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# CRITICAL RACE THEORY, NATURAL RIGHTS, AND THE FATE OF LIBERALISM

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Honors Thesis

CRITICAL RACE THEORY, NATURAL RIGHTS, AND THE FATE OF  
LIBERALISM

by  
Landon Hooley

Submitted to Brigham Young University in partial fulfillment  
of graduation requirement for University Honors

Political Science Department  
Brigham Young University  
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## ABSTRACT

### CRITICAL RACE THEORY, NATURAL RIGHTS, AND THE FATE OF LIBERALISM

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Bachelor of Arts

Is critical race theory compatible with liberalism? I argue that it is not and that natural rights theory, liberalism's rational core, ought to be preferred as the primary framework to create public policy and understand the law. Critical race theory (CRT) has outgrown its original design as a legal critique and become a political worldview, although it is not developed enough to constitute an ideology or philosophy. It has inspired various organizations and movements that expand upon its principles and propose ideals and policies that conflict with the current constitutional liberal order. Many conflicts between natural rights theory and critical race theory occur because CRT is applied in the political realm as if it was a fully developed ideology. CRT lacks the structure needed to guard against arbitrary abuse of power and supplants liberal values of individual rights with racial equity above all other considerations. There are many valid critiques of the current liberal system, but the solutions proposed by CRT are unsustainable. Ultimately, while CRT and natural rights have some potentially intersecting goals, our American democracy must choose between these political frameworks to decide how we should think of our past, what we should change about our

present, and what direction society should take in the future. This decision will determine the fate of liberalism itself.



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## Introduction

Is critical race theory compatible with liberalism? Liberalism has spread across the world and become so universalized it could be considered the de facto form of government. Despite seemingly winning the ideological conflict of the 20<sup>th</sup> century by outlasting communism and fascism, its legitimacy and morality have been called into question more and more, especially in the United States. The critical race theory movement has been thrust into the political limelight over the past decade or so for its especially vocal criticisms of liberalism, along with the many offshoot movements and activists its principles have inspired. As racial identity politics have become increasingly adopted into the political mainstream, its objectives and perspectives have been misconstrued and misunderstood by both its more recent advocates as well as its opponents. There are even those who paradoxically claim to support critical race theory while identifying as a “liberal,” despite the fundamental incompatibilities between the two worldviews.

Thus, to clearly understand what is at stake in this ongoing political debate, we must identify the philosophical underpinnings of both liberalism and critical race theory to properly compare them. In doing so we find that American liberalism originates in a Jeffersonian interpretation of natural rights theory and is built upon an entirely different moral framework than critical race theory. By examining Richard Delgado’s book *An Introduction to Critical Race Theory*, Michael Zuckert’s *The Natural Rights Republic*, and Patrick Deneen’s *Why Liberalism Failed*, we can better understand why liberalism is being challenged and what each author predicts regarding the future of liberalism. The

American public must eventually choose between these two opposing political worldviews to shape societal goals and judge government legitimacy, and in doing so will decide whether liberalism will continue to thrive in the future.

### **Critical Race Theory's History and Fundamentals**

Critical race theory (CRT) is a collection of legal critiques and policy preferences meant to transform “the relationship among race, racism, and power”<sup>1</sup> in America. However, it is rarely explained in terms of its underlying philosophical principles. While there is a substantial historical narrative that has been created amongst CRT scholars and activists to explain and justify the necessity for structural political change, this narrative is specific to American culture and rarely draws directly on philosophical justification, favoring political activism over philosophical examination.

Unfortunately, opponents of CRT have often used the labels “neo-Marxism” or “Woke-ism” as an epithet rather than neutral terminology to describe the movement. While there is an argument to be had that some general concepts were grandfathered in from Marxism and have eventually found their way into the superstructure of CRT, assuming that it is merely a reformulation of any kind of major philosophy is reductive at best. CRT is far from being a comprehensive political philosophy and would be better described as a movement or a worldview containing philosophic intonations. The pervasiveness of its influence in the contemporary political landscape have made it easy

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<sup>1</sup> Richard Delgado and Jean Stefancic. *Critical Race Theory: An Introduction*. (New York: New York University Press, 2016) 3.

to mistake it for an ideology, in spite of its lack of substantive solutions to replace what it critiques. According to some of its advocates, CRT represents a relatively small niche of political thought driven by a handful of involved activists and scholars belonging to the political left, and its characterization as anything else stems from a misunderstanding of how politically specialized it is. If defined narrowly, it can be claimed that CRT is taught almost exclusively at law schools, although it has slowly found its way into other university-level academic disciplines such as sociology.

