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## ON BLACK SOUTH AFRICANS, BLACK AMERICANS, AND BLACK WEST INDIANS: SOME THOUGHTS ON *WE WANT WHAT'S OURS*

*Eleanor Marie Lawrence Brown\**

*WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM.* BY *Bernadette Atuahene.* Oxford and New York: Oxford University Press. 2014. Pp. viii, 198. \$42.50.

Most modern constitutions have eminent domain provisions that mandate just compensation for forced deprivations of land and require such deprivations to be for a public use or public purpose.<sup>1</sup> The Takings Clause is a classic example of such a provision.<sup>2</sup> The takings literature is essentially focused on outlining the outer boundaries within which the state can take property from an owner.<sup>3</sup> But there are other takings that have been deemed “extraordinary”; in such circumstances, the state takes away property without just compensation and simultaneously makes a point about a person or a group’s standing in the community of citizens.<sup>4</sup>

As Yale Law professor and leading scholar on property, Carol Rose, has noted, such takings typically accompany historical moments of great upheaval, such as wars, revolutions, or social unrest, and involve a complete reconfiguration of property rights.<sup>5</sup> In the American context, for example, consider property taken from British loyalists, Native Americans, and Confederate slaveholders.<sup>6</sup> The point was to express society’s disapproval of

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1. See, e.g., CONSTITUCIÓN NACIONAL [CONST. NAC.] 1994, § 17 (Arg.); GRUDGESETZ [GG] [CONSTITUTION] 1949, art. 14 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [<http://perma.cc/NEK9-YUUY>]; S. AFR. CONST. 1996, ch. 2, § 25.

2. U.S. CONST. amend. V.

3. See, e.g., Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL’Y 75, 80–84 (1996); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 72–93 (1986); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 314–35 (2012); Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1685–89 (2007).

4. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6.

5. *Id.*

6. For a discussion on the seizure of Loyalist property, see JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 35 (3d ed. 2008), who notes that “the confiscation of Loyalist property continued; indeed, North Carolina seized Loyalist land as late as 1790.” American takings of Indian land date back to the

groups deemed “outsider” or disloyal.<sup>7</sup> More recently, the destruction of “Black Wall Street” in the 1921 Tulsa, Oklahoma race riots signified such a taking—government stood passively by while white thugs destroyed virtually every black-owned property in the business district.<sup>8</sup> The point was clear: “uppity” blacks were not welcome in the business of capitalism—at least not as owners. Rose quite rightly notes that extraordinary takings often signal more terrible things to come. In Tulsa, several black citizens were brutally butchered shortly after the destruction, which still stands as the most murderous race riot of the twentieth century.<sup>9</sup>

For Rose, the quintessential example of such an extraordinary taking is the confiscation of Jewish property in Nazi-occupied Europe.<sup>10</sup> Take *Kristallnacht*, or “the night of the broken glass,” in Germany in 1937<sup>11</sup>: German citizens, working alongside Nazi-affiliated thugs, destroyed the property of Jewish citizens, with nary an intervention from the German police.<sup>12</sup> By the time the night was over, German citizens had destroyed the homes and synagogues of the Jewish citizens and thoroughly looted Jewish stores. Their clear objective was to terrorize Jewish citizens—the unspeakable began shortly thereafter.

Bernadette Atuahene’s *We Want What’s Ours: Learning from South Africa’s Land Restitution Program*<sup>13</sup> is an extraordinary contribution to the literature on extraordinary takings. Building on Rose’s work, Atuahene argues that these takings are undertheorized (p. 23). Atuahene’s concept of “dignitary takings” sheds light on this literature (p. 3). She appropriates the metaphor of the “invisible man” from Ralph Ellison’s novel of the same name,<sup>14</sup> in which an unnamed African American man is deemed “invisible.”

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earliest days of the nation. See, e.g., Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329, 346 (“The Europeans he portrays are the self-satisfied and opportunistic landgrabbers . . . nonetheless, their land grabs form the source of governing law for Marshall’s opinion.”). During the Civil War, Congress passed a series of “Confiscation Acts” aimed at seizing many forms of Confederate property. See SILVANA R. SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS, 1861–1862 251–61 (2005).

7. Rose, *supra* note 4, at 28.

8. See JAMES S. HIRSCH, RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY 44, 92 (2002).

9. See *id.*, at 118–19 (noting contemporary sources reporting between thirty and 175 deaths); see also Civil Rights, OKLAHOMA HISTORICAL SOCIETY, <http://www.okhistory.org/kids/crviolence> [<http://perma.cc/PT2G-BRJU>] (estimating the death toll between seventy-five and 100).

10. Carol M. Rose, Racially Restrictive Covenants—Were They Dignity Takings? 13 (March 2015) (unpublished manuscript) (available at <http://perma.cc/J25E-9BGF>).

11. U.S. Holocaust Mem’l Museum, *Kristallnacht: A Nationwide Pogrom*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005201> [<http://perma.cc/S556-RVVR>].

12. *Id.*

13. Bernadette Atuahene is a Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.

14. RALPH ELLISON, INVISIBLE MAN (Penguin Books 2014) (1952).

Atuahene argues that the taking of property and dignity deems persons “invisible” (pp. 30–31). This effect is especially pronounced when the confiscation of property is used to dehumanize and subjugate the citizens within—or remove them entirely from—the social contract (pp. 24–29).

In Part I, I summarize the key facets of Atuahene’s argument, with a particular concentration on her concepts of dignitary takings and property-induced invisibility. In Part II, I emphasize that Atuahene’s focus on the displacement of people of color—including blacks, Indians, and coloreds—in the Gauteng and Western Cape provinces of South Africa echoes Rose’s discussion of the German Jews of Kristallnacht. Not only real property, but dignity, was “taken” in both of these processes. But Atuahene’s notion of dignitary takings, while an excellent academic contribution, might also be applied to the more difficult cases of potential takings from those who now constitute the majority of poor South Africans—that is, South Africans who never had even quasi-formal relationships with land. They were, at best, squatters with no land to take. Nevertheless, they too suffered losses: because of their skin color, they were denied access to government-subsidized land. Here, undoubtedly, there is a dignitary affront, but is there a “taking”? Put differently, does a lost opportunity—that is, an opportunity cost—constitute a taking?<sup>15</sup>

Ta-Nehisi Coates, whose article on the housing experiences of African-Americans has received widespread media coverage, would have us believe so. Although Coates writes about the United States, the applicability of his logic to South Africa is clear. I juxtapose his approach with that of Atuahene to review his argument that African Americans should be compensated for such opportunity costs. The narrative of exclusion of African Americans is similar in important ways to the narrative of exclusion of black South Africans. In the United States, these exclusions operated in more subtle ways, at least in the Northern states, than they did in South Africa. Unlike South Africa, the United States did not primarily exclude through explicit state laws. Instead, exclusion in the United States emerged through racially restrictive covenants—private contractual arrangements between neighbors that barred the sale or rental of certain properties to African Americans.

Unbeknownst to most, these racially restrictive covenants received significant support from the federal government. In fact, the federal government denied African Americans access to federally-funded mortgage financing and homes in neighborhoods *without* racially restrictive covenants for many years. Because this denial of access undermined the capability of African Americans to build net worth, Coates believes that compensation is due. While the methodology of exclusion might have been different in South Africa, the segregationist goals and the results were similar: many African Americans are, at best, marginal property owners, and their net worth is low. The applicability of Coates’s logic to Atuahene’s South Africa is clear.

