

2000

# Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis

Elizabeth M. Iglesias

*University of Miami School of Law*, [eiglesia@law.miami.edu](mailto:eiglesia@law.miami.edu)

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## Recommended Citation

Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 *Vill. L. Rev.* 1037 (2000).

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GLOBAL MARKETS, RACIAL SPACES AND THE ROLE OF CRITICAL  
RACE THEORY IN THE STRUGGLE FOR COMMUNITY CONTROL  
OF INVESTMENTS: AN INSTITUTIONAL CLASS ANALYSIS

ELIZABETH M. IGLESIAS\*

*"All things and all circumstances must first be created on the mental plane."*<sup>1</sup>

*"The ruling ideas are nothing more than the ideal expression of the dominant material relationships grasped as ideas."*<sup>2</sup>

I. INTRODUCTION

IN this essay, I examine the role of law in the production of racial spaces. An initial comment about the term "racial spaces" is a good place to start. Viewed through the lens of neo-liberal economic theory, the term "racial spaces" is a meaningless formulation. This is because, in neo-liberal economics, communities are conceptualized as networks of markets.<sup>3</sup> Capital flows reflect the purportedly "color blind" imperatives of profit maximization, and race neutral laws of supply and demand work to allocate capital to the highest value user across competing networks of markets according to their competitive and comparative advantages.<sup>4</sup> Indeed, from this perspective, the redlining practices and disinvestment decisions through which minority communities in the United States have been converted into ghettos are not only inexplicable, but ultimately *immaterial* because "it is difficult to see why communities *in general* suffer a net harm when funds are transferred between them (although some communities may be net importers of credit and others net exporters)."<sup>5</sup>

By contrast, the term "racial spaces" refers to a social reality created by and experienced through patterns of mobility and immobility that have been organized around the historical practices and logic of white

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\* Professor of Law and Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami School of Law.

1. See U.S. ANDERSEN, THREE MAGIC WORDS 91 (1954).

2. See Karl Marx, *The German Ideology*, in THE MARX AND ENGELS READER 136-37 (Robert C. Tucker ed., 1972).

3. See Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361, 383 (1997) (discussing neo-liberalism in context of LatCrit theories).

4. See Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 309-10 (1993) (reducing communities to fungible networks of inflows/outflows in factors of production, investment and exchange).

5. *Id.*

supremacy—a logic in which neither persons nor capital have ever circulated freely.<sup>6</sup> In the United States, practices of racial segregation and discrimination have historically prevented, and continue to prevent, the free movement of persons.<sup>7</sup> The free markets of neo-liberal economic theory have yet to produce the unrestricted access to housing, employment or credit that would be necessary, though insufficient, to render every community a fungible network of markets.<sup>8</sup> In Latin America, racial spaces are the product of processes both analogous, and at the same time, unique to a region where white supremacy is mediated through the political apparatuses and economic structures of neo-colonial dependency, state corporatism, military bureaucratism and authoritarian repression.<sup>9</sup> One need only consider the involuntary resettlements where the many displaced are encamped or imprisoned by local disciplinary apparatuses—in some instances under military order<sup>10</sup> and in other instances, under the auspices of World Bank project managers.<sup>11</sup> These resettlements are spacial artifacts of the relations of power/lessness that entrap and immobilize the vast majority of the world's peoples, the lack of resources that would enable them to *move freely*, and the closed borders that constrain the free market

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6. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 10 LA RAZA L.J. 309, 316-17 (1998) (discussing historical methods of preserving white supremacy against African-Americans and how they compare to mobility of new immigrants).

7. For a phenomenological account of the way racism inhibits minority movement through racialized spaces, see Anthony Farley, *The Poetics of Color Line Space*, in CRITICAL RACE THEORY: HISTORIES, CROSSROADS AND DIRECTIONS (Francisco Valdes et al. eds., forthcoming 2000).

8. See Elizabeth M. Iglesias, *Confronting Racial Inequity: LatCrit Reflections on Law, Class and the Anti-Political Economy* (forthcoming 2001) (deconstructing deployment of neo-liberal ideology in legal construction of institutional class structures).

9. See Iglesias, *supra* note 3, at 361 (articulating LatCrit perspective on international law); Elizabeth M. Iglesias, *Foreword: International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 178 (1997) (discussing “analysis of the cultural, political and economic dimensions of white supremacy, particularly as it impacts Latinas/os”).

10. See, e.g., Derrill Bazzy, *Nowhere to Go*, CHRISTIAN SCI. MONITOR, Dec. 10, 1986, at 22 (reporting on forced relocation of Guatemalan Indians from their villages to “model villages” as part of Guatemalan army’s counter-insurgency strategy based on Vietnam model); AMERICAN WATCH COMMITTEE, LITTLE HOPE: HUMAN RIGHTS IN GUATEMALA, JANUARY 1984 TO JANUARY 1985, 25-26 (1985) (“After the military’s massive scorched earth tactics and massacres of 1982 and early 1983, thousands of Indians, displaced from their lands . . . were resettled in model villages . . . . The army represents the ultimate authority in the village; and the residents were not free to leave.”); Joanne Omany, *Indians Reoriented at Model Village*, WASH. POST, Nov. 23, 1986, at A22 (reporting advantages of living in model villages).

11. See, e.g., Brian McAllister, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, the Environment, and Sustainable Development*, 16 HASTINGS INT’L & COMP. L. REV. 689, 711-13 (1993) (discussing World Bank and involuntary resettlements).

flows of neo-liberalism within the racial parameters delimited by First World nativism.

These patterns of mobility and immobility are a central element in the production of racial spaces. But the concept of "racial spaces" has additional value other than foregrounding aspects of social reality that remain inexplicable or immaterial to neo-liberal ideology. As a theoretical construct, the concept of racial spaces enables new ways of understanding the production of subordination—understandings that may help resolve the supposed conflict between class-based and race-based emancipatory movements. This is because racial spaces are visible artifacts of both racial segregation and the relations of investment, production and exchange that are reflected in the export of capital; monopolies of political and economic power; and the restricted circulation of goods, services and capital within racially subordinated communities. Conceptualized in this way, the very existence of racial spaces raises fundamental questions about the relationship between racial inequality and the political and economic structures and processes of the neo-liberal political economy, both here in the United States and throughout Latin America. Can racial subordination be eliminated within the institutional arrangements of a neo-liberal political economy? And, perhaps more to the point, where and how is law implicated in the production of these spaces?

The rest of this Essay is divided into two parts. The first part illustrates the kinds of contributions Critical Race Theory can and should be making to the struggle for social racial justice generally, and to the transformation of racial spaces in particular.<sup>12</sup> In order to underscore the global dimensions of this project, I focus on work conducted by the Institute for Liberty and Democracy in Peru ("ILD") and reported on by the Peruvian economist Hernando De Soto in his now famous book entitled, *The Other Path*.<sup>13</sup> This work analyzes the plight of informal workers in Peru. According to De Soto, Peruvian poverty is not caused by the structures of capitalist accumulation, international dependency relations or social discrimination.<sup>14</sup> Instead, it is caused by a domestic legal system, which condemns the vast majority of people to the instability, uncertainty and vulnerability of illegality by making legality inaccessible to all but the

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12. For a discussion of the possible contribution of Critical Race Theory, see *infra* notes 30-79 and accompanying text.

13. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott trans., Harper & Row, 1989) [hereinafter *THE OTHER PATH*].

14. *See id.* at 131-32 (dismissing traditional theories about the causes of informal markets and poverty, concluding that insufficiencies in legal system are main cause of informal communities and poverty in Peru); *see also* Jane Kaufman Winn, *Hernando De Soto's The Other Path: The Invisible Revolution in the Third World*, 77 *IOWA L. REV.* 899, 902-03 (1992) (book review) (summarizing De Soto's analysis of poverty as caused by legal systems instead of multinational corporations or local capitalists and criticizing De Soto for not recognizing role played by racial discrimination in causing poverty).

wealthy.<sup>15</sup> Because differential access to legality is more fundamental in structuring class hierarchies and antagonisms than differential ownership of the means of production, De Soto proposes an alternative analytical framework that replaces the Marxist notion of class with what he calls an "institutional-class paradigm."<sup>16</sup> In this analytical framework, poverty is a function of the way the legal system divides "those who obtain advantages and privileges from the state from the competitive majority against whom an inadequate legal system discriminates."<sup>17</sup>

De Soto's call for a new theoretical approach and his efforts to articulate this new approach as an "institutional-class analysis" offer some important points and counterpoints of departure for understanding the role of law in producing the relations of poverty and marginalization that are mapped across the globe as racial spaces. In the second part of this Essay, I develop these counterpoints by offering an alternative institutional-class analysis.<sup>18</sup> This alternative framework locates the production of racial spaces, not *per se* in the differential access to legality enjoyed by rich and poor, but rather, in the manner in which law (understood broadly to include its substantive norms, procedures and institutions) operates in different ways to allocate differential power among competing groups across many institutional contexts. It is precisely by institutionalizing relations of differential power that law organizes institutional class structures.<sup>19</sup> The degree to which these structures reproduce poverty and subordination depends on the degree to which they enable or disable self-organization and mobilization among the multivariate collective political identities through which subordinated groups might seek to transform the political econ-

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15. See THE OTHER PATH, *supra* note 13, at 191-99 (discussing instability of Peruvian legal system as cause of informal communities, social unrest and poverty).

16. See *id.* at 209, 239-40 (shifting focus of analysis from control of means of production to analysis of role of legal institutions in structuring market economy); Hernando De Soto, *The Informals Pose an Answer to Marx*, 12 WASH. U. L.Q. 165, 171-72 (1989) (offering non-Marxist solutions for solving problems of informal communities in Peru); Winn, *supra* note 14, at 904 (stating "[w]hen De Soto titled his book *El Otro Sendero*, he challenged Marxists in Peru by arguing that Peru could take another path out of its troubles").

17. THE OTHER PATH, *supra* note 13, at 198-99 (discussing how excessive regulation ensures that only wealthy businessmen with personal ties to government can understand and benefit from law); Mario Vargas Llosa, *Foreword* to HERNANDO DE SOTO, THE OTHER PATH at xviii (June Abbott trans., Harper & Row 1989) (introducing De Soto's analysis of Peruvian legal system by stating that "[t]he reality behind the façade is a discriminating, elitist system run by the smallest of minorities").

18. For a discussion of this alternative analysis, see *infra* notes 80-119 and accompanying text.

19. See generally The Community Reinvestment Act, 12 U.S.C. § 2901-2907 (1988); Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994). For a discussion of these two legal institutions as examples of how law can shape and organize power relationships, see *infra* notes 80-119 and accompanying text.

omy.<sup>20</sup> To illustrate the elements of this kind of institutional-class analysis, I focus specifically on the institutional class structures that are organized in and around two particular socio-legal contexts. First, I examine the struggle for low-income community lending in the United States as mediated by the Community Reinvestment Act of 1977 and its various amendments.<sup>21</sup> Second, I consider the struggle over development lending as mediated by the World Bank's Inspection Panel.<sup>22</sup>

These two legal regimes—one domestic, the other international—were both designed to combat the fact that, contrary to neo-liberal economic rhetoric, when economic decisions are sheltered from political oversight and regulation, capital does not flow efficiently or even rationally. Both legal regimes are efforts to institutionalize procedures that will increase the participation of affected communities in the decision-making processes through which capital is allocated. The Community Reinvestment Act is directed at federally regulated banks and savings and loans institutions,<sup>23</sup> while the Inspection Panel accepts complaints arising out of World Bank loan practices and development projects.<sup>24</sup>

My purpose is not to provide a comprehensive, technocratic account of these two socio-legal regimes, but rather, to use them as vehicles for illustrating some general observations about the nature of power; the role of law in configuring relations of power and marginalization through the organization of institutional class structures; and the role of these institutional structures in the continued reproduction of racial spaces, both within and beyond the United States. These general observations, in turn, are directly relevant to ongoing debates over the contributions that Critical Race Theory ("CRT"), *understood specifically as a practice in the production of legal theory*, can and should be making to the social justice struggles of various and variously subordinated groups.