Although CRT is presented by its proponents as a very specific set of legal critiques which began in the 1970's, its political influence reaches far beyond this narrow description. The principles and accompanying worldviews it publishes have had a meaningful influence on American politics and deserve examination in all forms. Its advocates are well aware that "the [CRT] movement is thriving"<sup>2</sup> and that its principles have gradually been adopted into, academia, public opinion, and the corporate world. CRT has also been increasingly used to justify legal opinions by some judges, "often without labeling them as such."<sup>3</sup> Perhaps due to how radical some of its views are in the public eye, advocates rarely acknowledge the influence of CRT outside of academia.

Due to the discrepancies between what CRT advocates claim is *technically* part of the theory and the apparent influence it has had on many other movements and ideas; I will refer to examples of CRT-inspired works as *identity politics*<sup>4</sup> rather than CRT. The reason for this distinction is that while racial identity politics often draw on the principles

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<sup>2</sup> Delgado and Stefancic, *Critical Race Theory*, 3.

<sup>3</sup> Delgado and Stefancic, *Critical Race Theory*, 133.

<sup>4</sup> The term *identity politics* is often used in the media in reference to the connection between more mainstream works by race-conscious activists and original CRT principles. However, while the term *identity politics* is convenient to group various authors together, it is not an accurate usage of the term within the context of CRT literature. As far as I am aware, there is no widely accepted neutral term that describes the connection between these activists and their CRT source material.

first created by CRT, these offshoots do not consider themselves a part of the critical legal community. In essence, CRT scholars have formed a collection of principles and concepts used to critique specific aspects of the American legal system which are then adopted by other movements and authors who apply them in broader contexts.

The overarching philosophy of CRT that identity politics has adopted is broad and has been increasingly endorsed in an ever-growing number of academic projects, books, media narratives, and school curriculums. Some of the most prominent applications of CRT today within identity politics include Nikole Hannah-Jones's New York Times "1619 Project", Ibram X. Kendi's antiracism movement, Robin Diangelo's book *White Fragility*, the cultural redefinition of racism, and the Black Lives Matter organization. None of these individual examples are, strictly speaking, critical race theory, but they do all adopt its framework to form their own positions. This makes it difficult for the average person to recognize whether a given idea is *really* CRT. For example, the 1619 Project is clearly using the CRT principle of "revisionist history"<sup>5</sup> by retelling the national historical narrative through a racialized lens to highlight the injustices faced by black Americans since before the country was founded. The 1619 Project is not part of the legal critique literature, so its advocates claim it is not technically CRT, despite the evident influence. For the purposes of this thesis, examples of *identity politics* like those previously mentioned will be used to showcase specific applications of the CRT philosophy and demonstrate its practical political implications. That said, the distinction between these branches of identity politics and the way scholars attempt to define CRT should be kept in mind.

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<sup>5</sup> Delgado and Stefancic, *Critical Race Theory*, 25.

Derrick Bell is considered to be the founder of CRT, which was developed in the 1970s with important contributions coming from figures such as Kimberlé Crenshaw, Alan Freeman, Angela Harris, and Richard Delgado, among many others. Richard Delgado and Jean Stefancic, authors of the 2016 book *Critical Race Theory: An Introduction*, are among the foremost experts of the historical development and current state of the CRT movement. Their book has been described as a comprehensive summary of the theory, although Delgado notes that “probably not every [CRT] writer would subscribe to every tenet”<sup>6</sup> that he presents. Delgado himself is often listed as one of the founders of the movement and is among its earliest contributors, along with Bell and Freeman. In writing this book, Delgado acts as an advocate in trying to make CRT more accessible to the public and its arguments more convincing to a wider audience. Despite speaking to those who are unfamiliar with the theory, he does not seem to shy away from its more radical views to make them more palatable to political moderates. For these reasons, Delgado’s book remains one of the best sources for this thesis in its purpose comparing the underlying philosophies of CRT and Natural Rights Theory (NRT).