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15. In this piece, I focus on the loss of dignity, but there are other ways to characterize these losses—the opportunity-cost framework associated with economics is one such mechanism.

We might imagine the possibility that, absent such exclusions, a resilient, home-owning class of African Americans might have developed. Indeed, there is another group that we have not addressed: blacks who actually became robust, as opposed to marginal, landowners, accumulated cash, and bought precisely what they wanted—mostly where they wanted. It is this group that is the subject of my own work and of Part III—namely, the cash-rich black migrants from the British West Indies who came to New York and quickly became property owners.

In Part III, I include the employment experiences of West Indians in early twentieth-century New York. While this Review is primarily about property-based discrimination, these employment narratives allow us to see Atuahene's dignitary affronts in a new light. Through these West Indians, we can imagine how Coates's narrative might have been different. West Indians were able to buy property in spite of federal exclusions from financing subsidies because they had cash; they illustrate what might have been possible for African-Americans, but for such exclusions. Indeed, long before West Indians were buying into neighborhoods governed by racially restrictive covenants, they were working in factories where blacks were not welcome. A workplace sign saying "Negroes need not apply" constituted a dignitary affront—the employment equivalent of a racially restrictive covenant.

The property story is a similar one: just as West Indians were working in racially exclusive factories, they were living in racially exclusive neighborhoods. Herein lies the difference with African Americans: these West Indians had cash, and even virulent racists became pragmatic sellers when faced with black buyers who were willing to pay a premium to access neighborhoods that had previously been off-limits.

Where did this cash come from? The genesis of West Indian wealth reflects a significant difference in the historical trajectories of West Indians and African Americans. Following emancipation in the British West Indies, many black West Indians were able to acquire land from the British, become property holders in their own rights, and subsequently use this property to build wealth. Given the reality of post-Reconstruction racism, most African Americans were not able to become early property holders, and their later exclusions from federal mortgage subsidies only compounded this early landlessness.

The experiences of West Indians in New York illustrate how it might have been possible for that group to experience dignitary affronts a la Atuahene, even as they roughly escaped the takings that often accompany these affronts. Neither blacks in South Africa nor blacks in the United States were as fortunate. Indeed, for African Americans and South Africans of color, Atuahene's concerns have never been so pertinent.

#### I. SOUTH AFRICANS

When a state takes property, the appropriate remedy has typically been to provide "just compensation," which is usually tied to the market value of

the property confiscated.<sup>16</sup> Property law professors generally write about land or fungible things, such as money, that can compensate for the loss of land.<sup>17</sup> Property scholar Margaret Radin's emphasis on a "personhood" approach introduced a now-accepted distinction between property that has acquired personal significance (for example, a wedding ring) and property that retains merely instrumental value (for example, money).<sup>18</sup> Thanks to Radin, we now also understand that persons may become bound up in things, including land, in a manner that is constitutive of the self. To respect personhood, we accord persons broad liberty with respect to their control over things.<sup>19</sup> But even with this recognition, when things that embody personhood are taken away, we typically do not speak about anything other than money.<sup>20</sup> As property scholars, we have only recently begun to recognize those aspects of property that implicate personhood.

This recognition has important implications. Channelling Radin, we recognize that the confiscation of a lifelong home would be more devastating to most people than the confiscation of a commercial property; after all, a commercial property has monetary value, but does not typically carry lifelong memories. We now recognize that there are some aspects of property that we cannot capture in strictly monetary terms.<sup>21</sup> For the owner of the property, the lifelong home is not fungible with the commercial property, even if they technically have the same value. Yet, even with this recognition, the most we typically ask as property scholars is the following: Is the difference between the two objects quantifiable? And, if so, how much more should the state pay? Even if we recognize aspects of property that may not be captured in a monetary way, we typically do not have non-monetary mechanisms for acknowledging this value.

Atuahene has bravely wandered into even more difficult territory. If we still have difficulty capturing "personhood value," how might we begin to capture "dignitary value"? She is interested in compensation for dignitary wrongs, and she wants more than money. To return to the fundamental question: What happens when the state does more than simply take property? What happens when the state also "takes dignity"? In such instances, the question becomes whether just compensation, as traditionally understood, is enough.

For Atuahene, the answer is decidedly "no." She elucidates this through a detailed qualitative field study of the land restitution program in post-apartheid South Africa (Chapter Three). Involving tens of thousands of claimants, this program is the most ambitious of the last few decades (p. 62 n.27). While there have been other programs of this kind—involving indigenous peoples in Australia, New Zealand, and Canada, for example—these

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16. JOSEPH SINGER ET AL., PROPERTY LAW 1162 (6th ed. 2014).

17. *Id.*

18. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982).

19. *Id.* at 960.

20. *See id.* at 961.

21. *See id.* at 959–60.

programs involved far fewer people.<sup>22</sup> For an ambitious program, Atuahene writes an ambitious book—the appropriately titled *We Want What's Ours* is equal to the task.

What do dignitary takings mean on the ground? In a detailed ethnography, Atuahene interviews displaced South Africans. She documents their lives in rich detail, both before and after the displacement that inevitably followed the forced-removal policies implemented by the apartheid state. The narrative is familiar: to ensure that South Africans lived in racially homogenous communities, the government conducted an aggressive program of displacement—one that actually began during colonial times, before the formal announcement of an apartheid, or “separate,”<sup>23</sup> regime (pp. 7–12). In South African apartheid, blacks were moved to “black homelands” or “townships,” “coloureds” were moved to “coloured areas,” and so forth (pp. 7–12). Prior to apartheid, many of these communities had been highly diverse<sup>24</sup>: Indian Hindus lived beside Christian coloureds, who lived beside blacks from a rich array of African tribal groups (pp. 114–15). Atuahene provides rich accounts of economic livelihoods forged from subsistence farming on simple, but highly valued, plots of land. These livelihoods were supplemented by a barter economy within a tightly knit community; people relied on neighbors to provide services, such as babysitting, in kind when they were unable to pay for them in cash.<sup>25</sup>

In a particularly memorable line, one respondent characterizes his loss as multigenerational—a taking of not only the consequences of his work, but also the work of his father and grandfather. In his words, “they took all what I had” (p. 42). Moreover, for these people, displacement constituted far more than a simple economic loss. The long-term social and psychological consequences of displacement from the property and the communities that anchored them was devastating. Atuahene exactingly recounts the common perception that the relocated will never recover from the upheaval (pp. 164–65). For these people, land is not enough. Money is not enough. Atuahene’s central contribution is to insist that any “just compensation” procedure must simultaneously involve a process that she terms “dignity restoration” (pp. 3–4). Narratives must be told and heard; suffering must be acknowledged by the state. Going forward, petitioners for justice (“claimants”) must have a primary say as to where they will live.<sup>26</sup> Moreover, claimants should also help direct state-related land policies to ensure that such policies are properly tailored to restoring their particular psychosocial health

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22. See pp. 3, 14, 65; Derick Fay & Deborah James, *Giving Land Back or Righting Wrongs?: Comparative Issues in the Study of Land Restitution*, in *LAND, MEMORY, RECONSTRUCTION, AND JUSTICE: PERSPECTIVES ON LAND CLAIMS IN SOUTH AFRICA* 41, 52, 55 (Cherryl Walker et al. eds., 2010).

23. *Apartheid*, 1 *THE OXFORD ENGLISH DICTIONARY* 542 (2d ed. 1989).

24. See DAVID WELSH, *THE RISE AND FALL OF APARTHEID* 55 (2009).

25. Here, Atuahene offers a particularly rich account of a communal approach to a subsistence economy. Pp. 42–45.

26. See pp. 173, 175.

needs and sustaining their livelihoods.<sup>27</sup> By any account, these are serious objectives that make traditional reparations look like small stuff.

