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## DIALOGUE: *THE RACIAL CONTRACT* TODAY

### Race and the social contract: Charles Mills on the consensual foundations of white supremacy

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This essay argues that Charles W. Mills's *The Racial Contract* can enrich our understanding of the relationship between white supremacy and the foundations of the American polity. It begins with the text's central thesis before making three claims. First, I argue that Mills's work can deepen our thinking about the place of de jure white supremacy in American political history. His concept of a "racial contract" brings to the fore the consensual basis of slavery and Jim Crow. Second, I argue that Mills should be considered, along with Judith N. Shklar and Rogers M. Smith, as among the very few who identify racial oppression as a constitutive feature of the American polity and its civic culture. Third, I suggest why social contract theory, even Mills's revisionist application, may not advance Mills's normative goals.

**Keywords:** American political thought; social contract theory; the racial contract; slavery; white supremacy

#### Introduction

Charles W. Mills's *The Racial Contract* (1997) is a philosophical account of white supremacy in the modern world. As a work of non-ideal political philosophy, the book argues that racial oppression is deeply rooted in the modern nation-state, shaping its major institutions, dominant economic arrangements, and civic culture. Mills's central claim is that systemic forms of race-based domination rest in a consensual politics that restricted to whites only the rights, protections, and civic standing afforded by the social contract. He says: "The Racial Contract has underwritten the social contract, so that duties, rights, and liberties have routinely been assigned on a racially differentiated basis" (1997, 93). This immanent critique of social contract theory reveals modernity's constitutive contradiction: the triumph of Enlightenment ideals alongside the expansion of racial slavery. For these and other virtues, *The Racial Contract* occupies an important place in contemporary political philosophy and is recognized as a foundational text of critical race theory.

It is unfortunate that *The Racial Contract* has had so little influence on the study of American political thought. It is unfortunate because Mills's theoretical framing can explicate the centrality of race and racism in American political thought and practice. In what follows, I begin with Mills's structural account of white supremacy, which is critical to his theoretical engagement. Mills contends that white supremacy is rooted in the modern polity's basic structure and since the basic structure rests on the consent of its citizens and white supremacy is fundamental to

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the basic structure, Mills concludes that white supremacy, too, is based on consent. A reformist reading of social contract theory is at the heart of Mills's account of racial oppression. In social contract theory, consent is the only legitimate basis of political authority and grounds for obligations. This is so because persons are by nature equal and free. But this universal and egalitarian assumption is often taken as a given and thus obscures the actual history of the United States. Second, I argue that Mills's revisionist contractualism can recover the consensual politics that underlay *de jure* white supremacy in the United States, specifically slavery and Jim Crow in the post-emancipation South. I emphasize those sites where citizens express their consent: formal arenas of democratic politics and in the press. Third, I make the case that Mills is among the few in the canon to treat racial domination as intrinsic to the American polity. Fourth, I turn to Mills's more normative goals in writing the book and ask why he places such faith in a social contract framework. Though I share Mills's desire for corrective justice, I contend that social contract theory asks us to turn away from facts and therefore unwittingly makes us inattentive to conditions such as historical and racial injustice, which can undermine rather than advance Mills's normative goals.

### White supremacy and the racial contract

*The Racial Contract* sketches a general conception of white supremacy. Historically, white supremacy took many forms: conquest, genocide, slavery, and Jim Crow. Currently it enables and entrenches disadvantages tracking black life. Many scholars therefore underscore the distinctiveness of each historical conjuncture instead of speaking of white supremacy as timeless and unchanging (Hall 1980; Omi and Winant 1986; Marx 1998; Lowndes, Novkov, and Warren 2008; King and Smith 2011). For example, historians refer to Jim Crow as "white supremacy" to highlight a new sociopolitical configuration different from slavery notwithstanding the fact that slavery paved its way (Woodward 1951; Fredrickson 1981; Ayers 2007). They emphasize change over time, whereas Mills outlines a capacious conception of white supremacy that includes slavery, Jim Crow, and even present forms of employment discrimination. This understanding of white supremacy does not derive its coherence from idiosyncratic features of any of its given instances such as a contingent attitude, practice, or institution (Mills 1997). The reason is simple. Take, for example, segregation laws in the post-emancipation South. They were essential to *de jure* but not *de facto* white supremacy so it would be incorrect to consider such laws necessary for a given situation to count as an instance of white supremacy. Mills wants to remind his readers that while color-blind public policy may well remedy *de jure* forms of white supremacy it certainly does not abolish *de facto* forms of white supremacy and may in fact further entrench practices of exclusion and unfairness in an unregulated private sphere (Boxill 1992; Bonilla-Silva 2006; Anderson 2010).

Mills (1997) offers an account of what conditions would have to be true for a state of affairs in any geographical and (modern) historical context (including the present) to count as an *instance* of white supremacy. He says white supremacy is "*itself* a political system, a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, rights and duties" (1997, 3). It is "a particular mode of domination," one rooted in the state's legal structure and civic culture (Mills 1999, 98). And it "encompasses *de facto* as well as *de jure* white privilege and refers more broadly to the European domination of the planet that has left us with the racialized distributions of economic, political, and cultural power that we have today" (Mills 1999, 98). The basic idea is that whites as a group are structurally positioned so they were able to effectively coerce, persecute, and exploit African-Americans as a group, and they are able to do so regardless of the individual fate of any

one white or African-American. This line of argument adds up to a view of white supremacy as a structural form of oppression, an extreme state of relational inequality or group domination (Young 1990, 2000; Anderson 2010).