CRT was formed under the umbrella of critical legal studies, which posits that the law should be looked at in terms of how it affects different groups in its execution. In this way a policy can be judged based on its actual effects rather than its intention. A good law produces favorable effects for the group in question and a bad law produces negative effects. “Radical feminism” was the one of the first branches to develop from critical legal studies and focused on the relationship between the law and women as a group identity. CRT “owes a large debt”<sup>7</sup> to both critical legal studies and radical feminism for

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<sup>6</sup> Delgado and Stefancic, *Critical Race Theory*, 4.

<sup>7</sup> Delgado and Stefancic, *Critical Race Theory*, 5.

its own development, which was then intermingled with a variety of concepts originating from thinkers such as Antonio Gramsci, Michel Foucault, and Jacques Derrida to create another branch of critical legal studies named critical *race* theory. This new critical legal study focused on how the law affected minority races as a group identity. It established that the US was built to uphold a racial hierarchy that kept whites in power while exploiting minorities. In order to dismantle it, the very foundations of the liberal order needed to be critiqued and deconstructed.

### **CRT's Critiques of Liberalism**

Beginning with the first chapter, Delgado very plainly presents CRT as a critique not only of specific laws and policies, but one which “questions the very foundations of the liberal order.” This includes criticism of “enlightenment rationalism,” “neutral principles of constitutional law,” and “equality theory,”<sup>8</sup> which may be interpreted as referring to natural rights and its associated support for equality of opportunity. CRT desires to replace liberalism as the moral framework with which we make laws. Delgado even goes so far to explicitly state that “critical race scholars are discontented with liberalism as a framework for addressing America’s racial problems.”<sup>9</sup> Furthermore, “as for criticizing the existing system, the critics respond that they are indeed at work developing a vision to replace it.”<sup>10</sup> CRT was designed as a pragmatic framework to push

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<sup>8</sup> Delgado and Stefancic, *Critical Race Theory*, 3.

<sup>9</sup> Delgado and Stefancic, *Critical Race Theory*, 26.

<sup>10</sup> Delgado and Stefancic, *Critical Race Theory*, 106.



for actual changes to the law and its interpretation, but necessarily relies on broader principles upon which it develops specific critiques. This brings us to uncover which thinkers and philosophical concepts are included in the CRT worldview.

Seeing that it borrows ideas from Jacques Derrida and Michel Foucault, it should be no surprise that CRT attempts to operationalize their concepts even further, resulting in its focus on disassembling liberalism on a granular level. Jacques Derrida regularly focused on deconstructing the logocentrism of enlightenment rationalism found in Western civilization. Michel Foucault viewed all social institutions in terms of power and held that all “truths” maintained by a society were intimately related to its power structure.<sup>11</sup> Both thinkers’ ideas help to form some of the core assumptions of CRT, primarily that modern liberalism has failed as an ideology and is too corrupt to save.

In critiquing liberalism, the CRT community has developed distinctions between some seemingly common words and given additional nuance to others. It is important to understand, for example, the difference between *equality* and *equity*, especially because the distinction has been negligible until somewhat recently. *Equality* is generally used in reference to liberal principles of natural equality stemming from the concept of the state of nature. Equality is intimately connected with concepts such as natural rights, color blind policy, equality of opportunity, and the related hesitancy to enforce equality of outcome. Equity deals with measuring the equality of outcomes, in this case across racial groups. CRT views any unequal outcomes between racial groups as evidence that racism

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<sup>11</sup> Dreyfus, Hubert L. and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, (Chicago: University of Chicago Press, 1983), 131.

is present within a system<sup>12</sup> and strives to increase racial equity by changing both policies and procedures.

The cultural understanding of what “racism” means has also changed over the past several decades, with CRT’s interpretation of racism becoming more widely accepted in the political mainstream as time goes on. The traditional definition of racism denotes a personal prejudice characterized by beliefs that there are differences in the races that make one race superior or inferior to another. When used in CRT, racism is anything that produces racial inequity, not necessarily connected with individual prejudice. Although the term *racism* and its derivatives are still often used as pejoratives in colloquial speech, in an academic context racism is meant to be a neutral term.