The first post-apartheid, multiracial, democratic government led by Mandela came close to realizing the ideal of “dignity restoration” through the land-restitution process it established. The South African Constitution mandates that “[a] person or community dispossessed of property . . . as a result of past racially discriminatory laws or practices is entitled . . . either to restitution of that property or to equitable redress.”<sup>28</sup> The statutory agency responsible for the execution of this charge was the Commission on Restitution of Land Rights (“the Commission”) (p. 13). Atuahene contends that the architects of the Commission were inspired, in part, by the recognition that money and land alone would not suffice for redress (p. 60). Indeed, Atuahene goes further. She defines reparations, drawing heavily on the United Nations’ definition, as “the right to have restored to them property of which they were deprived . . . and to be compensated appropriately for any such property that cannot be restored to them.”<sup>29</sup> To be blunt, reparations are about land and, if not land, money. Atuahene argues that “the architects of the restitution process made an intentional turn away from reparations to embrace the more robust project of dignity restoration” (p. 58). In that project, land and money were important, but dignity was equally important (p. 58). Though, the architects may not have used the term “dignity restoration,” that was precisely what they were doing.

Building on her field research, Atuahene envisions an ideal commission where leaders of displaced communities play key roles in the land-restitution process (pp. 107–08). These leaders form claimants’ committees, which are empowered to represent their communities before land-restitution officials (p. 119), and “run interference” between their former neighbors and land-restitution officials (p. 119). The committees are designed to facilitate communication; they guide fellow claimants through the complex process of lodging claims, having such claims validated and verified, and ultimately negotiating with land-restitution officials (p. 124). Notably, the process is central—indeed, it is largely through the process, with its emphasis on community involvement, instructive communication between claimants, and claimants themselves spearheading communication, that dignity is restored (p. 108). This is precisely what the Commission claimed to be trying to do.<sup>30</sup>

But in many ways, the actual Commission fell short of this goal. The land-restitution board was a classic resource-constrained bureaucracy, the

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27. See pp. 110 (“[B]y denying Sophiatown residents the opportunity to have a true voice in determining their compensation, the post-apartheid state behaved like the apartheid regime . . .”).

28. S. AFR. CONST., 1996, ch. 2, § 25(7).

29. P. 4 (quoting Rep. of the Comm. on the Elimination of Racial Discrimination, at 126, U.N. Doc. A/51/18 (1996)).

30. African Nat’l Cong., *Policy on Restitution of Land Rights*, AFRICAN NATIONAL CONGRESS <http://www.anc.org.za/show.php?id=228> [perma.cc/L95F-UJQG].



challenges of which were only compounded by the fact that it was in a developing country (p. 92). Claimants constantly complained that only the better-resourced and socially connected community members were able to negotiate the bureaucracy.<sup>31</sup> Those with more resources saw their claims processed faster, fuelling speculation about favoritism.<sup>32</sup> Moreover, since the Commission was originally constituted for only a ten-year term—in hindsight, too short a mandate—it faced the prospect of an ever-looming deadline (p. 92). As the Commission’s expiration deadline approached, complaints about the Commission by panicked claimants amplified, and its focus turned to efficiency.<sup>33</sup> Facing a pending deadline, the commissioners, Atuahene writes, implicitly decided to process as many claims as possible (p. 165). The commission had to choose between efficiency and dignity; efficiency won.

This is understandable. Bureaucracies across the world have to justify their funding and, indeed, their very existence.<sup>34</sup> They are staffed by bureaucrats who need some way to quantify what they have accomplished. What better way to demonstrate success than by tallying the number of claims processed? Atuahene contends that this quantitative orientation skewed the process.<sup>35</sup> Financial claims were more easily processed than land claims (p. 92). Thus, claimants were directed to financial claims, as opposed to land claims, and many were encouraged to change their pending land claims into financial claims (p. 92).

This practice is problematic for several reasons. First, a dignity-restoration process has to honor the preferences of the claimants. Those who applied for land presumably wanted land. To massage their preferences so that they accept money rather than land does not sufficiently respect their dignity. Moreover, awarding land rather than money would have made it more likely that the original communities would have been reconstituted and, in turn, that would have made it more likely that the original community members would have actually returned to these communities. Given the goals articulated by Atuahene—which she contends were shared by the architects of the Commission—it is ironic that as the Commission’s expiration approached, the process boiled down to money (p. 93). At that point, even land seemed too complicated to process—and nary a word for dignity.

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31. Cf. pp. 139–41 (discussing the benefits to wealthy or well-connected individuals of having a lawyer negotiate the restitution process).

32. See pp. 140–41 (citing an example of how the skilled work of an attorney resulted in a dispossessed community “taking back” the old homes that had been rented out to whites by the municipality).

33. Cf. COMM’N ON RESTITUTION OF LAND RIGHTS, ANNUAL REPORT 2014/2015 6 (2015), available at <https://perma.cc/B5GM-CAZP> (noting that the South African government in 2014 responded to calls from citizens who had missed the initial deadline to reopen the restitution program for a period of five years).

34. See, e.g. *id.*; see also Kaifeng Yang & Marc Holzer, *The Performance-Trust Link: Implications for Performance Measurement*, 66 PUB. ADMIN. REV. 114, 114–15 (2006).

35. See pp. 92 (“Since providing financial awards was quicker than other options, the commission focused on financial compensation in those early years.”).

This is precisely what Atuahene contends that a dignity-restoration process should *not* be doing. With the benefit of hindsight, one wonders if the focus on money as the primary mechanism of redress was perhaps inevitable. That is, in part, the subject of the remainder of this Review.

At this point, I am going to do something unusual for a Review. I am going to shift focus from Atuahene's primary subject area—those who were dispossessed of land—to South Africans who had no land in the first place. These South Africans did not have suffer takings, at least in the way that we traditionally think of the word, because nothing tangible was taken from them. The definition of a “right in land” included in the Act establishing the Commission process was expansive; indeed, the Commission was empowered to consider:

[A]ny right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.<sup>36</sup>

But as Atuahene notes, many persons were unaware of the Act's broad scope and did not believe that it applied to them (p. 76). Moreover, many would have undoubtedly been unable to compile documentation or solicit oral testimony from former neighbors to demonstrate their connections to land, particularly in conditions of extreme poverty. Nevertheless, no one disputes that dislocation would have caused these people—even if they were relatively transient tenants—significant financial losses (pp. 42–45). At a minimum, they suffered significant opportunity costs—namely, the potential net worth these individuals lost when the government excluded them from the often-subsidized acquisition and leasing opportunities granted to their white compatriots.<sup>37</sup>

These opportunity costs are particularly important. By all accounts, the number of South Africans who had no formal legal land claims to begin with—even under the aforementioned, expansive definitions of formal land claims, rendering them “squatters” in the apartheid legal system—was much larger than the number of South Africans who were deprived of land when they were displaced.<sup>38</sup> They constitute many of the South African poor

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36. Pp. 75–76 (quoting Land Restitution and Reform Laws Amendment Act, § 2(f) (Act No. 63/1997) (S. Afr.) (amending Restitution of Land Rights Act, § 1 (Act No. 22/1994) (S. Afr.))).

37. Bradley Skelcher, *Apartheid and the Removal of Black Spots from Lake Bhangazi in Kwazulu-Natal, South Africa*, 33 J. BLACK STUD. 761, 770 (2003) (explaining that, because a vast majority of government-subsidized land was allocated for white-only use, Africans were denied the opportunity to acquire title that was afforded to whites).