How could such a condition persist in a republic founded on Enlightenment ideals? To answer this question, Mills insists that one must look to the social contract. Social contract theory spins the instinctive idea of a promise into a normative account of the political. In its classic framing, social contract theory presupposes universal and egalitarian principles as the basis of political society, government as founded “on the popular consent of individuals taken as equals” (Mills 1997, 3). Mills argues that if we accept the premise that all signatories to the social contract are equal and free we will fail to see those who are in fact unfree and unequal; its idealized form of authority and obligations offers a “profoundly misleading account” of modern citizenship, one that obscures the “ugly realities of group power and domination” (1997, 3). Mills says the idea of a “racial contract” remedies this “consensual hallucination” (1997, 18). He adds that it explains how an “unjust, *exploitative*, society ruled by an *oppressive* government and regulated by an *immoral* code, comes into existence” (1997, 5).

The racial contract, Mills argues, is “a contract between those categorized as white *over* the nonwhites, who are thus the objects rather than the subjects of the agreement” (1997, 12). It is an agreement that

establishes a racial polity, a racial state, and a racial juridical system, where the status of whites and nonwhites is clearly demarcated, whether by law or custom. And the purpose of this state, by contrast with the neutral state of classic contractarianism, is, *inter alia*, specifically to maintain and reproduce this racial order, securing the privileges and advantages of the full white citizens and maintaining the subordination of nonwhites. (Mills 1997, 13–14)

The racial contract is a series of consensual acts that constitute and reconstitute “the people” as including only whites and the republic as a racial polity. Accordingly, it does not correspond to a single act, though there are many “conceptual, juridical, and normative” moments approximating a racial contract (1997, 20–21). Mills argues that these different actions can nevertheless be understood as ratifications of the racial contract because each of them expresses and affirms “the differential privileging of whites as a group with respect to the nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socioeconomic opportunities to them” (1997, 11). The racial contract is therefore not analogical to the social contract for the former emphasizes non-ideal conditions, is historically situated, and is context sensitive. The racial contract thus makes vivid those cruel facts and horrifying truths long obscured by the idea of a social contract.

### **The consensual foundations of slavery and Jim Crow**

*The Racial Contract* can deepen our thinking about the relationship between popular consent and racial injustice in American political history. Toward this end, I recover some crucial moments in American constitutional and electoral politics to show that a majority of white citizens explicitly consented to race-based injustices. Such events can be interpreted as enacting and/or affirming a racial contract, an agreement among the participating white citizens to deny basic rights, liberties, and protections to nonwhites, in particular, African-Americans. I concentrate on the institution of slavery and Jim Crow in the South to underscore the consensual basis of *de jure* white supremacy in American political history.

We are all familiar with the narrative of the American Founding as having transformed Enlightenment ideals into lived institutions. This story has hardened into truth; that of a nation

founded on freedom and equality; slavery but a misstep on an otherwise liberal and democratic track. But as the historian Edmund Morgan reminded his fellow Americans on the eve of the bicentennial of the Declaration of Independence: The founders “either held slaves or were willing to join hands with those who did,” they were dedicated not only to “humanity and dignity” but also racial slavery (1975, 4–5). He called it the “American paradox” and insisted that its origins lay in seventeenth-century Virginia, British North America’s first slave colony (1975, 6). Morgan argued that the new society was “determined as much by race as by slavery” (1975, 315). He observed that if “freemen with disappointed hopes should make common cause with slaves of desperate hope” then this new world could be destroyed (1975, 328). For this reason Virginia slaveowners, holding power in property, moved to strengthen and protect their new social order against possible insurgency by poor whites acting alone or in concert with enslaved blacks. They did so by appealing to the white lumpenproletariat, offering them symbolic recognition as co-members of a “superior race,” which in the absence of enfranchisement and under conditions of colonial dependence, amounted to significant standing. The white yeomanry received “social, psychological, and political advantages that turned the thrust of exploitation away from them and aligned them with the exploiters” argued Morgan (1975, 344). Morgan wrote that a “screen of racial contempt” blocked the possibility of solidarity among poor whites and enslaved blacks, ensuring the survival and extension of slavery (1975, 328). And poor whites came, over time, to embrace their “common identity” with their exploiters: “Neither was a slave. And both were equal in not being slaves” (1975, 381).