Antiracist author and lecturer Ibram X. Kendi uses a collection of simple definitions that have become an increasingly popular way to conceptualize racism. The adjective *racist* means anyone or anything “supporting a racist policy through their actions or inaction” and “a racist policy is any measure that produces or sustains racial inequity between racial groups.”<sup>13</sup> Where there is racial inequity in any form, there is racism that is causing it. This newer view of racism is also known as structural or systemic racism, perpetuated by policies or procedures which result in inequity, and is distinct from discriminatory racism which is perpetuated by individuals.

In no uncertain terms, one of the primary messages of CRT is that liberalism is a failed ideology that has produced disastrous consequences, both social and economic, for racial minority groups. In being “overly caught up in the search for universals,”<sup>14</sup> within

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<sup>12</sup> Kendi Ibram X., *How to be an Antiracist*, (New York: One World, 2019), 21.

<sup>13</sup> *Ibid.*

<sup>14</sup> Delgado and Stefancic, *Critical Race Theory*, 65.

political theory, liberalism fails to be sufficiently nuanced when applied broadly and the specific grievances of minority groups go unaddressed. CRT literature often provides evidence for why the current liberal system is broken by showing how it produces racial inequity in various aspects of society despite its purported prioritization of equality. Authors then use evidence of inequity to persuade the reader of the need to reform the broken system. The frustrating liberal dynamic of “cautious, incremental quality”<sup>15</sup> that makes large changes so difficult to bring about is often highlighted in CRT literature.

CRT scholars, termed “Crits” for short by Delgado, are also skeptical of the liberal constitutional principles of equal treatment and racial non-discrimination. Despite the strides Martin Luther King Jr. made during civil right movement, they believe the subsequent legal changes did not go far enough to meaningfully effect inequity.<sup>16</sup> Liberalism’s color-blind policies are seen as ineffective at reducing systemic racism because many racial inequities continue today even though non-discrimination has been encoded in law for decades. Inequity can only be targeted through proactive color-conscious programs such as affirmative action because the current social structure will inevitably “keep minorities in subordinate positions.”<sup>17</sup> In other words, CRT is very supportive of racial discrimination in the form of race-conscious policy in a variety of contexts in order to remedy racial inequity. In the words of Ibram X. Kendi, because “racial discrimination is not inherently racist,” a new type of “antiracist discrimination”<sup>18</sup>

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<sup>15</sup> Delgado and Stefancic, *Critical Race Theory*, 64.

<sup>16</sup> Delgado and Stefancic, *Critical Race Theory*, 27.

<sup>17</sup> Ibid.

<sup>18</sup> Kendi, *How to be an Antiracist*, 21-22

is justified. Therefore, “the only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”<sup>19</sup>

Crits are also skeptical of liberalism’s conception of rights. Essentially, rights are seen as insubstantial and that they “do the right holder much less good than we like to think.”<sup>20</sup> Delgado specifically contrasts the first amendment protection for hate speech, “which mainly targets minorities” with the lack of protection for other speech that “conflict[s] with the interests of the powerful” such as defamation of a wealthy person, the divulgence of government secrets, or copyright violations “of a powerful publishing house.”<sup>21</sup> This example is meant to highlight that the powerful are protected under liberalism, often unjustly, while the interests of minorities are ignored. Interestingly, Delgado seems to imply that procedural constitutional rights, such as to a fair trial, are a negative aspect of liberalism because they are inferior compared to substantive rights that would guarantee things like “food, housing, or education.” Delgado also argues that rights are “alienating”<sup>22</sup> because they divide people and disincentivize communal relationships and obligations.

The idea of meritocracy, the distribution of economic or social goods on the basis of talent and ability rather than status, are heavily criticized as well. CRT argues that the systems in place to measure merit result in inequity because they favor whites and are often highly correlated with socioeconomic status. Liberalism’s measures of merit are arbitrary and subjective, making the resultant inequity a product of a racist system heavily balanced in favor of continued supremacy of whites. For example, standardized

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<sup>19</sup> Kendi, *How to be an Antiracist*, 22.

<sup>20</sup> Delgado and Stefancic, *Critical Race Theory*, 29.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

tests favor those with more resources because they can afford the courses and materials that can help raise their scores, and Delgado implies that those who can afford the materials are much more likely to be white.<sup>23</sup> Ultimately, the meritocracy is a myth overshadowed by the racial hierarchy that predetermines an individual's status in society.

