benefits for themselves):

The most disappointing part about Fukuyama's analysis is that it plays right into the Right's brand of politics of misrecognition and maldistribution. First, he sympathizes with the allegation that black folks and other disadvantaged groups are in fact requesting undeserved special consideration as opposed to reparations and restitution for both crimes against humanity and appropriated wealth, as well as for the leveling up of recognition and distribution for the purposes of bringing about equality. Second, while advising the Left to pursue economic policies such as ACA, *he fails to acknowledge that the Right has substantially undermined the viability of ACA.*<sup>98</sup> It has done so through its perverse brand of identity politics manifest in reactionary nationalism, with its commitment to the maldistribution of resources backed by corporate financial support, the profits of which are threatened by widespread access to healthcare and overall human well-being.<sup>99</sup>

Nevertheless, Fukuyama suggests that the Left spend its energy attempting to bring the "white working class" back into the fold,<sup>100</sup> apparently instead of building the kind of coalition that

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They demanded smaller class sizes, prep time, nurses and counselors in every school. They put racial justice at the center of their demands, arguing for fair resources for schools that serve black and brown students, sanctuary schools for immigrants, and restorative justice practices to disrupt the school-to-prison pipeline. Most important, they made the strike a referendum on housing in Chicago by demanding landmark resources for homeless students and refusing to back down when the mayor and her allies argued that such issues had no place at the bargaining table." *Id.*

<sup>98</sup> See generally IDENTITY, *supra* note 1. See, e.g., *Obamacare: Has Trump Managed to Kill off Affordable Care Act*, BBC (Mar. 29, 2019), <https://www.bbc.com/news/world-us-canada-24370967> [<https://perma.cc/3HYA-RXRL>]; Ian Stewart, *As Judge Rules Obamacare Unconstitutional, Democrats Seethe, Republicans Stay Mum*, NPR (Dec. 15, 2018), <https://www.npr.org/2018/12/15/677036593/as-judge-rules-obamacare-unconstitutional-democrats-seethe-republicans-stay-mum> [<https://perma.cc/N6KL-D9T5>]; Frank J. Thompson, Michael K. Gusmano, Shugo Shinohara, *Trump and the Affordable Care Act: Congressional Repeal Efforts, Executive Federalism, and Program Durability*, 48 PUBLIUS: THE JOURNAL OF FEDERALISM 396 (2018), <https://doi.org/10.1093/publius/pjy007> [<https://perma.cc/3HYA-RXRL>]; Julie Rovner, *Timeline: Despite GOP's Failure to Repeal Obamacare, The ACA has Changed*, THE WASH. POST (April 5, 2018), [https://www.washingtonpost.com/national/health-science/timeline-despite-gops-failure-to-repeal-obamacare-the-aca-has-changed/2018/04/05/dba36240-38b1-11e8-af3c-2123715f78df\\_story.html](https://www.washingtonpost.com/national/health-science/timeline-despite-gops-failure-to-repeal-obamacare-the-aca-has-changed/2018/04/05/dba36240-38b1-11e8-af3c-2123715f78df_story.html) [<https://perma.cc/JFR6-JYZX>].

<sup>99</sup> See, e.g., Matthew Johnston, *Insurance in the Age of Obamacare (AET, CI)*, INVESTOPEDIA (Oct. 12, 2018), <https://www.investopedia.com/articles/personal-finance/061615/how-obamacare-affected-insurance-industry.asp> [<https://perma.cc/HV74-67XR>] (noting the insurance companies' initial opposition to ACA). On the corporate and business interests in, as well as the neoclassical economic ideas behind the rise and success of a conservatism that generally opposes policies such as ACA. See, e.g., JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016); KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009); DAVID MILLER, *How Neoliberalism Got Where It Is: Elite Planning, Corporate Lobbying and the Release of the Free Market*, in THE RISE AND FALL OF NEOLIBERALISM: THE COLLAPSE OF AN ECONOMIC ORDER? 23 (Kean Birch and Vlad Mykhnenko eds, 2010); GÉRARD DUMÉNIL & DOMINIQUE LÉVY, CAPITAL RESURGENT: ROOTS OF THE NEOLIBERAL REVOLUTION 11 (2004).