38. See *id.* at 770–71 (pointing to the Natives Land Act, which limited the percentage of land for Africans to 13% and the comments from Reverend Mtimkulu from Zululand that “[m]any natives . . . have already been removed from the farms on account of this Act. . . . There are others who have farms, but titles are refused them by the Government.” (citing Colin Bundy, *Land, Law and Power: Forced Removals in Historical Context*, in NO PLACE TO

today.<sup>39</sup> So here is the question: What about people who were effectively landless in legal terms—that is, persons who never had a quasi-formal relationship with land to begin with, but who would have most likely received land and government subsidies had they been white? Does the concept of “dignity takings” include them? In the next Part, I consider this question through the lens of the African American experience. I explore the work of Ta-Nehisi Coates, and I also discuss my own work on the property-buying and owning experiences of Afro-Caribbean migrants to the United States and their predecessors in the West Indies.

## II. AFRICAN AMERICANS

Broadening the discussion of “dignitary takings” to identify its implications for the landless gives Atuahene’s arguments particular resonance today. Both South Africa and the United States shared a period of separate but ostensibly equal—apartheid in South Africa and Jim Crow in the United States—in which a large number of landless blacks were deprived of the opportunity granted to whites to acquire land and homes aided by government subsidy. In South Africa, the subsidies for whites were direct. In an effort to constitute white communities, the government reduced prices for whites who wanted to acquire land.<sup>40</sup> In the United States, the process was more discreet and the motives less blatant: the government offered mortgage subsidies to facilitate the purchase of homes by middle-class Americans.<sup>41</sup> For myriad reasons, including securing the support of southern senators, the government drafted rules that ensured blacks did not qualify for mortgage subsidies.<sup>42</sup> This rendered such programs essentially whites only, excluding racial minority groups like Hispanics.

Indeed, Atuahene’s contribution could not come at a more timely moment. Right now there is tremendous discussion about what, precisely, the government owes blacks who were deprived access to publicly subsidized financing for housing. The Obama Administration recently moved to ensure that this history is not repeated.<sup>43</sup> However, some still claim that the president has not done enough to compensate those who suffered calculable,

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REST: FORCED REMOVALS AND THE LAW IN SOUTH AFRICA 3, 7 (Christina Murray & Catherine O’Regan eds., 1990)).

39. See African Nat’l Cong., *supra* note 30.

40. Bernadette Atuahene, *South Africa’s Land Reform Crisis: Eliminating the Legacy of Apartheid*, 90 FOREIGN AFF. 121, 124–25 (2001).

41. See CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 148–49, 151 (1955) (discussing the “government-supported program[s]” that encouraged the middle class to cluster in the suburbs and enabled them to afford homes).

42. See *id.* at 240.

43. Julie Hirschfeld Davis & Binyamin Appelbaum, *Obama Unveils Stricter Rules Against Segregation in Housing*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/us/hud-issuing-new-rules-to-fight-segregation.html> [<http://perma.cc/3EAY-99WK>].

monetary harms due to federal-financing exclusions because of their race.<sup>44</sup> The critics argue, essentially, if someone would have been able to buy a house but for his or her exclusion from federal mortgage financing, and he or she can quantify what he or she has lost in net worth as a result, the federal government has an obligation to cover the difference. Ta-Nehisi Coates eloquently champions this view in “The Case for Reparations” (“Reparations”). In that piece, Coates is concerned with dignity, but even more so, he is concerned with cash.<sup>45</sup> In this Part, I lay out Coates’s argument in more depth before turning to my own work on another group of blacks—black, West Indian migrants to New York.

Coates’s Reparations is a recent contribution to the *Atlantic Monthly*, and it has become the most widely read piece in the history of the magazine.<sup>46</sup> I write about it partly because it has garnered a broad readership, but also because the essay can profitably be read through the lens of takings scholarship. Although Coates is not a property scholar, the piece is almost entirely about the taking of property from African Americans.

Coates’s fundamental point is that, when we focus on what was taken from African Americans, we too often gloss over what economists call “opportunity costs.”<sup>47</sup> In these instances, property was not actually taken, but

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44. E.g., Ta-Nehisi Coates, *The Champion Barack Obama: How Black American Talks to the White House*, ATLANTIC (Jan. 31, 2014), <http://www.theatlantic.com/politics/archive/2014/01/the-champion-barack-obama/283458/> [http://perma.cc/X8BN-LXYC]. Coates is particularly critical of President Obama’s repeated speeches urging personal responsibility in the black community, which he sees as sidestepping the fundamental issue—namely, the ongoing effects of past exclusions. *Id.* His point is that even those who have lived lives of exemplary personal responsibility (such as Clyde Ross, discussed *infra*) found it difficult to mitigate the effects of exclusions from federal mortgage-financing schemes and the resulting condemnation to segregated, high-poverty communities. *But see* Jonathan Chait, *Barack Obama, Ta-Nehisi Coates, Poverty, and Culture*, N.Y. MAG. (Mar. 19, 2014, 11:11 AM), <http://nymag.com/daily/intelligencer/2014/03/obama-ta-nehisi-coates-poverty-and-culture.html> [http://perma.cc/VSL7-2U6S] (“But Coates is committing a fallacy by assuming that Obama’s exhortations to the black community amount to a belief that personal responsibility accounts for a major share of the blame.”).

45. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54, 70, <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/L6ZU-BSGA]; cf. Benjamin Wallace-Wells, *The Hard Truths of Ta-Nehisi Coates*, N.Y. MAG., July 2015, at 24, 29, <http://nymag.com/daily/intelligencer/2015/07/ta-nehisi-coates-between-the-world-and-me.html> [http://perma.cc/4UG7-WHX6] (discussing Coates’s disagreement with President Obama about whether change can be achieved through the efforts of the black community alone). *But cf.* Rod Dreher, *Ta-Nehisi Coates’s Holy Writ*, THE AM. CONSERVATIVE (Aug. 12, 2015, 12:07 PM), <http://www.theamericanconservative.com/dreher/ta-nehisi-coates-holy-writ/> [http://perma.cc/S53P-JRRW] (describing Coates’s *The Case for Reparations* as “absurd and unworkable, and a form of despair”).

46. Univ. of Chi., Inst. of Politics, *IOP - Ta-Nehisi Coates on The Case for Reparations*, YOUTUBE (Nov. 14, 2015), <https://www.youtube.com/watch?v=FUDYZTM4ens> [http://perma.cc/XFM9-RHGL].