### **CRT's Implied Worldviews and Assumptions**

Much of Delgado's book revolves around the evolution of CRT and introduces the reader to a variety of terms and topics regularly used throughout CRT literature. However, by examining the points CRT makes about the aspects of society it criticizes it is possible to establish certain presumptions inherent in its worldview. For example, it can be deduced that CRT is utopian in the sense that it strives to accomplish an idealized version of the world where racial inequities do not exist in any meaningful way. Although it is unclear what kind of government or ideology is needed to procure these results, it is evidently not liberalism.

We can also infer that CRT follows a utilitarian mindset in crafting policies because its primary consideration and ultimate end, racial equity, does not consider even remotely substantive limitations to the methods used to accomplish those ends. Where inequity exists, it is morally permissible to disregard the rule of law or promote the interests of one group above another in order to make progress towards creating an

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<sup>23</sup> Delgado and Stefancic, *Critical Race Theory*, 132.

equitable society. In the end, any policy or individual right can be judged based on the equity, or lack thereof, that it produces and consequently altered.

It is vitally important to recognize that Delgado notes that there are some CRT scholars who fall into an “idealist” school of thought and believe that racism is a matter of thinking, attitude, and discourse. Kimberlé Crenshaw, the author of the term *intersectionality*, is a prominent example of a CRT scholar in the idealist category. Presumably, if the idealists are right, teaching people to unlearn their racial biases, both conscious and unconscious, would be enough to end systemic racism. The idealist view of CRT has very few, if any, conflicts with liberalism or natural rights ideology. While it does advocate limiting the freedom of speech through the creation of tort law for “hate speech” offensive to minorities, it generally is invested in encouraging diversity in media, changing ideas of racial stereotypes, and generally encouraging conversation about race.<sup>24</sup> This approach to CRT and systemic racism is relatively non-threatening to liberalism because it has very few positions advocating major reforms to the current liberal system of governance.

However, most of Delgado’s book and focuses on the “realist” school of thought focused on major structural changes to accomplish equity. “The difference between the materialists and the idealists is no minor matter. It shapes strategy on decisions of how and where to invest one’s energies.”<sup>25</sup> The realist school of thought in CRT is especially interested in material wellbeing as one of the primary measures of success in accomplishing its goal of racial equity. It is this realist perspective of CRT that is supported by Derrick Bell, Richard Delgado, Ibram X. Kendi, the 1619 Project, the BLM

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<sup>24</sup> Delgado and Stefancic, *Critical Race Theory*, 25

<sup>25</sup> *Ibid.*

organization, and many others. These are the activists and scholars who decidedly believe that only major systemic changes will have any chance at accomplishing equity.

Therefore, we will focus almost exclusively on the realist side of CRT because it has both the greatest number of proposed policy reforms and more direct conflict with liberalism.

Realist CRT scholars use has a much broader definition of equity or material welfare. This includes practically all measurable aspects of a society's quality of life, such as levels of education, career opportunity, business ownership, health disparities, economic equality, and more. All these variables are considered under the umbrella term "realism" because they are seen as a direct result of systemic injustice. Wherever measurable inequities exist, some systemic failure is to blame. Racial equity therefore becomes the measure of good governance. CRT views all societal problems and policies through the lens of how it relates to these measurable "material" variables of racial equity. The lack of nuance in both its metrics of success and inability to outline appropriate methodologies for its implementation is evidence that CRT is not yet a comprehensive political philosophy even though it is employed as such. This singular focus on material outcome is a result of CRT's limitations as an undeveloped academic theory extended beyond its reasonable scope. CRT scholars may have intended to develop an alternative to liberalism as Delgado claims, but they have yet to come to a consensus on what its replacement would look like. In its current state, CRT attempts to replace liberalism but has nothing to replace it with except more equity. Either CRT's policy-level tools are too small or its system-wide goals too broad. It is unclear if CRT is meant to patch liberalism's holes as evidenced by its purported solutions or if it's meant to revolutionize society as we know as evidenced by Delgado's ambitious rhetoric.