There is circulating, in and about the legal academy, an increasingly popular *theory* that the production of Critical Race Theory is, at best, only marginally or indirectly relevant to the struggle for social justice and, at worst, a self-serving desertion of the front line—a head long plunge into the greener fields of the legal academy.<sup>25</sup> In this Essay, I engage this the-

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20. For a discussion of the kinds of legal interventions that are needed, see *infra* notes 80-119 and accompanying text.

21. For a discussion of the Community Reinvestment Act of 1977, see *infra* notes 85-100 and accompanying text.

22. For a discussion of the World Bank's Inspection Panel, see *infra* notes 101-19 and accompanying text.

23. See Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 *FORDHAM URB. L.J.* 165, 170 (1993) (summarizing application of Community Reinvestment Act).

24. See Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law*, 2 *HOFSTRA L. & POL'Y SYMP.* 61, 72 (1997) (discussing Inspection Panel procedures).

25. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *HARV. L. REV.* 1393, 1407-09 (1996) (discussing crit-

ory by unabashedly mapping out a different theory. Most generally, I challenge the idea that there is some avenue of agency outside and beyond the theoretical constructs over which we struggle when we *do* critical theory. Indeed, to *do* critical theory is precisely to struggle over the way we should *understand* and hence *resist* the production of subordination. The strategies we pursue through direct political action, litigation or lobbying are driven by the way we understand the meaning of subordination, the nature of power and the conditions that enable solidarity and structure individual identities, as well as our understandings of the role of law in producing the material dispossession and institution marginalization that is experienced as subordination.

Making effective strategic decisions about how to use or not use law in the struggle for social justice is hard, but it is even harder than we may realize as we plunge into the front line legal battles. Relations of domination and marginalization have survived even the most progressive legislative interventions and litigation victories, in part, because the decentralization of legal decision-making power across many different judicial, quasi-judicial, political and quasi-political forums makes it hard to see, and therefore harder to combat, the cumulative impact of liberal ideology on the legal distribution of power among different groups in different social spaces. Read through an institutional-class analysis, an apparent legal victory in one case can quickly be transformed into a politically regressive defeat in another, depending on the way the legal "victory" tends to structure institutional power among the competing groups.<sup>26</sup> As a result, the effective use of law requires strategies that can counteract the rhetorical maneuvers and procedural devices through which liberal legal interpretation systematically and repeatedly excludes the agency of the oppressed from the realm of the lawful. When this exclusion occurs, effective social transformation comes to depend on the assertion of illegal agency and the hyper-vulnerability it entails, while social justice and the hope of lasting change come to depend on the reconstruction of legal agency.<sup>27</sup> Whatever the response to institutionalized powerlessness and

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icism of Critical Race Theory as too abstract and its failure to offer practical solutions to problems of social justice); Robert L. Hayman, *Race and Reason: The Assault on Critical Race Theory About Inequality*, 16 NAT'L BLACK L.J. 1, 3-4 (1998) (dealing with several attacks on Critical Race Theory).

26. I am thinking here of the way the enactment of Title VII must have appeared to the minority union workers whose unions were destroyed and whose collective power was diluted by the Title VII cases ordering the compulsory merger of their unions into the larger, all-white unions in which they were to become a powerless minority. For an extensive analysis of the way decentralized adjudication disguises the structural violence produced through legal interpretation, see Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 434-35 (1993) (offering theoretical framework for understanding legal production of structural violence).

27. *See id.* (revealing how structural intersections of Title VII and NLRA suppress avenues of legal agency available for women of color to lawfully engage in transformative struggle over terms and conditions of work).

marginalization, law is clearly implicated in the production of both. This may make law of limited instrumental value as a tool in the struggle for social racial justice, but the role of law in institutionalizing relations of power/lessness makes it a fundamental “stake” in this struggle.

Put differently, while law won’t change the world, any emancipatory movement must seek ultimately to change the law, and to do so it will need theory. This is because all action is embedded in a theory, and, even more importantly, in a structure that is itself embedded in and organized by theory. Just as neo-liberal institutional class structures are organized through the articulation of neo-liberal theories in legal doctrine, the institutionalization of a new order of power and knowledge will depend, at least in part, on further dissemination of the kinds of ideas RaceCrit and LatCrit scholars have only just begun to address. It will depend, above all, on a vision of social justice that engages, rather than ignores, the international dimensions of racial subordination, the centrality of poverty in the subordination of peoples of color throughout the world, and the role of law in dis/organizing the intra- and inter-group solidarities that are so central to effective collective action in any institutional context.<sup>28</sup>

## II. BETWEEN STRUCTURE AND AGENCY: INSTITUTIONALIZED POWERLESSNESS AND *THE OTHER PATH*

In *The Other Path*, Hernando De Soto provided a vivid, though fundamentally romanticized, account of the informal economy in Peru. While the dominant narratives of the 1980s represented the informal economy as a black market populated by tax evading free riders, De Soto introduced the idea that black marketers were among the most dynamic agents of economic and social development in Peru, at least in the four economic sectors studied by the Institute. Focusing on business, manufacturing, housing and transportation, De Soto argued that the informal economy had evolved, in large part, because the Peruvian legal system was too complex, corrupt and restricted to function as an effective framework for regulating the activities of Peru’s impoverished majority.<sup>29</sup> For many Peruvians, working, investing and other forms of collective action organ-

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28. These three themes have been central in the emergent body of LatCrit scholarship, which reflects a concerted, collective project “to reinvigorate the antisubordination agenda of Critical Race Theory, revive its ethical aspirations, and expand its substantive scope.” Iglesias, *supra* note 9, at 177-78. For more extensive accounts of the way LatCrit theory is re-imagining the parameters of Critical Race Theory along multiple dimensions, see Elizabeth M. Iglesias, *Out of the Shadows: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 19 B.C. THIRD WORLD L.J. 349, 349 (1998); Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575 (1999); Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998).

29. See generally *The Other Path*, *supra* note 13.



ized outside the legal system have often been the only way to survive; but as De Soto emphasized, the costs of “informality”—the costs of having to operate illegally—are substantial. Informal trade, transport businesses, manufacturing enterprises and the illegal settlements established through violent and/or incremental land invasions were then, and still are, profoundly vulnerable. This vulnerability condemns “informals” to a life of uncertainty, instability and fear of extortion, imprisonment, physical attacks, and most significantly, to the possibility that their operations will be shut down, they and their families will be evicted, and their life’s work and investments will be lost.<sup>30</sup>

De Soto’s account of the plight of Peruvian informals provides a useful point of reference for achieving two different, but related, objectives. The first objective is to show how Critical Race Theory can best contribute to the struggle for social racial justice. De Soto’s study of the informal economy in Peru illustrates the limitations of political strategies that dichotomize theory and praxis and glorify the mobilization of collective action as the model of transformative agency. The instances of collective action he depicts are compelling, transformative in certain respects, and even heroic at times, but they are hardly emancipatory. Indeed, De Soto’s study is a vivid illustration of the disjuncture between intention and effective agency, which makes the theoretical analysis of power—its nature, structures and modalities—a crucial prerequisite in designing effective strategies for direct collective action or in determining which of the many different litigation struggles or lobbying efforts should claim our energies and attention. De Soto’s account also advances my second and more specific objective of analyzing the way law participates in the production of racial spaces within and across the territorial boundaries of the nation-state.

The title of the book, *The Other Path*, is a play on words by reference to *Sendero Luminoso*, or Shining Path. The Shining Path, a Peruvian guerilla movement was founded in 1970; by the 1990s, the movement had become one of the most violent insurgencies still active in Latin America.<sup>31</sup> As the title suggests, De Soto’s book, based on studies conducted in the early 1980s (before the disorganization and eventual demise of the Soviet “evil empire”) promised an alternative to the many different avenues through which the oppressed and impoverished of Peru might otherwise seek to improve their lives: an alternative to an Indian revolt to restore the Incan empire; to international communism; to export driven development (particularly of the coca plant variety); and alternatively, even to the community-based movements inspired by liberation theology.<sup>32</sup>

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30. See *id.* at 171-72 (analyzing informal housing, trade and transportation in Peru and “costs” of such informalities).

31. See THE PERU READER: HISTORY, CULTURE, POLITICS 305-07 (Orin Starn et al. eds., Duke U. Press 1995) (giving account of contradictory theories regarding *The Shining Path*).

32. See generally THE OTHER PATH, *supra* note 13 (discussing alternative path).

Perhaps for these reasons, De Soto's book on the survival strategies pursued by the poorest of the Peruvian poor was received with the unusual interest and enthusiastic endorsement of neo-liberal conservatives who were then uniting around an all-out campaign to tax the pampered poor and redistribute to the needy rich.<sup>33</sup> In those heady days of unrestricted corporate greed, *The Other Path* was so well received that it prompted praise from then-President Ronald Reagan, who, in his 1987 address to the United Nations General Assembly, said:

The scholar, Hernando De Soto, and his colleagues have . . . described an economy of the poor that bypasses crushing taxation and stifling regulation . . . . [B]y becoming underground entrepreneurs themselves, or by working for them, the poor have become less poor and the nation itself richer . . . . The free market is the other path to development and the one true path. It is the peoples' path. And, unlike other paths, it leads somewhere. It works.<sup>34</sup>

The question, of course, is why a book about the coping strategies of the poorest of the Peruvian poor would generate such interest and inspire

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33. When I presented an earlier version of this paper at the CRT conference at Yale in October of 1997, my friend Enrique Carrasco took issue with my use of the term "neo-liberal conservatives," by asking me whether there was such a thing as a "neo-liberal radical." I answered that indeed there is such a thing: "The neo-liberal radical is, in effect, a communist." Embedded in both his question and my answer is the paradox of the way ideologies converge at their extremities. Ironically, a careful reading of Marx's *The German Ideology* might lead anyone with half an open mind to conclude that the future projected by today's neo-liberal boosters is none other than "the final stage of communism" projected by Marx—that is, a neo-liberal paradise of flexible production and the unrestricted circulation of goods, capital and labor—where the withering away of the state produces a post-modern paradise of personal freedom. According to Marx:

[I]n communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic.

MARX AND ENGELS READER, *supra* note 2, at 124.

34. Winn, *supra* note 14, at 899 n.1 (quoting President Ronald Reagan, Address to United Nations General Assembly, New York, New York (Sept. 21, 1987)). Like his predecessor, President George Bush was also much impressed. Addressing the annual meeting of the World Bank and the International Monetary Fund in September of 1989, Bush referred to De Soto's work:

De Soto's great contribution has been to point out what, in retrospect, may seem obvious: people everywhere want the same things . . . . De Soto's prescription offers a clear and promising alternative to economic stagnation in Latin America and other parts of the world. Government must bring the "informal" workers into the regular economy—and then get out of the way, and let individual enterprise flourish.