It seems that the racial contract preceded the social contract that founded the independent United States. The constitution can be understood as upholding the unequal treatment of enslaved African-Americans, therefore renewing the racial contract. At the time of the Founding, slavery was legal in all 13 colonies and the US Constitution, while not mentioning the word slavery, protected and enforced the institution (US Constitution: Art. I, Sec. 2, Cl. 3; Art. I, Sec. 9, Cl. 1; Art. IV, Sec. 2, Cl. 3). Take the abolitionist William Lloyd Garrison, who, on 4 July 1854, publicly burned a copy of the constitution, denouncing it as a “covenant with death” and “an agreement with hell” (Stauffer 2002, 23; Laurie 2005). Garrison’s actions highlight the fact that while racial oppression is based on the consent of white citizens it does not require *all* or even the overwhelming majority of white Americans’ consent. If so then neither Garrison nor generations of anti-racist whites would have a place in American history. There have always been whites that refuse to be signatories to the racial contract.

It is important to distinguish between moments of consensual politics affirming, say, slavery and their rhetorical justifications. In a context presuming universal equality, a social relationship authorizing unequal treatment based on morally arbitrary qualities such as race or gender, must be defended and rationalized. As the philosopher Bernard Williams observes: “Few can be found who will explain their practice [of racial discrimination] merely by saying, ‘But they’re black; and it is my moral principle to treat black men differently from others’” (2005, 100). “If any reasons are given at all,” Williams adds,

they will be reasons that seek to correlate the fact of blackness with certain other considerations which are at least candidates for relevance to the question of how a man should be treated: such as insensitivity, brute stupidity, and ineducable irresponsibility, etc.” (2005, 100)

For example, proslavery arguments in nineteenth-century America amounted to little more than racial ideologies, which “supplied the means of explaining slavery to people whose terrain was a republic founded on radical doctrines of liberty and natural rights,” notes Barbara Fields, “and, more important, a republic in which those doctrines seemed to represent accurately the world in which all but a minority lived” (Fields and Fields 2014, 141). Ideologies fill a crucial need

by providing “conceptual social maps” (Freedman 1996, 30). They are guides for defending all sorts of political and socioeconomic arrangements, including egalitarian ones.

Racial ideologies are rhetorical fortifications. However, many whites in colonial America and the early republic took human bondage for granted, as simply part of the human condition (Tise 1987). Slaveholders defended themselves only when denounced and challenged. For example, they turned to the Bible to reconcile their Christianity with holding their black brothers and sisters in bondage. They also appealed to societal racism but societal racism does not amount to a systematic ideology. A coherent defense of slavery presumes a common commitment to universal human rights. It is worth observing that the overwhelming majority of whites lacked political rights and had no social recognition just above the station of a slave and little to no economic protections. Barbara Fields correctly argues that:

Only when the denial of liberty became an anomaly apparent even to the least observant and reflective members of Euro-American society did ideology systematically explain the anomaly. But slavery got along for a hundred years after its establishment without race as its ideological rationale. The reason is simple. Race explained why some people could rightly be denied what others took for granted: namely, liberty, supposedly a self-evident gift of nature’s god. But there was nothing to explain until most people could, in fact, take liberty for granted – as the indentured servants and disenfranchised freedmen of colonial America could not. (Fields and Fields 2014, 141)

I am not saying that African-Americans and whites in early America lacked a sense of basic equality. They certainly did not. The point I am making is twofold. First, I want to stress that racial ideologies track American political development. Second, I want to emphasize that the racial contract is different from justifications offered in its defense, justifications that change over time (Fredrickson 2002).

As all white men were demanding enfranchisement, anti-slavery activists joined in the democratic chants, appealing to rights rather than relying solely on religious appeal. They emphasized slavery’s stark inconsistency with liberal and democratic ideals (Ericson 2000). This new discourse aimed to make it difficult for white men to embrace slavery while defending their own rights. But many whites believed that Native Americans and African-Americans, like women, were naturally unequal and outside of reason and thus had no legitimate claim to rights or respect. Yet proslavery activists crafted and disseminated increasingly more nuanced arguments for slavery, which allowed racial ideologies, from the religious to the pseudo-scientific, to flourish. Such ideologies tell an interesting story; they testify to the South’s anxiety about whether they could count on white northerners enforcing the terms of the racial contract. Every new abolitionist amplified this fear. The paranoia that defined proslavery thought illustrates that some white citizens broke the racial contract and others were likely to join them if they were not persuaded to uphold its terms. Consent presupposes a reasonable alternative, another course of action. The racial contract as an idea makes no sense if we take it as an uncontested truth, that every white American held to its terms and never questioned those terms. Mills says out right that the racial contract “*is* a real choice for whites, though admittedly a difficult one” and one can “speak out and struggle against the terms of the Contract” (1997, 107).

Yet most whites agreed with each other to exclude African-Americans from equal citizenship, and in the nineteenth century they used Congress to renew and extend the racial contract. In 1836, for example, members of the U.S. House of Representatives adopted a series of gag rules that barred from debate slavery or its possible abolition:

That all petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatsoever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or

referred, be laid on the table, and that no further action whatever shall be had thereon. (Quoted in Holmes 1995, 213)

This amounts to a national renewal of the racial contract. But such a measure, however devastating for justice, also demonstrates the felt threat of white and black citizens actively working to eradicate slavery. Nevertheless, the proslavery forces won out, and in 1850 Congress passed the Fugitive Slave Law. The Afro-American abolitionist and political theorist, Martin R. Delany wrote that the law “had one object in its provisions,” which was “the reduction of every colored person in the United States ... to a state of relative *slavery*” (2003, 272). For a significant number of white northerners, the law caused a crisis in conscience and served to deepen the national division over slavery. Acknowledging that a consensual politics often bolstered slavery does not mean that all American citizens supported slavery. It makes little sense to view the American public as having ever expressed an internally unified will, especially one approaching a racial contract. What is important is not the degree of consensus but that enough Americans did consent to institutions and practices that severely constrained the lives of African-Americans.