CRT is intimately linked with a particular interpretation and perspective of US history. As with any other topic it addresses, it views history through a racialized lens. Using the concept of revisionist history, CRT elects to emphasize the role of racism in the formation and subsequent development of the country as its central theme, a perspective perhaps most closely associated with historian Howard Zinn's controversial book *A People's History of the United States*. This prioritization of race before all else has continued in modern identity politics through works such as the 1619 Project, which claims that "the United States is a nation founded on both an ideal and a lie"<sup>26</sup> due to its failure to provide equal rights for black Americans at its founding.

### **Politicization Through Kendi's Antiracism**

As mentioned earlier, CRT has inspired a vast array of identity politic works that further expand on the perspectives advocated in critical literature. In doing so, these works reveal the unsaid truths that were always part of CRT but never explicitly stated. Ibram X. Kendi's antiracism movement is a prime example of the natural evolution of this expanded CRT that has become more politically mainstream. Within these expansions of CRT, new concepts arise that slowly become adopted across the CRT movement. One of these emerging concepts is non-neutrality, which is implied in CRT literature that describes racism as "normal" and "pervasive" in every aspect of life. Kendi likewise suggests that "there is no neutrality in the racism struggle"<sup>27</sup> because, when CRT

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<sup>26</sup> "The 1619 Project," *New York Times Magazine*, August 18, 2019, 16.

<sup>27</sup> Kendi, *How to be an Antiracist*, 12.



is applied broadly as a worldview, every word, thought, and deed can be reliably categorized as *racist* or *antiracist*. Either one is actively fighting against systemic racism, or is complicit in the system's perpetuation, making non-action or neutrality inherently racist. This is true for all businesses, religions, organizations, and individuals.

Christianity, in particular, becomes a political battleground due to antiracism's embracement of Kendi's version of liberation theology. This interpretation of Christianity represents a profoundly departure from traditional Christian theology. Instead of focusing on its spiritual doctrines, Kendi emphasizes that "a Christian is one who is striving for liberation,"<sup>28</sup> meaning an individual who is an antiracist. In this political Christianity, Jesus is perceived as a "radical revolutionary" who "was dangerous because he was changing the system" and was consequently crucified because of the political threat he posed to the Roman empire.<sup>29</sup> Antiracism rejects the "elite White Jesus Christ, who cleaned people up through 'rules and regulations'" like commandments that direct individual morality or judge moral character. It rejects traditional "savior theology" because Kendi believes that outlining moral requirements for people is itself racist because people do not require a savior. Instead of focusing on a gospel preaching righteousness or keeping commandments, Kendi believes that "any gospel that does not...speak to the issue of enslavement and injustice...is not the gospel."<sup>30</sup> Kendi implies that Christians that do not accept this interpretation of liberation theology or are not politically active in supporting the antiracist movement are not true Christians and are, in

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<sup>28</sup> Kendi, *How to be an Antiracist*, 20.

<sup>29</sup> Kendi, *How to be an Antiracist*, 18.

<sup>30</sup> Kendi, *How to be an Antiracist*, 19.

fact, racist. This example demonstrates that antiracism expects a religious devotion to its political goals, even the most personal, spiritual aspects of an individual's life.

In summary, what we find within CRT is a movement that may have originally been intended to merely critique liberalism but which now also seeks to replace it as a moral and political framework. It has expanded in scope over the years and its influence can now be seen in practically every aspect of political life even tangentially related to race. Everything about CRT has been magnified by contemporary identity politics, meaning that principles that weren't explored extensively in the legal literature have now been adopted by the political mainstream, such as the concept of non-neutrality and Kendi's definitions of racism. Instead of merely being a niche critical legal perspective, it has grown to become a much larger movement and worldview being continually built up by popular authors and lecturers who draw on CRT principles and apply them in their own works.

Because of the complex nature of CRT's origin and current state, we can consider the original version of CRT nothing more than a legal critique focused on changing liberalism from within. Although it has grown substantially in popularity and breadth of critiques, it is not yet a proper philosophy or ideology either because it doesn't have the necessary depth. It critiques another ideology and intends to replace it but has not developed an alternative form of government or principles of governance to replace it with. It primarily proposes negatives, what ought to be removed, rather than positives, what ought to be in its place. CRT should be considered a worldview because its rhetoric and goals propose revolutionary changes, far beyond that of small quarrels with the

particulars of law, but it still lacks substance in deciding who should rule and by what methods the ideal government should rule with.