*Id.* at 899 n.2 (quoting President George Bush's speech to World Bank on September 27, 1989).

such a warm embrace from the high priest of United States imperialism and global capitalism. The answer is easy. The book has been popular among neo-liberal conservatives because it provided a simple analysis of the problem of poverty and a simple solution that just happened to coincide with what global capitalists still want to believe: the best way to deal with the problems of the poor is to establish effective legal structures for the recognition and enforcement of property rights and contractual agreements, and then let the free market run its course.<sup>35</sup>

I want to focus initially on one of the studies through which De Soto purports to demonstrate this point.<sup>36</sup> The purpose of the study was to "explain why some people prefer formality and others informality."<sup>37</sup> This led the ILD researchers to conduct a series of inquiries. First, they talked directly to informal workers. These workers complained that the legal procedures required to formalize their economic activities were prohibitively costly and complex.<sup>38</sup> This, in turn, inspired the ILD to conduct a simulation in order to measure the costs of access to legality.<sup>39</sup>

In the summer of 1983, a team of ILD researchers set up a small garment factory in an industrial area on the outskirts of Lima, organizing it as a sole proprietorship.<sup>40</sup> To establish this business, they rented a factory building, installed garment machinery and recruited four university students to go through the legal procedures required to formalize the business.<sup>41</sup> The study was designed to be representative of the situation faced by ordinary Peruvians.<sup>42</sup> Accordingly, formalizing the simulated garment factory required going through approximately sixty percent of the bureaucratic procedures common to all industries and ninety percent of the procedures required of non-incorporated sole proprietorships.<sup>43</sup> The students were also instructed to handle the bureaucratic "red tape" with-

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35. See THE OTHER PATH, *supra* note 13, at 244-45 (arguing in favor of free market).

36. See *id.* at 132-34 (describing simulation conducted to test efficiency of legal structures in Peru by trying to organize proprietorship using existing legal venues).

37. See *id.* at 132.

38. See *id.* at 132-33 (conducting initial circumstantial comparison between reactions of informal and formal workers to accessibility of existing legal structures).

39. See *id.* at 134-35 (graphing various costs of access).

40. See *id.* at 133 (explaining basic mechanics of simulated business).

41. See *id.* (describing procedure followed by author and research assistants to test their hypothesis regarding relationship between accessibility of existing legal structures in Peru and immobility of poverty-stricken people).

42. See *id.* at 135 (providing graph of average length of time needed for various procedures required in formalizing business). The purpose and outcome of these procedures was to acquire some required license, certificate or registration. See *id.*

43. See *id.* at 133 (choosing textiles as industry for simulation because it was "widespread in Peru and thus culturally significant, the activity chosen for the simulation was also highly representative").

out the assistance of intermediaries, and to pay bribes only when necessary to continue the simulation.<sup>44</sup>

The results of the study are instructive. It took 289 full time days of work for the four university students to acquire the eleven permits needed to complete the simulation.<sup>45</sup> Two of the ten solicited bribes had to be paid.<sup>46</sup> The total costs in actual expenses, wasted time and lost profits were estimated at \$1,231, or thirty-two times the minimum monthly wage in Peru at that time.<sup>47</sup> Perhaps most interestingly, De Soto repeated the simulation in Tampa, Florida, where the procedures to achieve the same result reportedly took only three and one-half hours.<sup>48</sup>

This study is interesting both on its own terms and in terms of the conclusions De Soto and other neo-liberal conservatives draw from it. On its own terms, the study has lessons for us about the nature of power, the role of law in producing and disorganizing power, and the relationship between structure and agency in the struggle for social justice. In fact, I want to focus more precisely on the nature of the agency that Peruvian informals exercised in and around the social, legal and political structures revealed by De Soto's analysis. This focus will underscore a point that many already know, but too often seem to forget in the debate over the relative priority of theory or praxis in the struggle for justice. Clearly, Peruvian informals expended enormous amounts of time, energy and resources in pursuing their objectives. It is equally clear from De Soto's two simulations that legal structures determined whether those efforts would take 289 days or three and one-half hours to achieve their objectives. The point is this: the more effort something takes, the less power one has. From this perspective, the fact that Peruvian peasants established their informal settlements in and around Lima through the direct collective action of both gradual and violent land invasions, or that the Community Reinvestment Movement negotiated a series of community development loans after mobilizing massive protests in the credit-starved communities of the United States, are evidence more of the powerlessness and marginalization of these communities than evidence of their power.

In order to understand this point, it is important to understand that agency is not the same thing as power. Effective power is best understood as a function of the routine relationships between human agency and the institutional structures in which that power is exercised. Collective political mobilization—the demonstrations in the streets—can be represented and experienced both as occurring outside dominant institutional arrangements and as transforming inherited political identities. However, the raw power needed to achieve one's ends or protect one's interest

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44. *See id.* at 134.

45. *See id.* at 133-35.

46. *See id.*

47. *See id.*

48. *See id.* at 133.

through the extraordinary efforts involved in mobilizing and maintaining broad based social movements and political coalitions can hardly be equated with the power that rests on the legally sanctioned institutionalized *authority* to effectuate these objectives through the routine practices and procedures of existing institutions.<sup>49</sup>

Therefore, the struggle against subordination must be understood as a struggle for power within the institutional arrangements through which power is legally organized and deployed. This in turn means that the anti-subordination objectives at the heart of CRT depend on reorganizing these institutional structures, reforming the legal doctrines that construct them and reconstructing the order of knowledge that informs and legitimates these doctrines, as much as they depend on the mobilization of collective action. This is particularly true given the extent to which direct action is constrained by the structural contexts within which it is always/already located—at least until “the revolution.” Even then, the structural arrangements of the past tend to have an uncanny hold on the possibilities of the future. To the extent that the role of law in perpetuating these structures is neither immediately obvious, nor easily confronted, combated or transformed, CRT can make a significant contribution by helping us understand how relations of power/lessness are institutionalized in and through different legal regimes; by helping us locate and assess the institutional positions that subordinated people(s) tend to occupy in these legal regimes; and by helping us determine how best to restructure these institutional arrangements in light of what we have learned about the ways in which identity-politics can enable or disable the solidarities and alliances needed to combat subordination in these institutional contexts.

More concretely, my point is this: case studies of Peruvian land invasions are compelling reminders that direct collective action does not rewrite laws nor does it reorganize oppressive institutions. Although activists may cherish the notion that other agents will be inspired (or compelled) to rewrite the laws and reorganize these institutions, collective action does not guarantee that these agents will have the political will to complete the task, particularly in the face of new and evolving obstacles. Collective action also does not ensure that *anyone* will have the ability to conceptualize, or the technical resources or “know-how” to effectuate, emancipatory institutional transformation for the long run.<sup>50</sup>

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49. See, e.g., Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of “Community” to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PENN. J. LAB. & EMPL. L. 773, 797-99 (2000) (urging that regime’s legitimacy is not measured by fact that justice can be achieved through extraordinary efforts and agency of otherwise marginalized persons, but rather by extent to which regime enables achievement of justice *on a routine basis*).

50. See, e.g., Alan Mabin, *On the Problems and Prospects of Overcoming Segregation and Fragmentation in Southern Africa’s Cities in the Postmodern Era*, in POST MODERN CITIES AND SPACES (Sophie Watson & Katherine Gibson eds., 1995).

Reports from South Africa provide another instructive example because they provide a window into the kind of reality that collective mobilization has often confronted "after the revolution." Alan Mabin reports that when South African community-based organizations (otherwise known as the "civics") and government officials began their negotiations in 1989 to dismantle the urban structures constructed over decades of apartheid and colonialism, "all the creative thinking seemed to come from the civic side."<sup>51</sup> The negotiations began in the context of a state of emergency. The civics successfully organized massive boycotts of rents on public housing and service charges in the townships.<sup>52</sup> When the civics succeeded in expanding the scope of negotiations from issues related to ending the boycotts to the nature, structure and operation of local government, "[i]t seemed that this emancipatory movement, which sought to represent the township masses, stood at the point of taking power at the local level from existing authorities."<sup>53</sup> But, by all accounts, they failed. The question is why?

The first explanation is easy: the people who mobilized in the streets were completely unprepared, either for the vicious brutality their political achievements would unleash, or for the routine processes, endless meetings and technocratic negotiations through which the struggle for anti-racist democratic reform would move out of the streets and into the bureaucratic offices of state power.<sup>54</sup> Although grassroots mobilization did achieve significant political victories, by the 1990s, "the civics . . . [were] fragmented, weak and no longer [had] the same popular support. They [were] weakened by the whole process of national negotiations and, above all, by the terror unleashed in the townships through Inkatha."<sup>55</sup>

The second explanation for the civics' failure to consolidate and institutionalize their power focuses on the crisis of political vision reflected in the news reports from South Africa: "ANC PLEDGES FISCAL DISCIPLINE."<sup>56</sup> In the new South Africa, The Freedom Charter gave way to supply-side economics, and the commitment to economic "Growth Through Redistribution" gave way to the political economy of structural adjustment. This meant no significant new taxes. Exchange controls were to be phased out, and free trade phased in.<sup>57</sup>

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51. *Id.* at 188.

52. *See id.*

53. *Id.*

54. *See id.* at 189-90 (noting that ordinary people mobilizing in and through "civics" were unprepared for violence or for bureaucratic politics).

55. Laurence Harris, *The Political Economy of Reform in South Africa, in MARXISM IN THE POST MODERN AGE: CONFRONTING THE NEW WORLD ORDER* 315 (Antonio Callari et al. eds., 1995).

56. *Id.*

57. *See id.* at 316 (explaining that economic agenda initially embraced within COSATU, SACP and ANC, and referred to by slogan "Growth Through Redistribution," emphasized that "the state should take a strong role in redistributing income and wealth toward the masses, simultaneously developing domestic industry's pro-

The devolution of the emancipatory project in South Africa clearly illustrates the more general point that the power to say "no" to oppression does not automatically translate into the power to create a reality to which we can say "yes."<sup>58</sup> Indeed, even the power to effect fundamental and radical change does not automatically translate into the ability to conceptualize the institutional arrangements that can sustain the values and objectives of emancipation. Without institutional transformation, everything directly done can be indirectly undone. Without conceptual evolution informed by a critical understanding of the way new processes, like flexible production, globalization and the proliferation of political identities can affect relations of subordination, the struggle for emancipatory social transformation may end up solving the problems of the past and leaving the new processes of subordination intact. This is precisely because the problems of development are the problems of institutionalizing an alternative order of knowledge and power. These problems, being both structural and conceptual, require the kind of structural and conceptual reforms that are generated only in and through the production of theory.