This tension was on full display in the 1858 Presidential Election. Stephen A. Douglas, the Democratic Party’s candidate, centered his campaign on the vision of a founding racial contract. He argued that the Founders explicitly sought to exclude African-Americans from the principles embodied in the Declaration of Independence. Douglas insisted that

every one of the thirteen colonies was a slaveholding colony and every Signer of the Declaration of Independence represented a slaveholding constitution and yet no one of them abolished slavery, or at least conferred citizenship upon the slaves when they signed and proclaimed a Declaration of Independence. (Holzer 2004, 151)

Douglas said he was merely upholding the Founders’ intent; they had an opportunity to include African-Americans and instead they chose to protect slavery. Douglas then gave a racial justification: “the Signers of the Declaration of Independence had no reference whatever to the negro ... or any other inferior or degraded race, when they spoke of the equality of men” (Holzer 2004, 151). Douglas thus concluded that the American government is based on a racial consent. “I hold that a negro is not and never ought to be a citizen of the United States” because “this Government was made ... by the white men, for the benefit of white men and their posterity for ever, and should be administered by white men and none others” (Holzer 2004, 151). Given the strategic context of a national campaign we can assume that Douglas calculated the benefits of defending the racial contract; that he had plausible reasons for pursuing such a strategy. Yes, he lost to Abraham Lincoln and there was a Civil War and slavery was soon abolished. But none of it was inevitable or even predictable. As late as 1860 many were still willing to uphold the terms of the racial contract and many died defending those convictions.

Besides legislation and electoral fireworks, newspapers offer another rhetorical surface upon which we can witness widespread preferences and values because newspapers were organs for both disseminating racial ideologies and attacking slavery. An editorial in the *Richmond Examiner* argued in strikingly tautological terms that the Declaration of Independence did not apply to African-Americans. It said that anyone who thought otherwise had mistakenly assumed

that the negro is a white man, only a little different in external appearance and education. But this assumption cannot be supported. Ethnology and anatomy, history and daily observation, all contradict that idea in a way about which there can be no mistake. (Quoted in Riss 2009, 10)

This editorial expressed some of the sentiments that motivated citizens to consent to the terms of the racial contract but it also illustrated a desire to defend slavery against its critics, those arguing



that the ideals of the Declaration of Independence apply to all, regardless of race. There were many anti-slavery newspapers making such arguments, from Garrison's *The Liberator* to Frederick Douglass's *The North Star*.

Jim Crow was the second major instantiation of de jure white supremacy. It was a system of racial domination originating in the American South in the post-Reconstruction era and solidifying into law by 1910, and remaining so until the 1960s. It was primarily a system of economic and social disempowerment, a form of domination inhering in the private sphere that was secured and buttressed through public policies such as disenfranchisement, segregation, the defunding of education for African-Americans, as well as local, state, and federal government complicity with extra-legal violence as a form of sociopolitical control – the intimidation, murder, and lynching of African-Americans by white supremacists. Jim Crow exemplified what Michael Omi and Howard Winant call a racial formation: The “process by which social, economic, and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings” (1986, 61). George Fredrickson notes that white supremacy in its most fully developed form “suggests systematic and self-conscious efforts to make race or color a qualification for membership in the civil community” (1981, xi–iii). In emphasizing the South I am not saying that African-Americans in the North were included and equal citizens. White supremacy in the North took a different form. For instance, it relied on de facto subordination and exploitation, that is, informal exclusion from organizations and relationships and unfair terms in market transactions such as access to employment, credit, and housing. I am underscoring the South because it most clearly approximates Mills's idea of a racial contract.

Interestingly, Jim Crow rode in on a democratic wave. The historian C. Vann Woodward wrote: “It is one of the paradoxes of Southern history that political democracy for the white man and racial discrimination for the black were often products of the same dynamics” (1951, 211). After the Redeemer or white nationalist violence of the 1870s and 1880s, white supremacist forces learned that legislation was as effective as violence.