47. Coates, *supra* note 45, at 58 (citing, for example, the practice of “redlining” African American neighborhoods, rendering properties in these areas ineligible for FHA-backed mortgages).

the opportunity to acquire property was never given in the first place. African Americans have abysmal net worth.<sup>48</sup> This is largely because of homeownership—a home is the largest asset that an American typically buys.<sup>49</sup> And African Americans are significantly less likely to own a home. When they do, they are more likely to buy lower-value homes in high-poverty, highly segregated neighborhoods,<sup>50</sup> and they are likely subject to more onerous mortgage terms.<sup>51</sup>

For some time we have seen public recognition that African Americans experienced “dignitary takings,” and that these takings have long-term consequences for African American wealth acquisition.<sup>52</sup> The focus has moved beyond the actual taking of real property—for example, in post-Reconstruction race riots—to more subtle takings. Melvin Oliver and Thomas Shapiro argue that the greatest impediment to African American wealth-acquisition was their exclusion by the federal government from the largest expansion of wealth in American history—namely, the post-World War II effort to spur middle-class homeownership.<sup>53</sup> Prior to federal intervention in this area, the United States was overwhelmingly a country of relatively poor renters, and this was true for both blacks and whites.<sup>54</sup>

This expansion in homeownership was spearheaded by the Federal Housing Administration (FHA), which insured private mortgages to reduce

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48. See THOMAS M. SHAPIRO ET AL., INST. ON ASSETS & SOC. POLICY, *THE RACIAL WEALTH GAP INCREASES FOURFOLD 1* (2010), [https://iasp.brandeis.edu/pdfs/2010/RWG\\_FourFold.pdf](https://iasp.brandeis.edu/pdfs/2010/RWG_FourFold.pdf) [<https://perma.cc/GP8K-UR5V>] (graphing the median wealth holdings of white and African American families from 1984 to 2007); Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<http://perma.cc/9FXP-YWS2>] (graphically showing that the net worth of whites is thirteen times greater than the net worth of blacks).

49. Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, FORBES, March 26, 2015, <http://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/> [<http://perma.cc/DJ2Z-EJCV>] (“For most U.S. families, a home usually comprises the largest portion of their assets.”).

50. See EMILY ROSENBAUM & SAMANTHA FRIEDMAN, *THE HOUSING DIVIDE* 121 (2007).

51. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 8 (Routledge Tenth-Anniversary ed. 2006) (“Banks turn down qualified blacks much more often for home loans than they do similarly qualified whites. Blacks who do qualify, moreover, pay higher interest rates on home mortgages than whites.”).

52. Cf., Amartya K. Sen, *From Income Inequality to Economic Inequality*, in RACE, POVERTY, AND DOMESTIC POLICY 59–82 (C. Michael Henry ed., 2d 2013) (drawing a distinction between income inequality and the broader concept of economic inequality, which involves “causal influences on individual well-being and freedom that are economic in nature but that are not captured by the simple statistic of income”).

53. OLIVER & SHAPIRO, *supra* note 51, at 22.

54. See Wyo. Dep’t of Admin. & Info., *Historical Census of Housing Tables: Home Ownership*, <http://ai.wyo.gov/economic-analysis/cost-of-living-1/wyoming-housing-information/historical-census-of-housing-tables-homeownership> [<http://perma.cc/M3PM-FV9W>] (explaining that, prior to the surge in homeownership following World War II, national homeownership rates were very low).

interest rates for the burgeoning middle class.<sup>55</sup> The FHA created a color-coded index which mapped neighborhoods according to their perceived “stability.”<sup>56</sup> African American neighborhoods were almost universally deemed ineligible for FHA loans.<sup>57</sup> Unsurprisingly, a housing expert noted that the “FHA adopted a racial policy that could well have been culled from the Nuremberg laws.”<sup>58</sup>

While this exclusion is consequential, it is unclear whether such an exclusion constituted a taking within the typical sense. This is not an argument about whether African Americans have suffered takings historically—we now understand that slaves had a property right in self-ownership.<sup>59</sup> Few modern scholars would debate that when the government passes laws establishing slavery, it simultaneously transfers this property to slaveowners, leaving slaves to suffer uncompensated takings.<sup>60</sup> Moreover, few scholars would dispute that many African Americans suffered property confiscations during the post-Reconstruction period that essentially constituted takings.<sup>61</sup>

The post-World War II period is different. During that era, real property was not typically taken from African Americans by the federal government, although, state governments are another matter.<sup>62</sup> But something equally insidious happened: African Americans never had the opportunity to buy property with the subsidized financing that was offered to middle-class white Americans.<sup>63</sup> Was this a taking? Did it have dignitary aspects? Atuahene’s analysis has significant implications for this argument.

These questions make the juxtaposition of Atuahene and Coates interesting. Coates focuses in large part on one major tool of FHA policy: racially restrictive covenants. These covenants are subdivision rules that “run with the land” and bar sales or rentals by African Americans and other minority

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55. Coates, *supra* note 45, at 58. A far more comprehensive history of this period is included in Abrams’s classic book on the subject. ABRAMS, *supra* note 41.

56. Coates, *supra* note 45, at 58.

57. *Id.* A leading authority in this area is Charles Abrams. His book, *supra* note 41, at 73–78, describes the “self-fulfilling prophecy” that has kept minorities in segregated ghettos, and it has become a standard text for those who study this area. For a summary of the literature on the FHA’s role in perpetuating racially restrictive covenants, see RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 107–11 (2013) and sources cited therein.

58. Coates, *supra* note 45, at 58 (quoting housing expert Charles Adams in 1955).

59. *E.g.*, Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 198 (2003).

60. *See, e.g., id.* at 215–21.

61. *See, e.g.*, Coates, *supra* note 45, at 56–57 (describing state complicity in the takings of black-owned land in the 1920s).

62. *See, e.g., id.*

63. *See id.* at 58.

groups within the designated areas.<sup>64</sup> The covenants are often quintessentially private arrangements; neighbors covenant with one another to secure promises that they will not sell property to African Americans.<sup>65</sup>

In their book on racially restrictive covenants, Richard Brooks and Carol Rose emphasize this point—that it is precisely because racially restrictive covenants were private that they were difficult to police.<sup>66</sup> The private nature of these covenants meant that the state action usually needed to invoke civil rights protections seemed to be missing.<sup>67</sup> Decades after *Shelley v. Kraemer*,<sup>68</sup> which prohibited judicial enforcement of such covenants, scholars are still considering whether private contractual arrangements become state action merely by way of judicial enforcement.<sup>69</sup> Understandably, legal scholars might balk at the notion of a racially restrictive covenant constituting a taking.<sup>70</sup> This is not only because it is unclear what precisely was taken—other than the important opportunity to buy property—and by whom, but also because the issue of state involvement remains contested.<sup>71</sup>

Coates does not express the types of reservations that typically trouble law professors. For him, racially restrictive covenants—although ostensibly private—were the lynchpin of government policy.<sup>72</sup> State action? Maybe not. But for him, there is a more important question: Why were racially restrictive covenants so important to federal housing policy? First, such covenants played a significant role in underwriting standards. In fact, the federal government redlined neighborhoods by insisting that only white neighborhoods could meet the underwriting requirements.<sup>73</sup> Second, the federal government played a major role in the institutionalization of racially restrictive covenants by only underwriting mortgages if the properties were governed by restrictive covenants.<sup>74</sup> This is heady stuff. By incentivizing the use of racially restrictive covenants, the FHA, it was believed, helped protect government interests by ensuring that its loans would not go bad.<sup>75</sup> The FHA presumed that if the neighborhood “turned black,” the loans were more likely to go under.<sup>76</sup>

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64. *Id.* at 65.

65. BROOKS & ROSE, *supra* note 57, at 1–3.

66. *Id.* at 4–6.

67. *See* Rose, *supra* note 10, at 13–15.

68. 334 U.S. 1 (1948).

69. *See, e.g.*, Rose, *supra* note 10, at 13–15 (summarizing both sides of this debate).

70. *See, e.g., id.* at 15–17.

71. *See, e.g., id.* at 13–17.

72. Coates, *supra* note 45, at 58.

73. *Id.*; *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 206 (1993).