<sup>100</sup> The white working class is only part of the working class and it is not always clear what is meant by the term. Recent media discussions use measures such as income (making less than a certain amount such as \$42,000) and/or education (not having a college degree) to define the working class. Use of the term "white working class" may mask more than it illuminates. What is clear is that the group is white. See John McCullough, *What does the media mean by "working class"? Somehow they're always white*, SALON (Nov. 14, 2018), <https://www.salon.com/2018/11/14/what-does-the-media-mean-by-working-class-somehow-theyre-always-white/> [<https://perma.cc/G3GR-QRFR>]; Susannah Snider, *Where Do I Fall in the American Economic Class System?*, U.S. NEWS (Jul. 17, 2018), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-07-17/where-do-i-fall-in-the-american-economic-class-system> [<https://perma.cc/UW8G-BXR3>].

constitutes an emerging diverse American majority of the sort that spirited Barack Obama into the U.S. presidency (which included some of those characterized as part of the white working class).<sup>101</sup> But in addition to the suggestion that the Left spend its efforts cultivating the “white working class,” Fukuyama fans the flames of white resentment generally. He particularly does so through his position on “political correctness,” a form of identity politics that he suggests is practiced by the Left.

*D. Political Correctness and a Thought on the Supreme Court*

Fukuyama explains that political correctness (“PC”) is “a social norm that prohibits people from publicly expressing their beliefs or opinions without fearing moral opprobrium.”<sup>102</sup> He thinks PC is especially problematic. And, there are those on the Left who agree with him. For example, Bill Maher has suggested that PC is the “elevation of sensitivity over truth,”<sup>103</sup> and he has used, for instance, a “politically incorrect” form of comedy to critique it.

While some forms of PC may hamper candid dialogue, PC arises out of the contestations of disadvantaged peoples. It arose to encourage basic decency and civility in dialogue, as well as knowledge-based conversations aware of the diversity of humanity and human practices—some good, others problematic. In this vein, it appropriately subjected racist, sexist, and other harmful speech, not legally prohibited, to moral opprobrium. In doing so—and here’s the rub—it targeted the felt privilege and prerogatives of the dominant and the powerful to demean others. The loss of this felt privilege is a primary source of elites’ resentment toward PC.

The proof of PC’s origins, and of the speech it restrained, is in the pudding. Its

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<sup>101</sup> On white working class, see IDENTITY, *supra* note 1, at 102–04. Of course this does not have to be an either-or proposition, though it may be an issue of resources, trying to change minds or registering people and getting out the vote. Admittedly, however, from the perspective of electoral politics, the structure of the electoral college and current demographics, some portion of the white working class must be part of this coalition; at least those from the democratic blue wall states of Ohio, Michigan, Pennsylvania, and Wisconsin, all other things remaining the same. See, e.g., Eric Bradner, *Democrats rebuilt their ‘blue wall’ in Michigan, Pennsylvania and Wisconsin. It’s a big deal for 2020*, CNN (Nov. 11, 2018), <https://edition.cnn.com/2018/11/07/politics/democrats-rebuild-blue-wall-michigan-pennsylvania-wisconsin/index.html> [<https://perma.cc/7PFF-J4XD>]. However, the white working class alone was not responsible for Trump’s election. See, e.g., PEW RESEARCH CENTER, FOR MOST TRUMP VOTERS, ‘VERY WARM’ FEELINGS FOR HIM ENDURED (Aug. 18, 2018), in full report Appendix pp. 23–4 (discussing various demographic breakdowns), <http://www.people-press.org/2018/08/09/for-most-trump-voters-very-warm-feelings-for-him-endured/> [<https://perma.cc/LNY6-E6Q8>]. Obama received 39% and 43% of total white vote in 2012 and 2008 respectively. But the diverse Obama coalition also consisted of African-Americans, Latinos, women, independents, millennials and those with a college education, of which groups, Latinos are a growing demographic. Chris Cillizza & Jon Cohen, *President Obama and the white vote? No problem*, THE WASH. POST (Nov. 8, 2012, 4:08 PM), <https://www.washingtonpost.com/news/the-fix/wp/2012/11/08/president-obama-and-the-white-vote-no-problem/> [<https://perma.cc/486P-NRJB>]. But cf. Kevin Maley, *What Happened to the Obama Coalition?*, VOX GLOBAL (Nov. 2016), <https://voxcglobal.com/intersection/2016/11/what-happened-to-the-obama-coalition/> [<https://perma.cc/A6RE-FC6L>]; Jonathan S. Tobin, *The Fanciful Quest to Revive the Obama Coalition*, NAT’L REV. (Jan. 16, 2019), <https://www.nationalreview.com/2019/01/democrats-2020-quest-to-revive-barack-obama-coalition/> [<https://perma.cc/3AMX-5DFY>].