At first, we used to kill them [African Americans] to keep them from voting; when we got sick of doing that we began to steal their ballots; and when stealing their ballots got to troubling our consciences we decided to handle the matter legally, fixing it so they couldn't vote

said a delegate to the Alabama convention of 1901 (Quoted in Litwack 1999, 227). He was speaking of the many state constitutional conventions of the era, which can be interpreted as a consensual politics expressing the terms of the racial contract. Such state conventions passed laws that disenfranchised and segregated African-Americans. As Woodward noted, the

barriers of racial discrimination mounted in direct ratio with the tide of political democracy among whites. In fact, an increase of Jim Crow laws upon the statute books of a state is almost an accurate index of the decline of reactionary regimes of the Redeemers and triumph of white democratic movements. (1951, 211)

In other words, a large number of white southerners reconstituted the racial contract through referendums and then ratified new state constitutions that enshrined into law separate and unequal treatment of African-Americans. Such conventions also provided legal enforcement of exploitative lien and tenancy contracts, as well as passed new vagrancy and convict-leasing laws for further exploiting African-American labor. It is therefore clear that Jim Crow expressed white southerners' civic ideals and was not merely the convulsions of a hardliner racist fringe group. “The plan,” as one Democratic Party leader insisted, was “to invest permanently the powers of government in the hands of the people who ought to have them – the white people” (quoted in



Litwack 1999, 224). James K. Vardaman, who would become Governor of Mississippi, said: “There is no use to equivocate or lie about the matter . . . Mississippi’s constitutional convention of 1890 was held for no other purpose than to eliminate” all African-Americans “from politics; not the ‘ignorant and vicious,’ as some of those apologists would have you believe,” he added, but all African-Americans (quoted in Litwack 1999, 227).

The reconstituting of the racial contract after the collapse of Reconstruction meant that Afro-southerners were once again enmeshed in a condition not dissimilar to slavery. Southern states systematized and codified racist norms and practices into a suffocating social structure. And they achieved through legislation what lynch mobs never could, the total destruction of the Afro-southern electorate. But why did poor whites consent? In his study of Reconstruction, W. E. B. Du Bois offered a compelling answer. He said poor whites were “compensated in part by a sort of public and psychological wage” (1935, 700).

They were admitted freely with all classes of white people to public functions, public parks, and the best schools. The police were drawn from their ranks, and the courts, dependent upon their votes, treated them with such leniency as to encourage lawlessness. Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect upon their personal treatment and the deference shown them . . . . On the other hand, in the same way, the Negro was subject to public insult; was afraid of mobs . . . and was compelled almost continuously to submit to various badges of inferiority . . . . Mob violence and lynching were the inevitable result (1935, 700).

The New South structurally advantaged poor whites, empowering them through a racialized social standing that compensated for their lowly economic status. They were, in the end, placed in an asymmetrical position to African-Americans who were often made powerless, dependent, and were also marginalized. As a result, whites were incentivized and authorized to arbitrarily exercise power over African-Americans, leaving the latter under a perpetual sentence of death. As Woodward aptly noted: “It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages” (1951, 211).

As we have seen, American citizens often consented to the racial contract. But I also want to stress that *all* whites were not signatories to the racial contract. My repeated reference to abolitionists underscores the fact that there was never unanimous consent, where all citizens spoke in one voice or expressed a universal will. Additionally, I situated racial ideologies in rich material and institutional contexts to reveal their relationship to American political development, which explicates the racial contract as a relationship between institutions, practices, and ideas.

### **A Founding inconsistency**

As the historian David Brion Davis observed, “liberty was scarcely born in Europe when it was buried in America” (1966, 15). A lot of ink has been dedicated to making sense of how slavery expanded within a liberal and democratic republic. In *Democracy in America*, Alexis de Tocqueville sketched what became a lasting account of American political culture when he advanced the thesis that racism was but an “anomaly.” From the absence of a landed aristocracy in the colonies, Tocqueville concluded that Americans were born into a condition of democratic equality and this birthright explains widespread contempt for slavery (2002 [1835]). Identifying democracy in America in contradistinction to feudalism in Europe, Tocqueville insisted that racism was an abnormality in an otherwise democratic country. This view has held fast. Gunnar Myrdal gave it new empirical credibility in *An American Dilemma*, where he wrote that an enduring “dilemma” shaped American culture, a deep and abiding commitment to the “American Creed” – that is, “the beliefs in equality and in the rights to liberty” – and the “subordinate position of Negroes” (1944, 189). Myrdal said the immense distance between the American creed and

the reality of black life is what characterizes the “American dilemma,” which remains the “unsolved task for American democracy” (1944, 189). Puzzled by the Left’s repeated failures, both Richard Hofstadter and Louis Hartz concluded that American self-understanding rested on an unyielding liberal consensus. Hartz said that it was because Americans lived by “Lockean consensus” (1955). “However at odds on specific issues,” argued Hofstadter, “the major political traditions have shared a belief in the rights of property, the philosophy of economic liberalism, the value of competition, they have accepted the virtues of capitalist culture as necessary qualities of man” (1948, xxxvii).

Some have challenged the anomaly thesis, contending instead that liberalism and racism are symbiotic, by which they mean that liberalism reinforces and entrenches racism and therefore the latter is not anomalous but consistent with the former (Goldfield 1997; Mehta 1997; Goldberg 2002; Losurdo 2014). To show how they emphasize racism’s pliability, its ever-changing transformations in the face of progressive challenges, for example, the rise of Jim Crow in the aftermath of slavery. But I believe that this approach evades the question altogether when it denies liberalism’s moral and rhetorical force. Liberal political morality was essential to the destruction of slavery. Proslavery activists knew this and they affirmed it when they appealed to racial ideologies to deny the claim that African-Americans are rational human beings and thus rights bearers. They were in fact the most devoted defenders of property rights. Just because they ransacked reason to resolve deep inconsistencies does not mean that such inconsistencies did not exist.