74. Coates, *supra* note 45, at 65.

75. *Id.*

76. *Id.*

And Coates does more: a la Atuahene, he finds real people who were unable to buy homes or obtain mortgages for this reason.<sup>77</sup> Coates follows the trajectory of Clyde Ross, a military veteran and former sharecropper who flees the terror of mid-century, Jim Crow Mississippi. Ross's family property was seized by the state, ostensibly to compensate the state for a fictional tax bill—a not uncommon occurrence.<sup>78</sup> Indeed, an investigative series by the Associated Press documented the widespread theft of African American-owned land dating back to the antebellum period.<sup>79</sup> Following the seizure, Ross subsequently migrated to Chicago.<sup>80</sup> In Chicago, he met property-related indignities reminiscent of Jim Crow, though of a different sort. Ross sought to purchase a home, but found himself ineligible for a federal program that provided specially subsidized mortgages to veterans.<sup>81</sup> He was unable to buy property in certain neighborhoods because white homeowners associations precluded his entry.<sup>82</sup> The poor supply of housing forced Ross to buy low-quality housing in a marginal neighborhood. He was unable to get a federally insured FHA mortgage because his neighborhood had been redlined.<sup>83</sup> When he was finally able to purchase a home, white flight ensued, driving down the value of his asset. To add insult to injury, Ross was at the mercy of an obscenely priced vendor's mortgage.<sup>84</sup> Ross never actually had any property taken from him in Chicago, but he nevertheless lost something. What do we do when we see the loss of dignitary interests without a formal taking?

To crystallize this point, let's focus on racially restrictive covenants. We must first acknowledge that there are important differences between the losses suffered by Ross and the dignity takings that concern Atuahene. First, the private property owners who were parties to such covenants were not particularly concerned with dehumanization—instead, they were typically trying to maintain their property values, and they remained indifferent to exclusion.<sup>85</sup> Second, racially restrictive covenants generally originated in the contractual arrangements of private actors.<sup>86</sup> Third, restrictive covenants never removed any actual property owned by African Americans.<sup>87</sup> Despite the clear differences between Atuahene's subjects, who had property taken, and Coates's subjects, who were denied the opportunity to purchase property, the results are equally devastating.

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77. *Id.* at 57–58.

78. *Id.* at 56–57.

79. *Id.* at 56.

80. *Id.* at 54–71.

81. *See id.* at 64.

82. *See id.* at 65.

83. *See id.* at 58.

84. *See id.* at 66.

85. Rose, *supra* note 10.

86. *Id.* at 3.

87. *Id.* at 17.



Coates's analysis is simple: surely, we owe African Americans the difference between what they would have had—calculated using the net worth of the median American who had access to a program of federally supported mortgage financing—and what they do have—calculated using the net worth of the median American who did not have access to such a program. This assumes, of course, that we can control for other factors.<sup>88</sup> Given the plethora of apartheid-era programs, which assigned and denied land-related benefits explicitly on the basis of race, the potential applicability of Coates's argument to South Africa is evident. The logical question is this: What would the median net worth of landless South Africans have been had they had access to the land-related benefits that have undoubtedly helped boost white South Africans' net worth?<sup>89</sup>

If we think of property owners, or potential property owners, from disfavored groups on a continuum, we have, to this point, discussed two groups of subjects. One group includes the Jews of Kristallnacht, who are not unlike the landed African Americans of Tulsa, who, in turn, are not unlike the landed South Africans of color discussed by Atuahene. Few scholars would disagree that these groups all saw their properties either destroyed or seized and suffered both traditional property takings and dignity takings. The second group is the landless, which might include both landless South Africans and landless African Americans. They may not have had property seized in the traditional sense, but their opportunity to acquire property was "taken." Because this opportunity was denied solely because of their race, they also experienced a "taking" of their dignity.

There is yet another group on the aforementioned continuum that we have not addressed. We might imagine the possibility of a third group of disfavored people: black people who actually became robust landowners. By virtue of their hard work, these individuals accumulated cash and bought precisely what they wanted, mostly where they wanted—an opportunity never afforded to Coates's subjects or their forebears. It is this group that is the subject of the next Part.

### III. WEST INDIANS

In my own work, I have looked at narratives of the home-buying experiences of other dark-skinned Americans of African descent—namely, cash-rich West Indian migrants.<sup>90</sup> I focus on a period in which large numbers of

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88. Coates, *supra* note 45.

89. For a discussion of comparative black-white inequality in South Africa and the United States, see John Campbell, *Black and White Income Inequality in South Africa and the United States*, COUNCIL ON FOREIGN REL. (Sept. 12, 2014), <http://blogs.cfr.org/campbell/2014/09/12/black-and-white-income-inequality-in-south-africa-and-the-united-states/> [<http://perma.cc/L2KD-MSY3>].

90. Indeed, the significant net worth of Caribbean black migrants (as opposed to African Americans) suggests that Coates might be on to something. See, e.g., Winston James, *Explaining Afro-Caribbean Social Mobility in the United States: Beyond the Sowell Thesis*, 44 COMP. STUD. IN SOC'Y & HIST. 218 (2002); see also NATHAN GLAZER & DANIEL P. MOYNIHAN, *BEYOND THE MELTING POT* (2d. ed. 1970); Winston James, *New Light on Afro-Caribbean Social*

West Indian migrants arrived in New York, between the 1920s and 1950s, when housing discrimination was still rife.

The implications of this historical West Indian advantage in housing markets are evident even today.<sup>91</sup> And so the question becomes: Why are the black brownstone owners in Harlem and Brooklyn disproportionately West Indian? Why are the landlords West Indian American, while the tenants African American? These are tough questions. For students of housing discrimination, West Indian Americans have long presented a quandary.<sup>92</sup>

West Indians, like African Americans, are overwhelmingly dark-skinned persons of African descent who were enslaved—albeit in the British-colonized West Indies rather than the United States—and are phenotypically indistinguishable from African Americans.<sup>93</sup> Thus, if it is reasonable to assume that racial exclusions are consistently applied to persons who are dark-skinned, one would expect to find that housing discrimination has had similar effects on West Indians and African Americans.<sup>94</sup> As one author notes, “[L]evels of segregation suggest that the housing and neighborhood characteristics of African Americans and West Indians should be indecipherable.”<sup>95</sup>

Yet this is not the case. West Indians have clear and well-documented advantages in housing markets in comparison to African Americans.<sup>96</sup> Granted, there may be other factors at play. One sociological study contends that “the tendency for West Indian households to occupy better-quality housing and neighborhoods than African Americans directly results from

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*Mobility in New York City: A Critique of the Sowell Thesis*, in *NEW CARIBBEAN THOUGHT* 395 (Brian Meeks & Folke Lindahl eds., 2001); IRA DE A. REID, *THE NEGRO IMMIGRANT* (1969). Many dark-skinned West Indians who were phenotypically indistinguishable from African Americans were able to buy property in white neighborhoods simply because they had cash (from non-federal sources, such as savings brought from their homelands). See Eleanor Marie Lawrence Brown, *The Blacks Who “Got Their Forty Acres”*: A Theory of Black West Indian Migrant Asset Acquisition, 89 *N.Y.U. L. REV.* 27, 42 (2014).

91. ROSENBAUM & FRIEDMAN, *supra* note 50, at 121 (noting that West Indians enjoy higher household incomes and “better-quality housing and neighborhoods than African Americans”); Kyle D. Crowder, *Residential Segregation of West Indians in the New York/New Jersey Metropolitan Area: The Roles of Race and Ethnicity*, 33 *INT’L MIGRATION REV.* 79, 84 (1999) (noting West Indian advantages in “income, occupation, and education”).