<sup>102</sup> *Against Identity Politics*, *supra* note 5, at 101.

<sup>103</sup> Matt Wilstein, *Why Liberals Need Bill Maher’s Tough Love*, DAILY BEAST (Apr. 22, 2018), <https://www.thedailybeast.com/bill-maher-the-only-late-night-host-willing-to-challenge-the-left> [<https://perma.cc/56ZL-3FDH>].

condemnation has helped unleash people like the U.S. President to call women “dogs,” to refer to other countries as shitholes, to suggest that Mexican immigrants are criminals and rapists, and to do so *without shame or consequence (and to the applause of his followers!)*.<sup>104</sup> That is, the uncritical and un-nuanced critique of PC has aided in weaponizing the First Amendment under the guise of protecting unpopular speech. The result has been to return us to a past in which the hateful and demeaning speech of the moneyed and powerful is privileged over the speech of the demeaned to defend against it. And given the power dynamic here, it is unsurprising that the people who whine the most about PC (shamed perhaps for problematic comments but rarely silenced) are the very same ones who cry the loudest about speech with which they disagree, speech that they are quick to label as instigating violence or as otherwise terrorist. This is especially so when disadvantaged groups engage in speech meant to highlight the injustices they face, including, for example, such benign assertions as black lives matter.<sup>105</sup>

But if the critique of PC has aided in weaponizing the First Amendment, privileging the powerful over the disadvantaged culturally in terms of speech, the Supreme Court has contributed to this process from a distributional/economic perspective. The Court has weaponized the First Amendment,<sup>106</sup> increasing the national power of the wealthy and corporate elites to control both

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<sup>104</sup> Philip Bump, *Trump's Rationalization for Calling Women 'Dogs' Helped Define his Campaign*, THE WASH. POST (Aug. 14, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/08/14/trumps-rationalization-for-calling-women-dogs-helped-define-his-campaign/?noredirect=on&utm\\_term=.c87eb94f2e86](https://www.washingtonpost.com/news/politics/wp/2018/08/14/trumps-rationalization-for-calling-women-dogs-helped-define-his-campaign/?noredirect=on&utm_term=.c87eb94f2e86) [<https://perma.cc/SN2W-8RLJ>]; Frida Ghitis, *Trump's Outrageous Remark Shows his Affinity for the Worst of America's Past*, CNN (Jan. 12, 2018), <https://www.cnn.com/2018/01/11/opinions/trump-shithole-immigration-remarks-reveal-instincts-ghitis-opinion/index.html> [<https://perma.cc/LL2N-E4P9>]; Lisa Mascaro, *Trump Complains about Allowing Immigrants from 'Shithole' Countries*, L.A. TIMES (Jan. 11, 2018), <https://www.latimes.com/politics/la-na-pol-trump-congress-dreamers-20180111-story.html> [<https://perma.cc/33L7-5J9V>].