Mills joins Edmund S. Morgan, Judith N. Shklar, and Rogers M. Smith as among the very few who identify racial oppression as a constitutive feature of the American polity and its civic culture. Both Morgan and Shklar stressed the role of slavery in shaping American citizenship while showing slavery’s tension with the nation’s liberal, republican, and democratic ideals. Witnessing the constant presence of what Orlando Patterson called “social death” slaveowners became rabid defenders of their own freedom (1982).

The presence of men and women who were, in law at least, almost totally subject to the will of other men gave to those in control of them an immediate experience of what it could mean to be at the mercy of a tyrant,

wrote Morgan, and thus “Virginians may have had a special appreciation of the freedom dear to republicans, because they saw every day what life without it could be like” (1975, 376). “This is not to say that a belief in republican equality had to rest on slavery,” insisted Morgan, “but only that in Virginia (and probably in other southern colonies) it did” (1975, 381). Shklar transformed this insight into an account of American citizenship. She said that America had “embarked upon two experiments simultaneously: one in democracy, the other in tyranny” (1998, 92). In short, citizenship in America

has in principle always been democratic, but only in principle. From the first the most radical claims for freedom and political equality were played out in counter point to chattel slavery, the most extreme form of servitude, the consequences of which still haunt us. The equality of political rights, which is the first rank of American citizenship, was proclaimed in the accepted presence of its absolute denial. (Shklar 1991, 1)

In other words, slavery was foundational to citizenship, shaping the nation’s formal political arenas, civil society, and even the market.

Nowhere is this clearer than in voting and earning. The “ballot has always been a certificate of full membership in society,” Shklar wrote, “and its value depends primarily on its capacity to confer a minimum of social dignity” (1991, 2). Because slavery was social death it stood in

direct contradiction to and thus negatively affirmed the power of the vote; Shklar said, “voting is ‘an affirmation of belonging’ rather than an exercise of a right” (1991, 26). She insisted that the vote takes its thrust “from the standing that it confers” (1991, 19). And one stands in relation to another. Neither African-Americans nor women would have disagreed. “It was the denial of suffrage to large groups of Americans that made the right to vote such a mark of social standing. To be refused the right was to be almost a slave” (Shklar 1991, 27). Thus voting is intrinsically subversive. Even if African-American votes did not impact an election, a vote nevertheless symbolized equal standing. In an era where you cast your ballot in sight of your fellow citizens, looking them in the eye, and bearing the burden of their contempt or communion, voting enacted equality among equals. If choosing the winner were all that mattered then white southerners would have just destroyed African-Americans’ ballots. It was not enough to deny Afro-southerners rights but it was also important that they be forced to publicly perform their social subordination and political inferiority, to visibly affirm whites’ sense of supremacy. But citizenship is far more than voting. Shklar argued that a citizen must also be “independent,” an “earner,” and for this reason a citizen “cannot be a slave or an aristocrat” (1991, 64). Earning is important because it is in the “marketplace” and in “voluntary associations that the American citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect” (1991, 63). In American life, slavery, which is legal extortion of labor and enforced dependency, gave earning its deep and almost fanatic meaning. Working for wages, no matter how meager, meant that you were not a slave. In republican theory, a minimum standard of living is important because it guarantees a level of basic independence, which is important for securing one from domination, meaning those social relations that leave you vulnerable to the arbitrary will of another (Pettit 1997; Lovett 2010).

Rogers M. Smith’s work also significantly undermines the anomaly reading of American political culture. He argues that, “Tocqueville treated racism as mere prejudice” and thus “relegated blacks and Native Americans to the status of ‘tangents’” (1993, 553). And he concludes that American politics is “best seen as expressing the interaction of multiple political traditions, including *liberalism*, *republicanism*, and *ascriptive forms of Americanism*, which has collectively comprised American political culture” (1993, 550). As we have seen above, Mills maintains that white supremacy remains “the unnamed political system that has made the world what it is today” (1997, 1). In emphasizing consent, he shows that racial oppression cannot be reduced to mere prejudice or an inconsistent practice external to American political culture. Deeply woven into the American fabric is racism as well as the Enlightenment.

### **The social contract and political Amnesia**

So far I have discussed Mills’s argument in its best light, placing his thesis in the most felicitous historical contexts so that we can see actual consensual politics approximating the idea of a racial contract. It should now be clear that Mills is after more than historical description; he has a normative axe to grind. Classic social contract theorists suffered from what Mills calls an “occupational blindness” (1997, 27). They were blind to their own prejudices and those of their times and incorporated their racial assumptions into their theories. Mills is clear that

the point of working with a ‘racial contract’ is to use it as a tool for dramatizing and making cognitively vivid the history of racial injustice, and then to facilitate – within a contractual framework – the discussion of matters of non-ideal rectificatory theory. (2007c, 237)

But can Mills’s reformist use of social contract theory do the work he wants it to do? In this section I suggest that Mills’s reliance on a social contract theory framing, no matter how

subversive, often becomes the theoretical problem in itself and thus detracts from the political work Mills sets for himself.