92. See ROSENBAUM & FRIEDMAN, *supra* note 50, at 121.

93. I will regularly refer to two groups of blacks. The first group, African Americans (often pithily referred to in the literature as “native” blacks), includes those descended from Africans who were enslaved here in the United States. The second group, West Indians, has a different historical heritage. These are persons who were enslaved in the West Indies but were not enslaved in the United States. They later became migrants to the United States, mostly after the abolition of slavery. The term “West Indians” as utilized in this Review does not generally include West Indian immigrants to the United States of other ethnic backgrounds. See Calvin B. Holder, *West Indies*, in *THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965* 674, 674–75 (Mary C. Waters & Reed Ueda eds., 2007) (describing the migration of West Indians to the United States and identifying the group as racially diverse, but predominantly black).

94. See ROSENBAUM & FRIEDMAN, *supra* note 50, at 121.

95. *Id.*

96. *Id.*

their relative concentration in formerly white middle-class neighborhoods that had stocks of owner-occupied homes.<sup>97</sup> That is, West Indians were more likely to buy into “solid,” white neighborhoods.

Despite this advantage, there is no doubt that West Indians experienced the dignitary affronts to which Atuahene alerts us. Indeed, no one makes this point better than Malcolm Gladwell. He reflects on the employment trajectory of his family’s Jamaican co-ethnics shortly after their arrival to New York in the 1920s.<sup>98</sup> As was typical at the time, many of these immigrants sought jobs in garment factories.<sup>99</sup> These garment factories were typically segregated; moreover, the segregation was deeply institutionalized, as evidenced by the existence of separate unions for black and white garment workers.<sup>100</sup> Yet Gladwell notes that West Indians sought and received jobs in factories with signs proclaiming that “no blacks need apply,” despite being recognizably dark-skinned persons of African descent.<sup>101</sup>

While this Review is primarily about property-based discrimination, these employment narratives allow us to see Atuahene’s dignitary affronts in a new light. That is, the early experiences of West Indians in New York underscore the possibility for dignitary affronts in employment—for example, the sign proclaiming that “no blacks need apply”—even as West Indians managed to escape the economic implications of these affronts. To continue the metaphor: there were no “takings” of these jobs, since the West Indians ultimately got jobs, but their dignity was still harmed.

A similar narrative might emerge in the arena of property. To understand the analogies, consider Brooks and Rose’s book, *Saving the Neighborhood*.<sup>102</sup> It tracks the trajectory and persistence of racially restrictive covenants in particular neighborhoods.<sup>103</sup> Brooks and Rose draw upon the law and social norms literature in the development of their thesis. They posit

97. *Id.*

98. Malcolm Gladwell, *Black Like Them*, THE NEW YORKER, Apr. 29, 1996, at 74, <http://www.newyorker.com/magazine/1996/04/29/black-like-them> [<https://perma.cc/MV35-H48E>]. Gladwell also discusses long-standing tensions between African Americans and his Jamaican co-ethnics (borne partly from differential treatment by employers).

99. *Id.* at 78.

100. *See id.*; *see also* Leigh David Benin, THE NEW LABOR RADICALISM AND NEW YORK CITY’S GARMENT INDUSTRY (Stuart Bruchey, ed. 2000); Herbert Hill, *The Untold Story*, 69 THE CRISIS 513 (Nov. 1962); Robert Laurentz, Racial/Ethnic Conflict in the New York City Garment Industry 1933-1980 (Apr. 17, 1980) (unpublished Ph. D. dissertation, State University of New York at Binghamton).

101. Gladwell, *supra* note 98, at 78. This point is made by prominent Harlem Renaissance intellectual W. A. Domingo. W. A. Domingo, *Gift of the Black Tropics*, in THE NEW NEGRO 341, 344–45 (Alain Locke ed., 1968); W. A. Domingo, *The Tropics in New York*, SURVEY GRAPHIC, Mar. 1, 1925, at 648, 649; *see also* Dennis Forsythe, *Black Immigrants and the American Ethos: Theories and Observations*, in CARIBBEAN IMMIGRATION TO THE UNITED STATES 55, 65–66 (Roy S. Bryce Laporte & Delores M. Mortimer eds., 1976) (highlighting the fact that West Indian immigrants quickly improved their job statuses despite having to start in menial positions).

102. BROOKS & ROSE, *supra* note 57.

103. *Id.*

that the persistence of these covenants—even after their enforcement was outlawed by the Supreme Court—turned less upon their enforceability and more upon their value in signaling norms of racial exclusivity.<sup>104</sup>

The connection between Brooks and Rose's narrative and that of Gladwell is implicit. A workplace sign saying "no blacks need apply" constitutes a dignitary affront—the employment equivalent of a racially restrictive covenant. If we argue by analogy to Brooks and Rose, these workplace signs have a signaling value in employment, just as racially restrictive covenants do in property. The narratives of West Indian New Yorkers in the 1920s indicate that, while racial discrimination was rife with signaling (for example, "no blacks need apply," "this property may not be sold to Negroes"), West Indians were still working in, theoretically, racially exclusive factories and living in, theoretically, racially exclusive neighborhoods.<sup>105</sup> The question becomes: What was so special about West Indians?

One cannot help but wonder whether West Indians had advantages that helped to mitigate the effects of housing discrimination that were typically not available to African Americans.<sup>106</sup> A primary mitigating effect appears to have been cash. Maintaining racial exclusivity in certain neighborhoods depended upon white owners maintaining a racial cartel.<sup>107</sup> They needed to uniformly maintain a united front in refusing to sell. Indeed, this is the problem that Coates highlights: homeowners and realtors were acting in concert as early as the 1920s, when West Indians began to arrive in New York in significant numbers, to ensure that racially restrictive covenants were upheld. Later, when the FHA was established, the federal government joined homeowners and realtors in maintaining the united front.

This front, however, would be broken with help from West Indian realtors. These realtors were the gatekeepers to home ownership for West Indians in an era when even the realtor sector was segregated.<sup>108</sup> They were experts at finding defectors—namely, whites willing to break norms of racial exclusivity to extract a premium for selling to blacks. Thus, West Indian brokers proceeded to buy significant numbers of titles, which were then off-loaded to fellow West Indians.<sup>109</sup> West Indian realtors could act in confidence because they often bought in trust—de facto, if not de jure—for fellow West Indians with ready access to cash.<sup>110</sup>

Where did this cash come from? There is a short-term and a long-term answer to this question. In the short term, West Indian buyers were more likely to access informal credit that allowed them to generate cash when

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104. *Id.* at 4–5.

105. See Gladwell, *supra* note 98, at 74–78.

106. See VILNA FRANCINE BASHI, *SURVIVAL OF THE KNITTED* 182–206 (2007).

107. Eleanor Marie Lawrence Brown, *Why Black Homeowners are More Likely to be Caribbean American than African American in New York*, in *THE BLACKS WHO "GOT THEIR FORTY ACRES"* 2 (forthcoming) (chapter on file with author).

108. *Id.* at 6.

109. *Id.* at 8.

110. *Id.*

needed.<sup>111</sup> Even when they did not have immediate cash, they had access to informal mortgage financing.<sup>112</sup> A seller should be indifferent if a buyer needs a mortgage, as long as the mortgage closes sufficiently quickly to produce cash in short order. Unlike their African American counterparts, West Indians had such access to mortgage financing, first informally and then more formally through means such as communal collective savings schemes, long before such financing formally existed.<sup>113</sup> Unsurprisingly, West Indian agents who bought on behalf of clients with cash had more leverage than their African American–realtor peers, even when those peers also targeted defectors.<sup>114</sup>

In the long term, West Indians proved well-versed in cutting deals, even in the face of significant dignitary affronts—a skill they learned from their ancestors.<sup>115</sup>

At the time of Emancipation, British plantation owners in the West Indies were compensated for what was then the most massive taking to date by the British government: the loss of their property rights in hundreds of thousands of slave bodies, which occurred when the British Parliament abolished slavery in the Caribbean.<sup>116</sup> No such compensation was provided for the actual slaves, who undoubtedly suffered a massive taking.<sup>117</sup> But this is not the whole story.