If the goal is to eliminate subordination, it is not enough to glorify the fact that human agency can transcend its context or that mass political coalitions can achieve transformative objectives such as destabilizing a racist regime or blocking the merger of a banking institution that has failed to invest in low-income communities. At some point, the claims advocated, and the interests represented, by any mass social political movement must be translated into new institutional structures through which currently subordinated groups can effectively assert their interests on a routine basis without having to engage forever in the extraordinary efforts of mass mobilization. The institutionalization of a new order of power and knowledge, however, does not follow automatically from mass mobilization. Rather, it requires legal reform interventions, informed by the kind of theoretical work that enables critical analysis of the way legally con-

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duction to meet the demand for increased living standards, and essentially growing on the basis of the domestic market, while seeking simultaneously to increase the competitiveness of export industries"). This prescription should be familiar to Latin American development economists, as well as to LatCrit scholars. See generally Enrique R. Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections Between LatCrit Theory and Law and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313 (1996-97) (taking critical perspective on failure of radical development economics to achieve any meaningful transformation in Latin America). But see Iglesias, *supra* note 9, at 200 n.24 (suggesting alternative reasons for this failure). In either event, Growth Through Redistribution promotes an agenda distinct from both the right-wing trickle-down alternative of "growth and redistribution," as well as the World Bank's approach focusing on "growth with distribution." See *id.*

58. See, e.g., Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 929-43 n.174 (1996) (exploring problem of designing effective legal strategies for eliminating rape in absence of positive substantive vision of what heterosexual autonomy means to women).

structured institutional arrangements organize authority and allocate power across the different classes and political identities, which interact in and through, and indeed are often constituted by, these institutions.

When I think about the South African civics trying to dismantle apartheid under new conditions of increasing suburbanization and flexible production, or the Peruvian informal workers trying to etch out a minimal existence despite, and in the shadow of, the regulatory and bureaucratic legal obstacles that construct them as illegals, I am increasingly convinced that the struggle for social justice is profoundly in need of a theory about the way to formulate legal theory. The struggle for social justice needs this theory as much as it needs the mobilization of collective action or the production of legal scholarship aimed at generating new doctrinal formulations for ongoing litigation. Critical analysis of the role of law in the disorganization of institutional structures is all the more pressing because the call to agency under conditions of institutionalized powerlessness is a call to perpetual marginality in a war without end.

As the examples of the Peruvian informals and the South African civics illustrate, direct collective action may, and has in the past, achieved some momentary advances. Nevertheless, these examples also suggest the degree to which any emancipatory achievements will remain profoundly unstable until the legally constructed institutions of white supremacy and the anti-democratic institutions of the anti-political economy are replaced with a new order of knowledge and power.<sup>59</sup> In this theory about how to do theory that I am imagining and deploying in this Essay, there are three crucial tasks for Critical Race Theory. The first task is to develop a compelling account of the way law constructs institutional class structures. Second, it must reveal the way these institutional structures demobilize and disorganize the collective political identities through which subordinated groups might otherwise seek to transform the political economy—for example, as community members, consumers, workers, racial minorities or welfare recipients. Third, Critical Race Theory needs to imagine the kinds of institutional arrangements that should replace them.

Focusing more specifically on the role of law in the production of racial spaces, the first task is to identify the institutional arrangements through which racial spaces are produced. These spaces are artifacts of dis/investment decisions made as much by private economic actors like banks and business corporations, as by government officials. Often these decisions have been made without the knowledge, and even over the violent objections, of affected communities.<sup>60</sup> The ability, *the power*, to make

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59. See Iglesias, *supra* note 26, at 395-96 (locating legal production of structural violence in interpretative manipulation of fundamental conceptual structures like individual/collective rights dichotomy, special interests/common good and group membership as prerequisite of representational authority).

60. See, e.g., Iglesias, *supra* note 49 (exploring broader implications of labor and community struggles for voice in corporate employment practices and participation in processes of community development).



these decisions, even in the face of sustained and organized community opposition, exists precisely because of the relations of power/lessness that are institutionalized through the legal doctrines that effectuate and legitimize hierarchical, non-participatory and exclusionary allocations of decisional authority. This includes legal doctrines like the business judgment rule and prohibitions on compulsory credit allocation, as well as restrictions on shareholder democracy, minority business set-asides and state regulations limiting corporate political expenditures. In each of these instances, the legal doctrines and constitutional interpretations through which these legal rules are articulated are themselves the interpretative spaces in which the democratization of power—whether economic or political—is systematically suppressed through the rhetorical manipulation of the economic/political dichotomy.<sup>61</sup>

Thus, on its own terms, De Soto's study of the obstacles that informal workers confront in attempting to legalize their economic activities reminds me of the need for critical theory that attacks the institutionalization of subordination and the conceptual order that sustains it, even as it engages the more difficult task of imagining and articulating an alternative institutional order. But De Soto's simulation offers other lessons when we focus more specifically on the way this simulation has been used by neo-liberal conservatives to "name the problem" and "prescribe a solution."

Neo-liberal conservatives also draw a lesson about human agency from De Soto's simulation and the structural constraints it reveals. It is a lesson about the power of human agency to transcend and transform the conditions of subordination of a life of poverty. The lesson they draw is that the human spirit is cross-culturally driven by a desire to achieve, and that poor people *would* achieve if only the government would get out of the way.<sup>62</sup> This is, of course, a meaningful conclusion to draw when the problems of the poor are presented as a consequence of a regulatory bureaucracy that suppresses the entrepreneurial human spirit.<sup>63</sup> What else

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61. See generally Iglesias, *supra* note 8 (mapping structures of institutionalized power/lessness through doctrinal deconstruction of economic/political dichotomy).

62. Llosa noted:

The findings of *The Other Path* challenge those who assert that Latin American culture, particularly the Indian and mestizo traditions, is incompatible with the entrepreneurial spirit and the democratic and economic systems of the more economically advanced nations of the world. Contrary to this preconception, ILD research has found that informals maintain private regimes through extralegal norms that they have created, and that these norms allow for healthy competition in which contractual rights are enforced.

Llosa, *supra* note 17, at xxiv.

63. See *id.* at xxvi ("The ILD has looked at the actual experience in Peru and has found that it is not the elimination of the entrepreneurial class that the poor want. On the contrary, they want the state to remove the obstacles that it has constructed that handicap their entrepreneurial efforts.").

can be expected when the state oppresses the market and political power interferes with economic freedom?

Clearly there is something wrong when compliance with the law makes effective agency functionally impossible for all but a few determined individuals with the resources and stamina to persevere. There is something wrong when non-compliance reduces the vast majority to a state of vulnerability and insecurity so profound that every operation becomes a fly-by-night endeavor. But this situation is not unique to Peru. On the contrary, in the United States the hyper-regulation of the poor has all but guaranteed that people in public housing will never start their own businesses. Lease provisions on public housing have routinely prohibited efforts to generate income at home, so “residents must either covertly conduct business out of their apartments or forbear from doing business at all.”<sup>64</sup>

The real puzzle is this: Why is it that the neo-liberal conservative’s response to De Soto’s account of the plight of the Peruvian informals does not dismiss the informals as the ones who simply didn’t try hard enough? After all, everyone confronts obstacles, every action has its costs and some businesses have managed to overcome the obstacles to legality. Since when have obstacles been anything but a reason to try harder? Could it be that neo-liberal conservatives have at last discovered the extent to which the ideology of the entrepreneurial self-made, lift him/self up by the he-man bootstraps ignores fundamental aspects of the reality of poverty, the lack of resources and options that characterize racial spaces, and the insecurity and immobility that condemn such a large majority to the repetition of—over and over—redoing that which they have already done? And why should anyone ever have to work that hard to survive? Could it be that the neo-liberal mind has at last registered the claim that hard work is not the answer to the problems of people whose hard work leaves them exhausted and (still) impoverished?

Not so fast. Such conclusions go beyond anything the neo-liberal can or would endorse. For the neo-liberal, the conclusions to be drawn are much narrower and more targeted. De Soto’s account earns their endorsement because it foregrounds government irrationality. Free the market, and there will be no racial spaces. “Free market” capitalism is the solution to, not the cause of, the informal economy. It is the solution to, not the cause of, racial subordination.

I want to offer a different account of the neo-liberal political economy—one that locates the production of racial spaces at the intersection of two apparently mutually incompatible “market” processes—and to suggest that the simple expedient of deregulating the over-regulated does not even remotely begin to address the profound impact of these two

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64. Margaret Beebe Held, *Developing Micro-Businesses in Public Housing: Notes from the Field*, 31 HARV. C.R.-C.L. L. REV. 473, 481 (1996) (describing effects of lease provisions in public housing).

processes on the reproduction of the poverty and racism that construct racial spaces. These processes are "the rock and the hard place" of market globalization and segmentation, and minority communities are caught right between them in their struggle for access to, and control over, the distribution of finance capital.

First, the idea that deregulation will liberate the poor ignores the differential access to capital that is being accelerated through the process of financial integration and the globalization of capital markets. In a *deregulated* global capital market, every credit application competes with every other credit application.<sup>65</sup> This means that potential homeowners in the inner cities of the United States compete for loans with the Hunt brothers in their efforts to corner the silver market,<sup>66</sup> and the speculative self-enrichment schemes of the latest wave of (Savings & Loan) robber barons.<sup>67</sup> In a deregulated market, these competing credit applications are not assessed in terms of their contributions to community development or even to the establishment of profitable economic activity. Instead, they are compared in terms of their profit maximization *for finance capital*.<sup>68</sup> Put differently, even profitable economic activity can be starved for capital because investment in profitable activity is not the same as profit maximization. This is not new to the free market system. What is new is that the globalization of capital markets enables the law of greed to go global. All the world's a portfolio. The de-territorialization of investment has accelerated the processes of dis/investment that are producing racial spaces, as finance capital abandons economic redevelopment in search of hyperprofits in the hyper-spaces of finance capital beyond the territorial boundaries of any particular community or nation.<sup>69</sup> This also applies to Third World capital as evidenced in Third World capital flight. What's good for

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65. See, e.g., JULIA ANN PARZEN & MICHAEL HALL KIESCHNICK, CREDIT WHERE IT'S DUE: DEVELOPMENT BANKING FOR COMMUNITIES 47 (1992).

Today, the great majority of business lending is done by financial intermediaries that have formal methods to compare the local business loan to finance inventory with a loan to finance the latest mega merger, or a loan to finance construction of a power plant in Brazil, or a loan to finance the purchase of mortgages made in a distant state. Increasingly, every investment is compared to every other investment on the basis of risk, return and liquidity and priced accordingly.

*Id.*

66. See WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 144-45, 189-90 (1987) (recounting how in early 1980s, "free-market" decisions of U.S. banks and brokerages led to their participation in financing Nelso and Hunt's outrageous conspiracy to monopolize world silver markets).

67. See generally MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY (1990) (recounting consequences of deregulation on Savings and Loan Industry).

68. See GREIDER, *supra* note 66, at 135-37 (discussing generally how profit maximization concepts disfavor lower economic class members when interest rates are increased by Federal Reserve to dissuade borrowing based on credit).

69. See generally JOHN R. DOMÍNGUEZ, CAPITAL FLOWS IN MINORITY AREAS 22 (1976) (discussing de-territorialization concepts in minority communities).

the First World gander is good for the Third World goose. If it's more profitable to invest in foreign denominated financial instruments than in real economic activity, then who's to blame for underdevelopment?<sup>70</sup>

Ironically, poor and minority communities are also starved for capital because of market segmentation. Minority businesses operating in minority communities report that profitable business ventures are starved for capital, but not because the businesses cannot offer above-market interest rates.<sup>71</sup> In fact, minority businesses routinely have to offer above-market rates to obtain the few loans they do get outside government protected credit programs.<sup>72</sup> The problem is not price *per se*, but the fact that minority businesses often cannot get private commercial loans at *any* price.<sup>73</sup> If minority businessmen in the United States have such a hard time getting the credit they need to access the free market, why would anyone believe that Peruvian informals would have access to the credit they need once the solution of deregulation is implemented?<sup>74</sup> Indeed, market segmentation is at least as pervasive and more flagrantly institutionalized in Latin America capital markets where domestic banks have gorged on enormous profits by manipulating differentials in international and domestic interest rates and by trading on the fact that small companies have much less access to foreign lenders and investment bankers than large companies in a few privileged sectors (like the automobile and pharmaceuticals sectors).<sup>75</sup> Like minority businesses in the United States, though for differ-

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70. See generally SYLVIA MAXFIELD, *GOVERNING CAPITAL: INTERNATIONAL FINANCE AND MEXICAN POLITICS* (1990) (discussing economic globalization and its resulting flight of capital from Mexico).