Mills's reformist contractualism begins from the premise that "political society is basically coercive and exploitative" and that "cases of class, gender, and racial exclusions are not anomalies" and should therefore inform the study of justice (2007c, 235). Mills says the "point is not just to correct the whitewashed history of modernity standard in mainstream political philosophy" but rather to offer a "theoretical revision" that would "assist our theorizing about justice" (2007c, 237). *The Racial Contract* does this by employing reformist contractualism that brings racial oppression to bear on the dominant discussions within mainstream theory by using a "vocabulary and apparatus already developed for contractarianism to map this unacknowledged system" (1997, 3). The idea of a racial contract maps the history of racial injustices to reveal how our dominant political morality can reinforce white supremacy. Contemporary contractualism often ignores questions of historical and racial injustice as problems requiring distinct theoretical reflection because both are considered easily remediable within a distributive or redistributive justice framework. The goal, then, is to integrate questions of historical and racial injustice into contemporary discussions of justice. Mills says that by confronting the "centrality of the history of racial exclusion" we will be better able to arrive at a theory of justice worthy of its name, one that takes seriously "the question of what the attainment of general universalism would require" (2007c, 244). Yet such a goal does not explain why Mills needs a social contract framework.

Mills defends his reliance on contractualism on practical grounds. "Contract talk is, after all," he says, "the political lingua franca of our times" (1997, 3). "From my own perspective," he writes, "the overwhelming rationale for seeking to engage with contract theory is that it's already there, and hegemonic" (Pateman and Mills 2007, 23). "Liberalism and the discourse of rights are globally triumphant," Mills adds,

and contractualism is one of the best-established vehicles for expressing these normative commitments. So it remains a great value as a framework for establishing a dialog with mainstream white theorists and translating the moral demands of people of color into a familiar language. (2007b, 115)

Mills says his ultimate goal is to "see subversive contract theory become mainstream contract theory" (Pateman and Mills 2007, 23). Mills assumes that he will get a better hearing if he advances his normative goals within a framework familiar to mainstream political theory. It is practical, if somewhat instrumental, and, as the book's success testifies, Mills's calculation was right. Is there, however, a cost?

It is worth noting that Mills's use of social contract theory is not simply instrumental. Mills's reformist zeal extends to the social contract itself and not merely to the modern polity. He wants to save the Enlightenment's legacy, and he says this much when he brings *The Racial Contract* to a close by insisting that he has had in mind "Habermas's radical and to be completed Enlightenment" (1997, 129). Mills wants to, on the one hand, show how the ideals of the social contract "have been betrayed by white contractarians" (1997, 129). And, on the other, rescue those ideals from those who repeatedly fail to live up to them. Mills says: "Besides, what's wrong with moral equality, autonomy, self-realization, equality before the law, due process, freedom of expression, freedom of association, voting rights, and so forth?" (2007a, 102). "The real problem historically," says Mills, "has been the restricted extension of these values to a limited population" (2007a, 102). I agree. But why do any of them require an appeal to social contract theory or any consent-based arguments? You can defend each and all of the above ideals without taking on the baggage of social contract theory. The social contract is, after all, just a metaphor, an expository device.

Furthermore, why address historical injustices by turning to a tradition that explicitly encourages us to turn away from history? Hobbes said:

there never was such a time [as the state of nature] ... and I believe it was never generally so, over all the world ... . Howsoever, it may be perceived what manner of life there would be, were there no common Power to feare. (1996, 89–90)

Social contract theorists use the “state of nature” to “devise a criterion which was outside of history, in terms of which to judge the moral status of the present political structure” (Dunn 1969, 101). Hobbes was so hostile to history that he insisted the question of historical injustices should be taken off the table as a condition for membership in the political community (Wolin 1989). Describing his fifth law of nature Hobbes argued that “every man strive to accommodate himself to the rest” (1996, 106). To effectively do so, one must be willing to let bygones be bygones, which is the sixth law of nature: “*That upon caution of the Future time, a man ought to pardon the offenses past of them that repenting, desire it.* For PARDON, is nothing but for granting Peace” (1996, 106). “Men look not at the greatness of the evill past,” says the seventh law of nature, “*but the greatness of the good to follow ... that commandeth Pardon, upon security of Future time*” (1996, 106). A stable and safe community requires that all accommodate themselves to the rest (fifth law of nature), which means that each must leave behind his grievances about past wrongs and thus be willing to pardon his offenders for the sake of future peace and commodious living (sixth law of nature), and in doing so he should not look to the past, those injustices against them, but the greatness to come (seventh law of nature). At least in this version of social contract theory, memory and history are not on solid ground, making it difficult to see how such a framework can advance a project for remedying historical wrongs.