<sup>105</sup> For examples of Trump's comments or discussions about his stance on PC, see, for example, *Donald Trump on Political Correctness*, N.Y. TIMES (Aug. 6, 2016), <https://www.nytimes.com/live/republican-debate-election-2016-cleveland/trump-on-political-correctness/> [<https://perma.cc/2NR3-CFK3>]; Karen Tumulty & Jenna Johnson, *Why Trump may be Winning the War on 'Political Correctness'*, THE WASH. POST (Jan. 4, 2016), [https://www.washingtonpost.com/politics/why-trump-may-be-winning-the-war-on-political-correctness/2016/01/04/098cf832-afda-11e5-b711-1998289ffcea\\_story.html?noredirect=on](https://www.washingtonpost.com/politics/why-trump-may-be-winning-the-war-on-political-correctness/2016/01/04/098cf832-afda-11e5-b711-1998289ffcea_story.html?noredirect=on) [<https://perma.cc/ME7Z-RRD8>]. For his and others' views on Black Lives Matter see, for example, Colin Campbell, *Donald Trump Blasts Black Lives Matter*, BUS. INSIDER (Sept. 9, 2015), <https://www.businessinsider.com/donald-trump-black-lives-matter-2015-9> [<https://perma.cc/3HNB-PHMP>]; Jeremy Diamond, *Trump: Black Lives Matter has Helped Instigate Police Killings*, CNN (July 19, 2016), <https://www.cnn.com/2016/07/18/politics/donald-trump-black-lives-matter/index.html> [<https://perma.cc/8XQP-VMFZ>]; Reena Flores, *White House Responds to Petition to Label Black Lives Matter a Terror Group*, CBS NEWS (July 17, 2016), <https://www.cbsnews.com/news/white-house-responds-to-petition-to-label-black-lives-matter-a-terror-group/> [<https://perma.cc/M5YQ-FDDV>]; Leon Neyfakh, *Donald Trump puts Black Lives Matter on Notice*, SLATE (Jan. 20, 2017), <https://slate.com/news-and-politics/2017/01/donald-trump-puts-black-lives-matter-on-notice.html> [<https://perma.cc/Q56B-E5J5>].

<sup>106</sup> Lydia Wheeler, *Kagan Accuses Supreme Court Majority of Weaponizing the First Amendment*, THE HILL (June 27, 2018), <https://thehill.com/regulation/court-battles/394402-kagan-accuses-supreme-court-majority-of-weaponizing-the-first> [<https://perma.cc/PL5R-EMVZ>]. See also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134-35 (2016) (arguing that the Supreme Court's current First Amendment jurisprudence, in the context of light-touch economic regulation, is expansively deregulatory without any limiting principle, thereby re-enshrining *Lochner* and libertarian notions in law). Shanor also notes that the “application of the First Amendment's right of association in recent labor union agency fee-share cases also exhibits some *Lochnerian* qualities, if defined as advancing economic libertarianism.” Boyd Garriot, *Janus and the Problem with Alleging Lochnerism* n.1, ON LABOR (May 4, 2018),

politics and the economy by hobbling campaign finance laws on the basis of the First Amendment,<sup>107</sup> while simultaneously weakening unions by limiting their access to funding on the same basis.<sup>108</sup>

But the Court has done more harm than this, in the process demonstrating the society's elites' specious commitment to democracy and the embrace of others. And it has done so in ways that are consistent with the elitist, sexist and racist policies of the past. It has, for instance, gutted the Voting Rights Act that helped ensure voting access for black and poor folks.<sup>109</sup> It let stand a voting identification law that would effectively disenfranchise groups of Native Americans.<sup>110</sup> It threw up its hands in contrived helplessness at partisan gerrymandering, which given the enduring racialized organization of US political parties smacks of racial gerrymandering.<sup>111</sup> It allowed a white couple to adopt a Native American child over her father's objections,<sup>112</sup> a possible result for Latinx

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<https://onlabor.org/janus-and-the-problem-with-alleging-lochnerism/> [<https://perma.cc/Z438-E8EC>]; Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court is using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY 46, 46–48 (2012) (arguing, similarly, that recent Supreme Court First Amendment cases “don’t just trim around the edges of regulation: They go to the heart of whether government can act to balance out private economic power in an era of growing economic inequality and insecurity,” and also implying that the Court, similar to the *Lochner*-era Court, is protecting big business “under the disingenuous claim of preserving everyone’s liberty [or First Amendment rights] equally”).

<sup>107</sup> Citizens United v. Federal Election Commission, 558 U.S. 310, 365–68 (2010) (holding that under the First Amendment political speech may not be suppressed on the basis of the speaker’s corporate identity, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment, overruling *McCormell v. Federal Election Commission*, 540 U.S. 93 (2003); and that disclaimer and disclosure provisions of the Bipartisan Campaign Reform Act of 2002 did not violate the First Amendment as applied to nonprofit corporation’s film and three advertisements for the film).

<sup>108</sup> Janus v. AFSCME, 138 S.Ct. 2448, 2459–60 (2018) (holding that nonunion workers cannot be forced to pay fees to public sector unions).