71. See DOMINGUEZ, *supra* note 69, at 19 (stating that lack of capital in minority communities results from reluctance of financial institutions to make loans in inner cities, as opposed to interest rate levels).

72. See *id.* at 31-33 (noting that minority businesses pay more to meet their credit needs even when credit is available outside of minority credit institutions).

73. See *id.* at 19 (discussing "inelastic demands" in minority community capital flow). Studying the flow of capital in minority communities, Dominguez makes the following observations about the role of "price" in the allocation of capital:

A statistical survey of minority businessmen was conducted in which the businessmen were asked to list the factors that determined whether or not they received investment funds from lending institutions. Most respondents placed little emphasis upon the cost of borrowing, since they normally expected to pay higher rates of interest than borrowers outside the inner city, and since changes in the rate of interest did not affect the availability of capital. Also, most of the businessmen stated that their expected returns for a given venture were usually substantially above the negotiated rate of interest. The principle problem they identified was the acquisition of funds from financial institutions that were generally reluctant to make loans in the ghetto—not the level of interest rates.

*Id.*

74. See Winn, *supra* note 14, at 911-20 (providing economic analysis of situation of Peruvian informals after deregulation).

75. See Sylvia Maxfield, *National Business, Debt-Led Growth and Political Transition in Latin America*, in *DEBT AND DEMOCRACY IN LATIN AMERICA* 78-80 (Barbara Stallings & Robert Kaufman eds., 1989) (discussing "short term financial binge" for Latin American financiers benefiting big business such as pharmaceutical and

ent reasons and through different mechanisms, small- and medium-sized businesses in Latin America have found domestic credit "exceptionally expensive," and foreign credit inaccessible at any price.<sup>76</sup>

But certainly capital markets cannot be both integrated and global and, at the same time, racially segmented and compartmentalized. This apparent contradiction is inexplicable in neo-liberal economic theory because it can only be understood if one is willing to consider the possibility that the flow of capital is embedded in a broader cultural phenomenon of racial discrimination, and that institutions (other than the state) are also implicated in the production of economic marginalization and poverty. The idea that the free market operates in the shadow of racial discrimination, both through the exercise of individualized discretion and institutionalized decision-criteria, is a notion that neo-liberal ideology refuses to internalize in its theoretical constructs.

In the United States, discrimination in the flow of finance capital, through practices of redlining minority communities and the denial of capital to minority entrepreneurs, has been a primary factor in the production of racial spaces. Dis/investment, coupled with the containment practices of racial segregation, convert minority communities into ghettos. In the Third World, the production of racial spaces has been affected through development projects that rip people out of their traditional social relations of production and exchange. This is done both directly, by financing involuntary resettlements, and indirectly, through finance practices that privilege major industries over micro-businesses and export sectors over domestic sectors.<sup>77</sup>

From this perspective, to suggest that simply freeing the entrepreneurial human spirit from the regulatory squeeze will eliminate poverty is to ignore the role of so-called "private" institutions of capitalism, such as banks and corporations, in the production of racial spaces. It also

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auto industries, and how Mexican financiers manipulated domestic and international interest rates for profit).

76. See *id.* at 80 (discussing burdensome prices of domestic credit for small and medium-sized businesses and their inaccessibility to international loans).

77. See Gregory D. Squires, *Community Reinvestment: An Emerging Social Movement*, in *FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DEVELOPMENT* 3 (Gregory D. Squires ed., 1992) (discussing how Post-World War II racially motivated mortgage practices resulted in increased minority occupied central cities); see also Maxfield, *supra* note 75, at 80 (discussing Latin American financial practices that favored major businesses with access to foreign financial markets, while small- and medium-sized businesses with no such access remained disadvantaged). This disproportionate access to foreign financial markets, resulting from Latin American domestic financial practices, injured the position of the working class. See Ian Roxborough, *Organized Labor: A Major Victim of Debt Crisis*, in *DEBT AND DEMOCRACY IN LATIN AMERICA*, *supra* note 75, at 91 (noting that labor force in Latin America has been injured by Latin American financial situation). The author states: "The general picture has been one of unrelieved gloom. Across the continent, wages and unemployment have dropped, often sharply, as the costs of adjustment have fallen on the poorer sections of the population." *Id.*

ignores the role of law in enabling institutionally dominant classes to make decisions that produce these results, even over the many legal challenges and sometimes-violent opposition of affected individuals and communities. Thus, while De Soto is most certainly on the right track in targeting law and legally constructed institutional arrangements as fundamental factors in the production of poverty, his institutional-class analysis is simplistic and incomplete in two critical and inter-related respects. First, it presupposes the points it purports to demonstrate: namely the superiority of a neo-liberal social order organized around the strategically manipulated separation of economic and political social spaces and processes. Second, while De Soto makes a compelling case that differential access to legality produces a new class structure of institutionally mediated hierarchies and antagonisms, he fails to perform an institutional-class analysis of the private institutions that tend to dominate in deregulated economic spaces. This omission may be consistent with the neo-liberal biases of his theory, but not with any purported objective of revealing the causes and solutions to the problem of poverty.

In the next part I want to illustrate how a more *critical* institutional-class analysis could enrich Critical Race Theory by (1) increasing our understanding of the role of law in the production of subordination, (2) enabling us to see the difference between legal reforms that create new causes of action and reforms that reorganize the distribution of institutional power,<sup>78</sup> and (3) contextualizing our analysis of identity politics and the formation of political identities within an analysis of the way in which the legal organization of institutional classes channels and constrains the political aspirations and collective solidarities needed for progressive change in particular institutional contexts.

Like De Soto, my institutional-class analysis seeks to replace Marxist class categories with an analysis of the way relations of privilege and marginalization are legally constructed. Unlike De Soto, however, I do not presuppose, but rather, critically analyze the separation of economics and politics—in fact and in fiction.<sup>79</sup> Moreover, my institutional-class analysis focuses more comprehensively on the way power is organized by legal institutions, and how legal institutions are organized by the interpretive manipulation of legal doctrines and categories. Thus, in analyzing how law participates in the production of poverty and the racialization of

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78. See Iglesias, *supra* note 26, at 420-25 (contrasting relative impacts on minority interests between transformative potential of legal strategies aimed at reforming substantive elements defining fair representation and anti-discrimination in labor statutes such as NLRA and Title VII, with legal strategies aimed at reorganizing institutional arrangements of majoritarian power that currently structure processes of collective bargaining).

79. See Elizabeth M. Iglesias, *Structural Violence: Law and the Antipolitical Economy* (forthcoming) (mapping strategic manipulation of separation and interpenetration of politics and economics across various regulatory frameworks and institutional contexts in order to deconstruct institutional class structures of neo-liberal political economy).

spaces, I focus specifically on (1) the way the decision-making power over the allocation of capital is legally institutionalized, (2) the order of knowledge that rationalizes and legitimizes these institutional structures in legal discourse, and (3) the way these institutional structures organize relations of powerlessness among the various groups affected by capital allocation decisions emerging from these institutions.

### III. BEYOND THE OTHER PATH: AN INSTITUTIONAL-CLASS ANALYSIS OF THE COMMUNITY REINVESTMENT ACT AND THE WORLD BANK INSPECTION PANEL

The U.S. Community Reinvestment Act of 1977 ("CRA") and the World Bank Inspection Panel ("Panel" or "Inspection Panel") are products of collective political and legal struggles to gain some control over the capital allocation and investment decisions that have so seriously affected poor communities both in the United States and throughout the world.<sup>80</sup> In the United States, the CRA represents an early, but still controversial victory against the redlining practices through which U.S. banking institutions continue to convert low and moderate income communities into virtual wastelands by sucking them dry of the credit flows and investment capital necessary to repair and improve physical infrastructures, enable economic growth and maintain social stability, and by exporting local deposits in search of more profitable investment prospects elsewhere.<sup>81</sup> Like the CRA, though through different procedures, the World Bank Inspection Panel is designed to make lending practices more accountable to the communities they affect.<sup>82</sup> My objective is to suggest how these two legal regimes should be analyzed in an institutional-class analysis.

Both the CRA and the Inspection Panel are legal interventions designed to reorganize pre-existing institutional arrangements.<sup>83</sup> The CRA

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80. See Community Reinvestment Act of 1977, 12 U.S.C. § 2901(b) (1994) (discussing Congressional purpose in area of Community Reinvestment). "It is the purpose of this chapter to require each appropriate federal financial supervisory agency to use its authority when examining financial institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operations of such institutions." *Id.* See Kristine J. Dunkerton, *World Bank Inspection Panel and Its Affect on Lending Accountability to Citizens of Borrowing Nations*, 5 U. BALT. J. ENVTL. L. 226, 226 (1995) ("Historically, these citizens were powerless to seek redress when bank-funded projects adversely affected them or the borrowing nation's environment. It was not until the creation of the Panel that the Bank adopted procedures for citizen appeals.").

81. See Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, 20 FORDHAM URB. L.J. 293, 294 (1993) (stating CRA has been successful against redlining practices, but is still controversial and subject to weak enforcement).

82. See Dunkerton, *supra* note 80, at 241 (stating Inspection Panel designed to grant citizens with mechanism for seeking relief against World Bank practices).

83. See Fishbein, *supra* note 81, at 294 (stating that CRA was designed to "change the practices of the lending industry"). In addition to re-organizing pre-existing institutional arrangements, the CRA was also aimed at modifying the behavior and practices of the federal banking supervisors. See *id.* at 293-94 (discuss-

intervenes in the allocation of finance capital by targeting institutional arrangements that are themselves organized by a number of domestic legal regimes, including banking and consumer protection laws, civil rights statutes and common law doctrines like the business judgment rule. These domestic legal regimes construct institutional classes by organizing relations of power/lessness among the various groups that interact in and through these institutional structures, such as bank managers, regulators, depositors, borrowers and community reinvestment organizations—all of whom are interested in, and affected by, capital allocation decisions. The Inspection Panel, on the other hand, targets institutional arrangements organized by international law and development practices. These are the institutional arrangements that both constitute and mediate relations of power/lessness among international organizations, sovereign states and a growing number of internationally mobilized NGOs (non-governmental organizations). In both instances, the important point is that law organizes classes by organizing the power relations that will operate in different institutional contexts.