The British had permitted—indeed, encouraged—slave property rights in fact if not in law. They did this by providing grounds to the slaves, often in the form of minifarms at the edge of the plantations.<sup>118</sup> This provision effectively incentivized owners to take care of their slaves, the backbone of the plantation workforce.<sup>119</sup> These lands were technically owned by their masters, but they were occupied by slaves rent free, and all of the agricultural proceeds from that land went to the slaves.<sup>120</sup> At Emancipation, many slaves were allowed to keep these provision grounds and continue their rent-free tenure on the land. One might consider such land access a kind of rough justice from the British government, given the years of unpaid slave labor on the plantations.<sup>121</sup> The proceeds from their tenure on these lands

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111. *Id.* at 19.

112. *Id.*

113. *Id.* at 119–20.

114. *Id.* at 20.

115. *Id.* at 31–33.

116. See Legacies of British Slave-Ownership, *Project Overview*, U. C. LONDON (2016), <https://www.ucl.ac.uk/lbs/project/> [<https://perma.cc/9UDB-PFVL>] (discussing the 20 million pounds sterling in compensation that was authorized by the British parliament to be paid from the public purse to former slave owners in the British colonies).

117. See *id.*

118. See Eleanor Marie Lawrence Brown, *Chapter on the Evolution of Property Ownership Among Former Slaves*, in THE BLACKS WHO “GOT THEIR FORTY ACRES” 122 (forthcoming) (chapter on file with author).

119. *Id.*

120. *Id.* at 122–25.

121. *Id.*

was significant; this was in many instances highly-productive land, and it allowed slaves and their descendants to run a profitable trade in provisions.<sup>122</sup>

I think that the slaves were onto something with their sense of rough justice through provision-ground access, although, it surely fell short of what they were owed.<sup>123</sup> But, even so, the provision-ground access fell far short of what Atuahene would consider a proper acknowledgement of harm. To the extent that the process itself is an important component of dignitary compensation, there was no process *a la* Atuahene (pp. 3–4, 55, 57–58): there was no formal accounting of the uncompensated labor that had been taken from slave bodies, nor was there any acknowledgement of the considerable harm, including dignitary harm, that had been done to the slaves. Indeed, it would be a stretch to argue that the British viewed their actions as constituting any form of compensation, since that would have acknowledged an obligation to compensate—a concession that was never made.

Thus, one can hardly make the case that former West Indian slaves, the forebears of migrants to the United States, received dignitary compensation. But many slaves received an equivalent through access to land, even if the British could not bring themselves to acknowledge the unspeakable indignities that afforded slaves the land.

Why was land so important, even without the process of which Atuahene writes? We know from economists that it matters whether formerly enslaved people receive land soon after receiving their freedom.<sup>124</sup> Former slaves' chances at building inclusive political institutions are intricately intertwined with their ability to break down non-inclusive economic institutions. Access to property helps former slaves do this, independent of their former masters.<sup>125</sup> Because West Indians received land, they were able to create an independent, landed peasantry with a political-power base independent of the landed plantocracy.<sup>126</sup>

With a landed peasantry, West Indians could insist on inclusive institutions where the property rights of the median resident, not just the property rights of the elite planter, were respected<sup>127</sup>—a chance that African Americans in the South never had.<sup>128</sup> This is largely why Clyde Ross was forced to flee Jim Crow-era Mississippi, where his father's land was seized without compensation. It is why Ross later found himself struggling to acquire property in Chicago, where a more subtle, but nevertheless pernicious, kind of

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122. *See id.* at 111.

123. *See pp.* 164–76.

124. Brown, *supra* note 118, at 141–42 (summarizing this literature, with particular attention paid to the work of Daron Acemoglu and James Robinson). *See also* DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL* 335–67 (2012).

125. *See ACEMOGLU & ROBINSON, supra* note 124, at 357.

126. *See* Brown, *supra* note 90, at 59–61.

127. *See id.*

128. *Id.* at 60.

Jim Crow was practiced.<sup>129</sup> Moreover, it was this same rough land compensation received by West Indians that allowed their descendants to acquire assets in the United States decades later—an opportunity that was denied to their African American counterparts.<sup>130</sup>

To return to Atuahene, there is little doubt that these West Indians suffered dignitary affronts. During slavery in the West Indies, there were traditional takings of slaves' bodies and also the dignitary takings that inevitably accompanied enslavement. It would be a stretch to say that slaves in the West Indies received proper, formal compensation—much less dignitary compensation—simply because they were allowed to keep their provision grounds. But the land mattered. As economists tell the story, the forty acres promised to African Americans in the aftermath of the Civil War mattered.<sup>131</sup> West Indians received their forty acres; African Americans did not.<sup>132</sup>

Fast-forward to the twentieth century: even if African Americans had possessed cash, many of them could have bought homes only in contravention of racially restrictive covenants. Moreover, when the federal government's support of such covenants was overt, these covenants were no longer private contractual arrangements; these indignities were government supported.

Herein lies the lesson of this narrative: even those with cash suffered dignitary affronts. Whether these affronts were takings is another matter. Following Coates's logic, West Indians might have been even better off if they also had access to federally subsidized loans. For example, in a community that was well known for its entrepreneurial bent,<sup>133</sup> persons might have purchased homes with federally supported mortgages while preserving their cash for business ventures. But in this instance, the opportunity-cost argument is weaker than it is for similarly situated African Americans. That is, Coates's Ross was far worse off, even if his West Indian equivalent also suffered a dignitary affront.

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129. See Coates, *supra* note 45.

130. See Brown, *supra* note 90, at 56, 59–67.

131. The failure to meet Union leader General Sherman's Reconstruction-era promise to newly freed African Americans of "forty acres and a mule" following the Civil War is well documented in BLACK ECON. RESEARCH CTR., ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH (Robert S. Browne ed., 1973). For a view from economists on the implications of denying African Americans their "forty acres," see ACEMOGLU & ROBINSON, *supra* note 124, at 357. "Forty Acres" remains a significant area of inquiry in the legal scholarship. See generally Brown, *supra* note 90. Legal scholars rely heavily on the leading historian of the Reconstruction and the post-Reconstruction backlash, Eric Foner. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (updated ed. 2014). The most comprehensive article documenting the continuing implications of land loss for blacks is by Thomas W. Mitchell. See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 511–23 (2001).

132. See Brown, *supra* note 90, at 33–34.

133. Calvin B. Holder, *Making Ends Meet: West Indian Economic Adjustment in New York City, 1900–1952*, 1 WADABAGEI: J. CARIBBEAN & ITS DIASPORAS 31, 52–54 (1998).

## CONCLUSION

Coates's insistence that we need a way to accommodate those who have always been landless, in part because of opportunities denied to them due to skin color, is an argument that Atuahene's notion of "dignity takings" would do well to address. Moreover, it would broaden the relevance of her argument, not only within the United States, but also within South Africa, where clear majorities of blacks never had any quasi-tangible relationship with land and could not file a claim during any land restitution process. The West Indian case study also underlines the expansiveness of Atuahene's argument—even with a population that had early access to property, questions of dignity still loom large.