<sup>109</sup> Shelby County v. Holder, 570 U.S. 529, 557 (2013) (holding unconstitutional Section 4(b)2 of the Voting Rights Act, which set out the coverage formula that determined which jurisdictions, based on their histories of discrimination, were subject to federal preclearance of enforceable changes to their voting laws).

<sup>110</sup> *Brakebill v. Jaegar*, 139 S.Ct. 10, 10 (2018) (refusing to vacate an Eight Circuit stay that would allow North Dakota to enforce a voter identification statute, enacted to prevent voter fraud, that required voters to present at the polls a valid identification with their current residential addresses in order to vote, but which the applicants argued and the federal district court found disproportionately disenfranchised Native Americans in the state). Evidence suggests that widespread voter fraud is a myth and that many state statutes enacted to prevent it are actually seeking to suppress voting among subordinated groups. See, e.g., BRENNAN CENTER FOR JUSTICE, *DEBUNKING THE VOTER FRAUD MYTH* (2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf) [<https://perma.cc/TXQ4-6XZY>].

<sup>111</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). See also Eric Foner, *The Supreme Court Is in Danger of Again Becoming ‘the Grave of Liberty’*, THE NATION (July 1, 2019) <https://www.thenation.com/article/eric-foner-supreme-court-john-roberts/> [<https://perma.cc/E2S9-DHV5>] (comparing the *Rucho* decision to the case of *Giles v. Harris*, 189 U.S. 475 (1903), in which a black man sued to overturn the Alabama voting requirements that disenfranchised most blacks. The Court recognized the actions were unconstitutional but said it involved a political question the court could not or refused to remedy).

<sup>112</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2553 (2013) (interpreting the Indian Child Welfare Act (ICWA)’s procedural safeguards as inapplicable to the involuntary termination of parental rights for an Indian child where the Indian parent never had custody); See also, e.g., Barbara A. Atwood, *A Response to Professor Berger’s ‘In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl’*, 67 FL. L. REV. F. 1, 1-2 (2015),

children whose parents have been deported pursuant to Trump's immigration policies.<sup>113</sup> And it stands poised to strip reproductive autonomy and rights from women,<sup>114</sup> all the while proclaiming the promises of liberty, objectivity, and fairness. In this, it seems Fukuyama has fundamentally misunderstood the liberal democratic project; namely, that white elites (and large segments of white society despite massive economic inequality among them) are committed to democracy only in as much as it can guarantee white male elite rule and control over most of the country's resources, and perhaps significant parts of the rest of the world's.

#### IV. CONCLUSION

Fukuyama and I are probably on the same side. We both believe that the current bout of white nationalism is a threat to democracy. However, Fukuyama's argument is fundamentally flawed and consequently so are his recommendations.

He correctly argues that part of the underlying motivation for the rise of nationalism is the ill effects of globalization which have resulted in economic anxiety and a loss of class status for middle- and working-class Americans. The loss of class status has been viewed by some as a threat to their very identities, contributing to the rise of nationalism or neofacism. But class status in places such as the United States has always been racialized, such that economic stress has almost always resulted in racial tension.

Fukuyama's first piece of advice then, drawn from his erroneous analysis that the Left is to blame for the rise of identity politics and obscuring the identity politics of the liberal state itself, is to recommend the silence of the racially subordinated. The subordinated are to be silent even though they too are suffering economic distress in this moment, while their historical recognition and distributional claims are ignored by sleight of hand. The effect is that the only vision left on the table is that of "traditional nationals," the voting majority of whom align themselves with white elites, deciding, it appears, that doing so is in their best social and economic interests.

Fukuyama's second piece of advice is reminiscent of William Julius Wilson's argument in his book on the declining significance of race.<sup>115</sup> There Wilson suggested that a focus on race obscured the economic problems that most Americans have in common. They both advise: *Focus on class*. The problem here is twofold. First, building coalitions around broad distributional goals face an uphill battle, precisely because of racial identity, history, and current practices of white

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[https://turtletalk.files.wordpress.com/2015/01/atwood\\_response.pdf](https://turtletalk.files.wordpress.com/2015/01/atwood_response.pdf) [<https://perma.cc/AB6W-BMQJ>] (analyzing the racial, class, and economic biases in against unmarried parents driving the Court's holding in *Adoptive Couple*).