The organization of power constructs institutional classes and determines the relative disjuncture these classes will experience in the relationship between structure and agency. Institutional classes with significant institutional power will experience little disjuncture; others more marginalized within the power relations that organize the institution will confront significant disjuncture between their objectives and aspirations *for* the institution, and their ability to effectuate these objectives *in and through* the institution. As a result, institutionally marginalized classes oftentimes have no alternative but to seek their objectives through external and oftentimes illegal mobilization, thus incurring the costs and suffering the legal vulnerability that invariably accompanies such mobilization.<sup>84</sup>

An institutional-class analysis thus enables us to see similarities in the way power is structured across different institutional contexts and regulatory frameworks. Law is pervasively implicated in the organization of institutional classes. Racial spaces, defined by poverty, marginalization and immobility, are produced through patterns of disinvestment decisions which are themselves outcomes of differential power among institutional classes. Clearly, some classes profit from these patterns of dis/investments; others have struggled hard to transform them. Yet, the structures of institutional authority, that law defines and enforces against both inter-

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ing implicit goals of CRA); Dunkerton, *supra* note 80, at 226 (noting creation of World Bank Inspection Panel gave adversely affected citizens ability to “seek redress,” and that prior to Panel creation, no such ability existed).

84. See, e.g., Iglesias, *supra* note 49 (exploring this point through case study of labor/community activism involving coercive police intervention); see also, e.g., Iglesias, *supra* note 26, at 404-34 (exploring way judicial interpretation marginalizes people of color by suppressing avenues of lawful agency for effectively transforming the workplace).



nal and external challenge, determine the interests that routinely prevail in any institutional-class conflict.

In the struggle over the allocation of capital, for example, law dictates who will have the power to determine the allocation of capital, the decision criteria that can be lawfully used, the purposes against which such decisions will be measured, the level of accountability of the decisionmakers to affected parties and interests, and the review procedures through which their accountability is operationalized. The distribution of power within an institutional arrangement depends on where and how different groups are positioned in relation to each of these decision points and processes. Accordingly, institutional-class analysis seeks to reveal the way power is legally distributed among the different groups within specific institutional contexts in order to better understand how law is implicated in producing the relations of power/lessness, which in turn enables the continuing reproduction of the poverty and subordination that are manifested as racial spaces. This analysis is both structural and discursive because it focuses both on the way different group interests are *positioned within* institutional structures, and on the way these interests are *represented in* dominant legal discourse. A brief review of the CRA and the World Bank Inspection Panel will help to illustrate these points more concretely.

#### A. *The Community Reinvestment Act*

The story of the CRA is a particularly useful place to examine the role of law and legal theory in progressive social change, particularly given my earlier analysis of the way collective action is embedded in structural constraints which can fundamentally distort its ultimate social impact. These structural constraints on the agency of the oppressed are precisely the kinds of constraints that have most effectively withstood the impact of insurgent attacks or direct collective protests, because they exist, operate and stake out their longevity in the realm of ideas. The realm of ideas establishes the parameters of legal reform, and these parameters must be redefined and replaced by a successful revolution *in the same realm of ideas*—a revolution whose major resource is critical theory.

The CRA has been a controversial flash point ever since it was first enacted in 1977.<sup>85</sup> Neo-liberal conservatives have attacked the statute as a special interest political intervention that threatens the ultimate viability of the American banking system by distorting economic rules of supply and demand, requiring federally regulated banking institutions to make unprofitable loans in order to advance non-economic social and political objectives, and superimposing an outdated model of community banking on an increasingly integrated global market to the detriment of all inter-

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85. See Calvin Bradford & Gale Cincotta, *The Legacy, the Promise, and the Unfinished Agenda*, in FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DEVELOPMENT, *supra* note 77, at 280-81 (discussing initial debates at time of CRA passage in 1977 as well as re-emerging debates in 1991).

ested parties, including the low and moderate income communities it seeks to protect.<sup>86</sup> Government allocation of credit is, to the neo-liberal conservative mind, an embryonic cancer embedded in the Act, poised at any politically opportune moment to escape the boundaries of the Act and deliver the U.S. banking system to the inefficiencies of a state-managed economy or, worse yet, to socialism.

Looking at the statute, one might wonder at all the hysteria. The statute establishes no private right of action and indeed imposes no justiciable obligation whatsoever. It simply directs each of the four federal banking regulatory agencies<sup>87</sup> "to assess" and "take into . . . account" an institution's record in "meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution," when deciding whether to approve an application for a deposit facility by a banking institution under their supervision.<sup>88</sup> And yet this statute is credited by its supporters (and detractors) for redirecting the flow of significant amounts of capital into community development projects, albeit for reasons that have nothing to do with the operation of the Act's intended enforcement structure.<sup>89</sup> Indeed, the CRA has never operated as initially intended.

As legally structured, the substantive obligations of the Act, requiring regulated institutions to refrain from geographic discrimination by meeting the credit needs of low- and moderate- income communities, were to be enforced by bank regulators at such time as regulated institutions

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86. See Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 *FORDHAM URB. L.J.* 281, 281-83 (1993) (attacking CRA as "fundamentally flawed").

87. See Richard Marsico, *supra* note 23, at 170 n.4 (describing CRA enforcement responsibilities that are divided among four federal regulatory agencies).

88. See 12 U.S.C. § 2903(a)(1) (1994) (discussing evaluation criteria for applications for deposit facilities). Congress strengthened the statute in 1989 by requiring bank regulators to prepare a public, written evaluation of the applicant's CRA performance and establishing a new system for rating the level of compliance with CRA requirements. See *id.* at § 2906(a) (providing for written evaluations). The 1989 amendments also required CRA ratings be made public for the first time. See *id.* at § 2906(b) (providing for public sections of agency report). In 1995, federal regulatory agencies finalized a series of new regulations making important changes, including new evaluation criteria. See E. L. Balducci, *The Community Reinvestment Act: New Standards Provide New Hope*, 23 *FORDHAM URB. L.J.* 831, 846-47 (1996) (discussing implementation of 1995 regulations and evaluation criteria contained in final agency regulations). Nevertheless, the Act remains the subject of controversy and congressional efforts to repeal it are sustained and persistent. See *id.* at 846 (discussing "litany of attacks" from same members of Congress).

89. See Bradford & Cincotta, *supra* note 85, at 280 (noting that despite "visible progress," regulators have not traditionally enforced CRA rules, but instead left "the means of meeting the objective of the Act up to each lender and the community"); see also Fishbein, *supra* note 81, at 298 ("The CRA is credited with resulting in total commitments in excess of \$30 billion to poor communities throughout the country, far exceeding whatever conditions would have been imposed by regulators."); cf. Macey & Miller, *supra* note 4, at 331-32 (arguing that dollar values are not as significant as they appear at first glance).

might submit an application to acquire a depository facility.<sup>90</sup> An adverse CRA finding would provide a basis for the agency to withhold approval of the applicant's business plans. However, throughout the history of the Act, bank regulators have rarely denied expansion applications on CRA grounds. Instead, the effectiveness of the CRA enforcement process has rested in the leverage it has provided community groups in negotiating community reinvestment agreements.<sup>91</sup> Prior to the CRA's enactment, anti-redlining community struggles had no avenue of effective agency other than public demonstrations and deposit withdrawal campaigns because requests to negotiate with bank management about bank investment practices were routinely ignored or affirmatively rebuffed.<sup>92</sup> The CRA changed this dynamic by making bank regulatory procedures a forum where community complaints about redlining practices would have to be heard, thus threatening to delay the approval of bank applications even if the regulators ultimately decided to approve the application.<sup>93</sup>

From an institutional class perspective, the CRA is a useful start in the right direction. A private right of action to enforce justiciable substantive obligations in a judicial forum arguably might have substantially depoliticized community organizations by shifting agency from community group organizers to lawyers, who would then fight in the relatively inaccessible forums of judicial process. Instead, the CRA effected a significant redistribution of institutional power between bank managers, regulators and communities, by providing community groups with formal standing to intervene in the regulatory process through which banking institutions get their business expansion plans approved.<sup>94</sup> This standing has provided community groups with the leverage they needed to be heard. Bank managers started earnestly negotiating with community groups only after the CRA's intervention altered the institutional balance of power between management and communities. This redistribution of power occurred

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90. See 12 U.S.C. § 2903(a) (describing agency assessment that is to be made of applying institution's record). An application to acquire a depository facility includes applications for national bank or thrift institution charters, deposit insurance in connection with a newly chartered depository institution, the establishment of a domestic branch, the relocation of a home or branch office, merger or consolidation with a depository institution, the acquisition of the assets of a depository institution, the assumption of the liabilities of a depository institution and the acquisition of shares in a depository institution requiring approval under the Federal Bank Holding Company Act or Savings Association Holding Company Act. See 12 U.S.C. § 2902(3)(b)-(e) (listing what situations constitute "application[s] for deposit facilit[ies]").

91. See Fishbein, *supra* note 81, at 298 (stating that "the effectiveness of the CRA challenge process usually rests with the ability of the community group leaders to negotiate an agreement").

92. See White, *supra* note 86, at 281-83 (attacking CRA as "fundamentally flawed").

93. See *id.* (same).

94. See Fishbein, *supra* note 81, at 297 (discussing importance of providing standing to intervene for community organizations).

not because bank regulators were particularly responsive to CRA protests, but because these protests could trigger substantial, if not fatal, delays in implementing the business plans that bank managers desire to pursue. This, in turn, ensured that the “real action” remained at the negotiating table, where community groups and bank managers would work out lending commitments in order to avert CRA protests, rather than channeling the action into the regulatory process, where community organizers and negotiators would most likely give way to legal advocates.

The redistribution of power effected through the CRA enforcement structure has made the Act highly controversial, leading opponents to complain that it authorizes regulatory extortion and gives community groups the “extraordinary authority to hold up mergers and other obligations.”<sup>95</sup> The CRA has been attacked more generally for introducing special interest politics into, and subordinating the economic logic of the market in, the allocation of capital.<sup>96</sup> In one of many legislative rounds, CRA opponents proposed to amend the statute to completely eliminate the original enforcement mechanism in favor of a “market solution” based on full disclosure.<sup>97</sup> The idea behind this market-based solution is that bank customers would be free to enforce the CRA by taking their business elsewhere.

More recently, after years of political mobilization, CRA opponents have managed to strike a major blow at the democratizing elements of the CRA enforcement structure through various provisions of the Financial Services Modernization Act of 1999.<sup>98</sup> These provisions establish “safe harbors,” which alter the examination schedule for banks having assets of less than \$250 million by providing that such banks shall not be examined more than once every four to five years, depending on the rating received during their last CRA examination. They also impose significant new burdens on community groups asserting CRA challenges by establishing a presumption of compliance absent substantial verifiable information to the contrary, thus increasing the community group’s costs of even “getting to the table.” Finally, and perhaps most disturbing, the so-called “sunshine provisions” of the Act affirmatively discriminate against CRA community

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95. *Credit Opportunity Amendments Act of 1997*, 143 Cong. Rec. E72-01 (statement of Rep. Bill McCollum).

96. *See id.* (noting problems of CRA and introduction of CRA Amendment).

97. *See id.* (noting problem of enforcement mechanism of current CRA).