Even Rousseau’s primitive man, who seems the most likely of the characters in the state of nature to have once existed, lacks empirical substance (1997). Yes, Rousseau described the genesis of class, where rich and poor arise from inequality in the distribution of natural talents combined with the discovery of agriculture and metallurgy. But Rousseau maintained that this was a consequence of nature and history’s contingencies not a political construction. The first “social contract” merely instituted and entrenched an inequality already in place, and it did so through the means of private property and law (1997). *Second Discourse* is not an account of the origins of any actual political society. “Let us begin by setting aside all the facts,” argued Rousseau,

for they do not affect the question [Discourse on the foundations of Inequality among Men]. The Inquiries that may be pursued regarding this Subject ought not be taken for historical truths, but only for hypothetical and conditional reasoning; better suited to elucidate the Nature of things than to show the genuine origin, and comparable to those our Physicists daily make regarding the formation of the World. (1997: 132)

Rousseau outlined what is called a conjectural history, which rests on rational deductions rather than observed evidence in history. This method identifies principles and rules of political life, ideal and non-ideal precepts, more analogical to laws of nature. For Rousseau, the normative lesson was that man is by nature good and he used this conclusion to refute the prevailing assumption that inequality and corruption are divine punishment for natural sin (Augustine) or the lived consequences of psychological attributes such as avarice (Hobbes). Rousseau said “Hobbes improperly included in Savage [prepolitical] man’s care for his preservation the need to satisfy a multitude of passions that are the product of Society and have made Laws necessary” (1997: 151). Rousseau’s ultimate goal was to identify an arrangement of political and social institutions that would be in consonance with man’s natural goodness.

Kant, too, cautioned against reading the state of nature as an actual account of history, or even an anthropological explanation. He said that

to base a historical account solely on conjectures would seem little better than drawing up a plan for a novel. Indeed, such an account could not be described as *conjectural history* at all, but merely as a *work of fiction*. (1970, 221)

Kant further argued that

we need by no means assume that this [social] contract ... actually exist as a *fact*, for it cannot be so ... It is in fact merely an *idea* of reason, [that] oblige[s] every legislator to frame his laws in such a way that they *could have been* produced by the united will of a whole nation. (1970, 79)

One way to read Kant – and for that matter, Hobbes – is that we do not socially contract in the state of nature to create and thus transition to political society; rather, we are perpetually contracting within political society so that we do not fall into a state of nature. A social contract is not what happened but what *would* ensue if political authority collapses; the story of a social contract shows how we could begin again.

Contractualism is always looking to the future; what could or would occur; what should or ought to transpire. Even the most famous contemporary defender of social contract theory, John Rawls, carries this bar forward. In *Political Liberalism* he says those in the original position

must want all previous generations to have followed it [their agreement to adopt the two principles of justice]. Thus the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time. (1993, 274)

The reason reparative justice does not matter for Rawls or any of the classic social contract theorists is because the axioms of the social contract collapse time and erase history. And one should not mistake the temporal development necessary to narrative as history or even time. For Hobbes, you better leave your grievances at the door; and for Rawls, the principles of justice arrived at in the original position will race backward across time and wipe away all institutions and practices antithetical to justice, erasing their vestiges and thus guaranteeing that there would be no need for restitutive justice – distributive justice will do just fine. It is this hostility to history that undermines the prospects for its use toward racial justice.

## Conclusion

After reconstructing *The Racial Contract's* main thesis, I made a case for reading the book as outlining a structural account of race-based domination, one that brings to the fore the place of consensual politics in establishing and ensconcing a racial state. Read this way, Mills's concept of a racial contract enriches our understanding of American political history, showing the centrality of white supremacy popular politics. It should therefore be clear that *The Racial Contract* ought to be essential reading for American political thought and culture. Mills's framework, when applied to slavery and Jim Crow, in particular, raises new and profound questions about our political inheritance and our present forms of racial blindness. And while I share Mills's substantive normative goals, especially his desire for reparative justice, I nevertheless raised some doubts as to whether his use of social contract theory can do the sort of work he wants it to do, specifically, sustaining a project for corrective justice.



I do not want to discount the egalitarian possibilities of reformist social contract theory. A contract by definition is a set of terms that defines an agreement and when all parties abide by the terms of the agreement the contract remains in effect and is upheld but if any parties do not fulfill the terms of the contract then the contract is breached and those parties have an obligation to compensate or provide restitution to the parties who did live up to the terms of the contract. Many whites have clearly breached the terms of the social contract by colluding with one another to exclude African-Americans. Or they essentially enacted a fraudulent contract by agreeing to universal and egalitarian terms they had no intention of living up to. But African-Americans have lived up to the terms of the social contract. On this basis alone whites would owe restitution to those they have defrauded of their rights and protections. Still, this is not the line of argument Mills pursues. Even Mills's "Contract of Breach" leaves unclear how his contractual framing necessitates, as a matter of logical and moral consequence, reparative justice (2007b). I am sure that I am not alone in thinking that contractualism may fail to advance Mills's very important work in regard to corrective justice.

The problem with contractualism, mainstream or radical, is that most will either reject its framing or question its chosen principles. Some will object, for instance, that a hypothetical contract is no contract and a tacit agreement is no agreement and imaginary obligations are just those – imaginary. Also, the problem with imaginary or hypothetical agreements is that anyone can choose anything. The point is that as ideal-theory, a social contract framework is inattentive to concrete instances of racial injustice. Mills still reproduces many of the analytical features of traditional contractualism and he, too, spends much of his time defending his use of social contract theory rather than offering a way forward.

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