<sup>113</sup> Camila Domonoske & Richard Gonzales, *What We Know: Family Separation And 'Zero Tolerance' At The Border*, NPR, (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [<https://perma.cc/Q4JK-RBSM>]; Meg Wagner et al., *What's happening at the US border*, CNN, (June 22, 2018), [https://www.cnn.com/politics/live-news/immigration-border-children-separation/h\\_86dac8f4d1616867b18211668c727bfd](https://www.cnn.com/politics/live-news/immigration-border-children-separation/h_86dac8f4d1616867b18211668c727bfd) [<https://perma.cc/5BC2-BWVW>].

<sup>114</sup> Sabrina Siddiqui & Lauren Gambino, *Brett Kavanaugh's confirmation to US supreme court gives Trump a major victory*, GUARDIAN (Oct. 7, 2018), <https://www.theguardian.com/us-news/2018/oct/06/brett-kavanaugh-confirmed-us-supreme-court> [<https://perma.cc/W8D7-QSG7>]; Adam Liptak & Noah Weiland, *Justice Kavanaugh Takes the Bench on the Supreme Court*, N.Y. TIMES (Oct 9, 2018), <https://www.nytimes.com/2018/10/09/us/politics/justice-brett-kavanaugh-supreme-court.html> [<https://perma.cc/J2AS-TEUC>].

<sup>115</sup> WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 109–111 (University of Chicago Press 3d ed. 2012) (1978).

racial alignment. Second, while many agree that capitalism increases the supply of goods and services and thus promotes growth (at least temporarily), they are at pains to acknowledge that it also tends to concentrate wealth in the hands of a few who have an interest in and increasingly the political power to maintain the status quo from which they benefit. This elite class, overwhelmingly white and male-led, buoyed by and stroking the politics of white racial resentment and alignment, are then in a position to stifle policies such as the ACA, meant to benefit the majority of Americans.

If this is correct, then Fukuyama's suggestions will reduce neither globalization-induced inequality and economic insecurity nor identity politics. And yet the visions and advocacy that might more effectively address these problems may lie in the very voices Fukuyama seeks to silence.

C.L.R. James once suggested that the black struggle was "a direct part of the struggle for socialism."<sup>116</sup> That is, whether one believes socialism, social democracy or some other form of regulated capitalism operates better economically, James thought that the black struggle sought widely-shared distributional justice for all, not just for some. From a different perspective but in a similar vein, King noted that:

The black revolution is much more than a struggle for the rights of Negroes. It is forcing America to face all its interrelated flaws—racism, poverty, militarism, and materialism. It is exposing evils that are deeply rooted in the whole structure of our society . . . and suggests that radical reconstruction of society itself is the real issue to be faced.<sup>117</sup>

Finally, Nikhal Pal Singh, in reviewing the long civil rights struggle, notes that "throughout the post-World War II period, blacks have been the single group in the United States whose politics have regularly gone beyond narrow self-interest and aimed at broad expansions of social as well as civil rights."<sup>118</sup> Black people, he argues, "deepened the participatory bias and radicalized the intellectual connotations of democracy beyond its typical 'liberal' qualifications."<sup>119</sup> He concludes that it just may be that "we advance equality only by continually passing through a politics of [those subordinated by] race and by refusing the notion of a definitive 'beyond' race,"<sup>120</sup> or, as it were, "beyond" identity politics, especially given liberalism's identity politics.

All of this does not mean that the Left, deprived of substantial political power and the power to mobilize identity-based groups per Fukuyama's recommendations, could not launch a successful political campaign; one that would yield them the power to implement both broad economic distribution and creedal-based programs. It simply seems unlikely that they will be successful in doing so.

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<sup>116</sup> SINGH, *supra* note 92, at 219 (citing C. L. R. JAMES, AMERICAN CIVILIZATION (1994)).

<sup>117</sup> Martin Luther King, Jr., *The Ethical Demands for Integration, Address Before a Church Conference in Nashville, Tenn.* (Dec. 27, 1969), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. (James M. Washington ed., 2003).

<sup>118</sup> SINGH, *supra* note 92, at 219.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 218.