98. The Financial Services Modernization Act of 1999 was officially enacted as the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 1999 U.S.C.A.N. (113 Stat.) 1338. This legislation, which has been called “the granddaddy of all financial deregulation” significantly lowers barriers between the banking and securities industries established by the Glass-Steagall Act of 1933, as well as barriers that the Bank Holding Company Act of 1956 established between the banking and insurance industries. *See* Ralph Nader, *The Democrats Bow to the Megabanks*, *THE PROGRESSIVE*, Jan. 2000, at 24 (noting that financial sector tossed \$155 million to congressional candidates in 1998 election, while “House-Senate conferees, who made the critical decisions on the final shape of the legislation, received more than \$16 million among themselves”).

groups by imposing differential regulatory burdens on CRA agreements. These new regulatory burdens require parties to such agreements to report annually on the terms of such agreements—but only when the agreements are between a depository institution and a non-governmental entity or person who has commented on, testified about, discussed with or otherwise contacted the bank concerning the CRA. Agreements made with developers and for-profit corporations are not covered—only agreements entered into in response to CRA inquiries or enforcement efforts.

These new provisions substantially alter the distribution of institutional power previously organized by the enforcement structure of the CRA. Community groups now face new barriers against participating effectively in CRA negotiations with regulated institutions. They not only bear substantial new costs in getting to the bargaining table, but the paper and accounting work associated with “sunshine” reporting may also increase the costs of administering negotiated agreements to degrees that make the struggle for such agreements pointless. The fact that these new provisions discriminate against low- and moderate-income community groups based on their exercise of basic First Amendment rights of freedom of expression, such as the right to testify and to petition government, suggests that the next major round in this struggle will be kicked back to the courts. This leads me to two final points—both informed by an effort to imagine the kind of theory required to intervene effectively in the continuing struggle over community participation in the allocation of financial capital.

The first point is that the CRA will remain a highly visible and vulnerable target until some significant victories are won in the realm of legal discourse. This is particularly true if the next round of challenges is to be waged in the courts, where the interpretation of constitutional doctrine has long been captive to the ideological and rhetorical manipulation of discursive constructs like the economic/political dichotomy.<sup>99</sup> In this field of contestation, the most significant victory would be to delegitimize definitively the economic/political dichotomy, particularly as it is rhetorically manipulated and strategically deployed in neo-liberal discourses. This is because neo-liberal conservatives effortlessly translate the fundamental conflicts of values and interests (reflected in CRA struggles over the purposes and procedures that should guide the allocation of capital) into a simplistic battle between “efficient markets” and “inefficient special interest political interventionism.” Unpacking the unjustified assumptions and affirmative misrepresentations embedded in such formulations would alter the discursive universe in which the CRA is both attacked and defended.

Second, and equally important, an institutional-class analysis informed by theoretical advances made in the study of social movement formations and post-modern political identities suggests that the foregoing

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99. See generally Iglesias, *supra* note 79.

analysis of the institutional-class conflict between bank managers and community organizations explores only one dimension of the inter-class dynamics that must be attended to in developing legal interventions which will produce more progressive institutional arrangements. For example, communities may be inadequately represented and/or some community representatives may be tempted to cut special deals for their particular constituents when negotiating community reinvestment plans at the bargaining table with bank managers. This raises many of the same issues raised by a Critical Race Feminist analysis of exclusive representation in the context of labor's collective bargaining with management.<sup>100</sup> Identifying these issues and designing institutional reforms that can address them is important theoretical work which will go a long way toward channeling reform energies into the kinds of structures that will make emancipatory agency more effective in struggling against the institutional processes that produce racial spaces.

### B. *The World Bank Inspection Panel*

Like the earlier CRA analysis, an institutional-class analysis of the World Bank Inspection Panel begins by identifying the various institutional classes whose interactions are mediated by the legal regimes into which the Inspection Panel intervenes. These classes include the sovereign borrowers, bank project managers, non-governmental organizations representing affected communities, the affected communities as self-conscious and mobilized agents, and project contractors such as suppliers, engineers and planners. The second step is to identify the power bases of each institutional class, the way their interactions are legally mediated and the way these institutionalized relations of the powerless are implicated in the decisional outcomes through which World Bank ("Bank") development projects have contributed to the production of poverty and the proliferation of racial spaces throughout the Third World.

The Inspection Panel was established by the Executive Directors of the World Bank in 1993 in response to heavy criticism that the Bank's lending practices were irrational, that its financing of large scale energy projects had resulted in the involuntary resettlement of numerous viable communities and that its policies promoted environmental destruction in the areas purportedly under development. The quality of the Bank's portfolio was judged low, and its lending practices increasingly unprofitable.<sup>101</sup>

The Inspection Panel establishes a potentially significant precedent that may open the way for more fundamental institutional reforms in the

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100. See generally Iglesias, *supra* note 26 (analyzing problems women of color confront in bargaining with management and obtaining fair representation, given structure of legal rights at intersection of Title VII and NLRA).

101. See Bradlow, *supra* note 19, at 564 (describing problems with Bank's management and portfolio). See generally Hey, *supra* note 24, at 61 (discussing impact of Inspection Panel on World Bank).

field of international law and development. It is the first time that an international forum has been created to deal specifically with the claims of non-state, non-business groups affected by the decisions of an international organization. These same communities were formerly prisoners of impunity, locked behind the legal fiction of state sovereignty. I call it a fiction because the doctrine of sovereignty has not served to shield Third World governments from the intrusive and coercive conditions attached to many World Bank loans, particularly structural adjustment loans.<sup>102</sup> Nevertheless, the doctrine of sovereignty has been routinely invoked to make the state's internal political process, that is, its treatment of its own citizens, unreviewable and, ultimately, irrelevant to the negotiation of World Bank development loans. Indeed, the World Bank has routinely dismissed allegations of project-related human rights violations by borrower governments on the grounds that its Articles of Agreement prohibit the Bank from interfering in the domestic "political affairs" of its member states.<sup>103</sup>

The case of the Chixoy River Dam project in Guatemala is a notorious example of how bad these project-related human rights violations can get.<sup>104</sup> In 1978, the World Bank lent Guatemala \$72 million to build a dam on the Chixoy River. When the local population, mostly indigenous Achi Indians, began to organize in order to resist their eviction from the area, the state responded. Three soldiers assigned to guard the project site fired on a group of citizens that had gathered in a nearby church to rally against the project. Seven people were killed. Terrorized but determined, the people continued to condemn the government's relocation plan, particularly its failure to provide fair compensation. The villagers were then ordered to report to a civil defense meeting at a nearby village. Seventy-two of the seventy-three men who went to the meeting were assassinated. A month later, a group of soldiers attacked the village, which at that point was populated almost entirely by women and children, because the men had gone into hiding after the earlier massacre. The women and

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102. See Iglesias, *supra* note 3, at 382 n.50 (deconstructing rhetorical manipulation of concept of sovereignty in and through critical analysis of its deployment for and against alternative proposals to link human rights enforcement to articulation of international economic law).

103. See Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 47, 54 (1996) (noting that Articles of both IBRD and IDA state that "[t]he Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions.").

104. See Probe International, *World Bank Energy Complex Creates Hell On Earth For Indian Citizens* (visited 8/30/98 and no longer online) <<http://www.nextcity.com/ProbeInternational/WorldBank/index.html>> [hereinafter Probe International] ("Possibly the worst human rights outrage ever associated with one of the Bank's projects occurred in Guatemala." citing CATHERINE CAUFIELD, *MASTERS OF ILLUSION: THE WORLD BANK AND THE POVERTY OF NATIONS* (1996)).

children were raped, killed and their bodies were thrown into the ravines.<sup>105</sup>

Four months after the massacre, the village disappeared into the rising waters of the Chixoy reservoir; but when the dam was completed, it did not work. As it turned out, the dam was built in a geologically unstable area known for seismic faults. There were so many engineering errors that the dam stopped producing electricity after five months of operation. The World Bank's response was to lend the government of Guatemala another \$47 million for repairs. Due to corruption, mismanagement and incompetence, the initially projected \$340 million dam ended up costing \$1 billion, not to mention the destruction of an entire village and the murder of its inhabitants.<sup>106</sup>

Although these events occurred twenty years ago, instances of project-related human rights violations continue. Indeed, of the ten formal Requests for Inspection processed by the World Bank's Inspection Panel during its first three years, at least one case involved allegations of grievous violations directed specifically at communities attempting to resist the destructive impact of a World Bank financed project.<sup>107</sup> This Request for Inspection concerned the Bank's failure to comply with its numerous internal policies and operational directives in connection with the World Bank's National Thermal Power Corporation Project in India. According to Probe International, Indian project authorities resorted to a whole range of repressive tactics designed to force the local population to move from the project area.<sup>108</sup> State officials engaged in reported beatings, arrests, surveillance, imprisonment and destruction of property, even as National Thermal Power Corporation ("NTPC") contractors forcibly bulldozed the land of families who had not agreed to move.<sup>109</sup> Almost 200,000 people have been removed from expropriated farmlands and forced into crowded resettlement colonies, where they have been relegated to small subsistence plots and short-term contract work.<sup>110</sup> Not only have they been denied the supposed benefits of the project (*e.g.*, electricity), but the basic infrastructure of the settlements has not been maintained. This has resulted in lack of water, clogged drains, broken water pumps and a lack of medical supplies or services.<sup>111</sup>

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105. *See id.* (describing events that occurred in connection with Dam of Chixoy River).

106. *See id.* (noting that cost of dam rose from estimated 340 million to 1 billion dollars).

107. *See* WORLD BANK INSPECTION PANEL, 1996-97 ANNUAL REPORT (Request No. 10: India: National Thermal Power Corporation Project).

108. *See generally* Probe International, *supra* note 104 (describing methods used to force locals from project area).

109. *See id.*

110. *See id.* ("Since the beginning of the Singrauli Energy Complex, almost 200,000 people have been forced to abandon their homes and livelihood.").

111. *See id.* (describing living conditions in resettlement colonies).



The lack of any effective avenue of agency within the state's political and administrative structure for affected communities to resist the harmful impact of development projects has been a fundamental and constitutive element of community powerlessness. Standing to invoke the Inspection Panel may change the relations of power/lessness between communities and state officials by providing communities with an alternative avenue of recourse: direct access to the World Bank's Executive Directors by way of the Inspection Panel and its mandate to ensure that World Bank projects are implemented in a manner consistent with the Bank's internal policies and operational directives. These directives cover a whole range of issues, from public participation at all stages of a project to the appropriate procedures for conducting environmental assessments. Indeed, the Request for Inspection in the NTPC case cited violations of no less than six of the World Bank's internal policies and operational directives: in particular, its directives on (1) Economic Evaluation of Investment Operations, (2) Environmental Assessments, (3) Involuntary Resettlements, (4) Indigenous Peoples, (5) Project Supervision and (6) Community Participation.<sup>112</sup>

As with the CRA and the continuing controversy that surrounds it, the ability to generate an institutional regime that internalizes the claims and interests, and routinizes the participation of impoverished communities in the decision-making processes through which World Bank investment capital is allocated, depends partly on our ability to redefine the way in which the economic/political dichotomy is mapped across the discursive fields of law—in this case, the field of international economic law. It is precisely this dichotomy that underpins and legitimizes the substantial limitations imposed on the Inspection Panel's jurisdiction to conduct inspections and make recommendations that address allegations of project-related human rights violations. The Panel's jurisdiction is narrowly restricted to determining whether the Bank's staff has failed to comply with the Bank's own internal policies and directives. The Panel is not authorized to assess the legality of state actions under international human rights law, for this might too quickly produce substantial interventions in the domestic political affairs of the borrower state. Its limited jurisdiction keeps the Panel within the boundaries of economic concerns because it ensures that the Panel will function only to make Bank staff accountable to Bank policies, which are themselves designed to promote the *economic* viability of the Bank's projects, as defined by the Bank's management. Proposals to expand the Panel's jurisdiction to address human rights violations by officials of the borrower would quickly confront the fiction of state sovereignty as inscribed in the political prohibition of the Bank's Articles of Agreement.

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112. See generally Hey, *supra* note 24 (noting violations of World Bank Internal Policy).

Equally significant, the Inspection Panel has no jurisdiction to conduct investigations or make recommendations in cases where the alleged harms suffered are caused not by the Bank's Staff's failure to follow internal policies or directives, but rather, by the Bank's policies themselves. From an institutional class perspective, the implications of this jurisdictional limitation are profound. The fact that a Panel Inspection may lead the Executive Board of Directors to pull the plug on projects where the state's actions are inconsistent with Bank policies may certainly empower communities in their interactions with state officials eager for the Bank's financial assistance, but it does nothing to empower communities vis-a-vis the Bank's Executive Board or its policies. The Panel's recommendations are merely advisory to the Executive Board, which is itself constituted through a governance structure of weighted voting. Under the Bank's Articles of Agreement, voting rights are allocated among member states according to the state's contributions to the Bank's callable capital, thus ensuring greater influence over Bank policies and activities to capital-exporters over debtor states and, in particular, to the United States. Thus, the Inspection Panel may simply end up encouraging communities to place their hopes and channel their energies into appeals to a highly political and ultimately unresponsive, if not positively hostile forum that is dominated, at best, by the assumptions of neo-liberal economic ideology or, at worst, by the strategic self-interested policies of the richest countries.

From this perspective, it is important to note that none of the ten Requests for Inspection formally reported in the Inspection Panel's first two annual reports deal with any claim arising out of a World Bank structural adjustment loan.<sup>113</sup> With just two exceptions,<sup>114</sup> each of the Requests has focused exclusively on claims arising out of World Bank project loans. This is curious because the Bank has increasingly focused on policy-based lending since the 1980s.<sup>115</sup> Its structural adjustment loans have been disbursed throughout the Third World, and particularly in Latin America, to induce Third World governments to implement domestic policies more consistent with neo-liberal economic ideology. This has meant a standard recipe of cuts in public services, privatization of state-controlled enterprises, elimination of subsidies for domestic consumption, export-promotion policies that channel resources away from production for the domestic market in order to earn the foreign exchange needed to repay

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113. See World Bank Inspection Panel, 1994-96 ANNUAL REPORT (1996) (noting absence of claims surrounding structural adjustment loans in Request for Inspection 2: Compensation for Expropriation of Foreign Assets in Ethiopia, 1995).

114. See *id.* (rejecting request on grounds that requestor had not exhausted local remedies and that requestor failed to show how failure to compensate was consequence of Bank actions or omissions); see also WORLD BANK INSPECTION PANEL, 1996-97 ANNUAL REPORT (1997) (rejecting management's claim that it had no responsibility for implementation of sectoral adjustment in Request for Inspection 8: Jute Sector Adjustment Credit, Bangladesh, 1996).

115. See generally Probe International, *supra* note 104 (noting policy-based lending beginning in 1980s).

both the World Bank and other international creditors, elimination of exchange controls, and currency devaluations that raise the domestic price of imports.

These conditions, so routinely attached to World Bank structural adjustment loans, constitute major incursions into the domestic policy-making prerogatives of the state. Moreover, these loan conditionalities have also escalated the political instability of numerous Third World governments precisely because they oftentimes trigger substantial opposition from affected communities.<sup>116</sup> In Nicaragua, to give just one example, government "stabilization" policies aimed at meeting the conditions of a World Bank structural adjustment loan provoked a remobilization of ex-combatants, with the ex-contras and ex-Sandinistas even joining together in 1992 to protest the government's failure to keep its promises of access to land, credit and employment.<sup>117</sup> Again, in 1994, Nicaraguans responded to the economic crisis generated by the government's structural adjustment policies with a series of public strikes—including a transportation strike against high fuel prices that effectively stopped the distribution of goods within the country for eight days.<sup>118</sup>

Although a number of Latin American governments have tried to address popular concerns through a constructive national dialogue and to resist the conditionalities imposed by World Bank structural adjustment loans,<sup>119</sup> neither dialogue nor resistance has been very effective, in large part because the terms of the World Bank structural adjustment loans are, in effect, non-negotiable.<sup>120</sup> They are driven by the self-serving ideology

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116. See The Development Group for Alternative Policies, *Structural Adjustment and the Spreading Crisis in Latin America* (visited 11/13/00) <<http://www.igc.apc.org/dgap/crisis.html>> [hereinafter Development Group] (noting political instability derived from World Bank loans).

117. See *id.* (discussing response to government's failure to keep promises).

118. See *id.* ("An August 1994 transportation strike protesting hikes in fuel prices, for example, effectively halted the distribution of goods within the country for eight days.").

119. See Diana E. Moller, *Intervention, Coercion, or Justifiable Need? A Legal Analysis of Structural Adjustment Lending in Costa Rica*, 2 SW. J. L. & TRADE AM. 483, 486 (Fall 1995) (noting Costa Rica's attempt to debate and reject conditions of World Bank loan).

120. See Development Group, *supra* note 116 (reporting on 1994 World Bank/IMF consultations in which Nicaraguan government arranged to include several non-governmental organizations (NGOs) and academic groups). The following proposition reveals that the government did not intend to change the programs:

NGOs, many of whom came to the sessions with their own analyses and alternative proposals, reported that the meetings on the adjustment package were little more than briefings on the programs planned by the Bank and the Fund with scant opportunity for constructive dialogue. Whatever the government's intentions in organizing the meetings, in reality it had little latitude to change the nature of the adjustment program, given the loan conditions of the international financial institutions and its own desperate need for foreign exchange.

*Id.*

of the rich, which proclaims, like opponents of the CRA in the United States, that unregulated private markets will produce higher standards of living in the long run, despite abundant evidence that the "long run" has come and gone, leaving only an increasing concentration of wealth among elites across the globe, the further immiseration of the poor, and the degradation of their standards of living and the spaces they inhabit.

It is certainly possible that some of the Bank's internal policies and operational directives might be invoked to challenge some aspect of a particular structural adjustment loan. Any challenge going directly to the question whether structural adjustment loan conditionalities violate fundamental international human rights, however, would be beyond the scope of the Inspection Panel's current jurisdiction. Proposals to expand the Panel's jurisdiction to address such complaints would immediately confront the opposition of precisely those states whose interests are served by the structural adjustment conditionalities imposed on borrower states. That is, the rich capital exporting states of the North, whose power in the interstate system is reflected in the weighted voting-rights structure through which the Bank is governed. These states are unlikely to give the Panel the power to review the policies that they themselves are promoting through the Bank. Indeed they have not even given the Panel the power to make binding determinations about the staff's compliance with the Bank's own policies.

Thus, whatever the impact of the Inspection Panel on the conflict between government officials and the peoples they govern, it is clear that this conflict is embedded within a broader conflict between rich and poor across many institutional contexts, organized by both domestic and international law. As with the CRA, a definitive discursive victory over the economic/political dichotomy would be a worthwhile achievement. If nothing else, this kind of victory would make asymmetrical allocations of institutional power more immediately apparent, thus enabling more informed responses. Just as my institutional-class analysis of the CRA suggests reasons why legal reform efforts should aim at keeping and expanding "the action" at the negotiating table between banks and communities, the foregoing analysis of the Inspection Panel regime suggests reasons why "the action" over World Bank lending practices is still lodged in the legislative forums and executive apparatus of First World governments. While I certainly would welcome a reinvigorated grassroots mobilization of the American people intent on reclaiming the power of the U.S. government on behalf of our fundamental commitments to basic humanity and global justice, in the meantime I simply want to suggest that the whole purpose of deconstructing the economic/political dichotomy is to promote the development of alternative legal regimes and institutional mechanisms that will move "the action" out of the U.S. Departments of Treasury and Commerce and into some other space, where the effective participation and adequate representation of affected communities will be

better positioned to put the World Bank out of the business of producing racial spaces.

#### IV. CONCLUSION

I would like to conclude with a few reflections on the kind of legal theory that is well worth the effort of RaceCrit and LatCrit scholars. First, there is no question that power relations are central to the production of racial spaces, nor is there any question that these relations of power/lessness are mapped across the economic and political institutions of the state and the market. There is likewise no question that we are every day in the process of discovering new aspects, dynamics and expressions of power. As legal scholars, RaceCrits and LatCrits have a particular role to play in contributing to progressive social transformation, which includes the production of theoretical work that increases our understanding of the way racialized spaces are produced through the legal organization of the social, political and economic institutions.

The call for institutional-class analysis is thus a call for a detailed analysis of the kinds of decision processes that law institutionalizes in different institutional contexts and the way authority over these decisions is allocated among competing groups within any particular institutional context. The emphasis here is on the way law organizes authority and disorganizes the avenues of effective dissent, with an emphasis on concrete rather than generalized explanations of the way power is constructed. This emphasis is because only such particularized analysis can enable us to envision how relations of power/lessness can and should be reconstructed in specific institutions.<sup>121</sup>

Secondly, analyzing the terms of the struggle over institutional structures is a practice that quickly moves into an analysis of law as a discursive universe, constructed by and manipulated through the deployment of dichotomies like economic/politics and special interests/common good. Thus, discursive analysis (analysis of discursive structures that organize legal doctrine and political rhetoric) is critical to the analysis of law's role in the production of institutional class structures.

Finally, this call for institutional-class analysis is a call to move beyond the race/class dichotomy and domestic myopia that have disorganized and demobilized so many progressive coalitions.<sup>122</sup> The major obstacle to community control of capital is not some supposed conflict between class struggles against economic exploitation and racial struggles against white supremacy—racial spaces are produced by both. Instead, the problem is that every legislative intervention, regulatory reform or new strategy of di-

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121. See Carrasco, *supra* note 57, at 330-31 (urging LatCrit scholars to master and engage language of economic analysis and finance theory in order to equip themselves for radical monitoring necessary to combat structural discrimination that neo-liberal policies and institutional arrangements tend to produce).

122. See, e.g., Iglesias, *supra* note 28.

rect political action is eventually filtered through legal discourses where the dichotomization of economics and politics is strategically manipulated to maintain structures of privilege and to resist the democratization of both the state and the economy.

Viewed against this backdrop, Critical Race Theory is best understood as an anti-subordination project in the production of legal scholarship. However removed or immediate legal scholarship may be to the struggle against subordination, the fact is that the production of legal scholarship would go on without Critical Race Theory if RaceCrits were ever misguided enough to abandon the field. It would continue because legal scholarship serves the important function of rationalizing, synthesizing and disseminating the decision-outcomes and doctrinal formulations through which legal institutions simultaneously deploy their own unique forms of power and organize relations of power/lessness that operate in virtually every other social institution that mediates human interaction.

From the public institutions of local, state and federal governments, to private institutions like banks, corporations and labor unions, to even the most supposedly intimate relations of family and sexuality, law is everywhere implicated in the organization of power/lessness. Critical Race Theory thus has had, and will continue to have, a significant impact on the struggle for social racial justice, precisely because law is about power, and legal scholarship is about the rationalization of power. To the extent that Critical Race Theory increases our collective understandings of the ways in which law, legal process and legal institutions participate in the reproduction of subordination, it will help reveal the stakes in the production of legal knowledge, and these stakes are very high indeed.