### **The Foundation of Natural Rights**

We've examined the purpose of CRT as a critique of liberalism and, to better assess this critique, we should consult a friendly expression of the enlightenment liberal position as well. Michael Zuckert, author of *The Natural Rights Republic*, gives a philosophical defense of natural rights theory (NRT) primarily from the perspective of Thomas Jefferson. Zuckert explains how Jefferson's understanding of NRT evolved from Lockean philosophy and why the natural rights republic it helped create is worth preserving. Zuckert occasionally distinguishes his own opinions from those of Jefferson, but otherwise accepts Jefferson's interpretation of NRT. This paper will broadly refer to Zuckert's explanation of this blend of Jeffersonian and Lockean philosophy as Natural Rights Theory.

Zuckert asserts that the Declaration of Independence formed the philosophical basis that, for the first time in history, synthesized the ideas of Locke and other thinkers into a broad legal framework that could be adopted practically on a national scale. These ideas were later expanded on in the creation of the Constitution of the United States with substantial contributions from other thinkers such as Montesquieu and Rousseau.

The most essential political and moral truths found in the Declaration of Independence and Constitution stem from a short series of philosophic premises. There is a pre-political phase establishing assumptions regarding the state of nature, a political

phase explaining the need for government and, finally, a post-political phase justifying a government's dissolution.<sup>31</sup>

The first document of the new American republic includes a series of carefully worded statements that begin in its second paragraph with a “self-evident” truth that “all men are created equal...[and] endowed...with certain unalienable Rights.” While the accuracy of the term self-evident may be up for debate, the meaning of equality among men, in Jefferson's view, is not. This pre-political condition does not explicitly advocate for moral equality, that all men “should” be equal, because it is a statement establishing that equality is already present from the beginning without the need for human action. It does not mean that men are equal in worth or ability, for that would contradict the reality of a natural aristocracy that Jefferson accepted.<sup>32</sup> Clearly, virtues, attributes, and talents are distributed unequally among mankind, some being smarter, stronger, more beautiful, or more moral than others.<sup>33</sup> Neither does *created equal* mean that all men possess equal political rights because it would be redundant considering that the following clause explains that all men are already endowed with inalienable rights. Properly contextualized, *created equal* instead means that men are independent of each other, that no individual has a natural claim to authority over another regardless of their differences in talent or ability.<sup>34</sup> In other words, assuming that every person has ownership of their body, and, by extension, their will and fruits of their labor, no person can rightfully claim ownership over the body, will, or possessions of another. Zuckert affirms that the

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<sup>31</sup> Zuckert, Michael, *The Natural Rights Republic*, (Notre Dame: University of Notre Dame Press, 1996), 18.

<sup>32</sup> Zuckert, Michael, *The Natural Rights Republic*, 19.

<sup>33</sup> As will be explored in later sections of these founding documents, recognition of a natural aristocracy innately means accepting that there will be differences in outcomes and that inequalities in wealth are to be expected.

<sup>34</sup> Zuckert, Michael, *The Natural Rights Republic*, 19.

Declaration maintains a distinction between the terms *created equal*, that one cannot claim authority over another, and *inalienable rights*, which all individuals possess by virtue of being human. These two assertions are inseparably linked and constitute a primary assumption from which other logical truths regarding just authority are deduced.

This revolutionary political theory contradicted all previous understandings of the source of authority that had long been used by European monarchs and rulers throughout the world to justify their rule. Man was not a naturally political animal as Aristotle reasoned; neither did the authority to rule over others come from God or the Bible. God did not institute the monarchy, humans did! If no higher authority designated who should be kings and rulers, mankind had a right to choose for itself who should lead. The presupposition of natural equality and inalienable rights therefore forms the political foundation upon which the legitimacy of any type of government rests.

Having asserted the independence of man in the state of nature, the Declaration moves to a second premise establishing the necessity of government in order to secure their inalienable rights. Contrary to some modern libertarian perspectives of government, NRT proclaims that government is necessary, for without government the state of nature would prevail, and men would violate one another's inalienable rights. Thomas Hobbes's description of a "nasty, brutish, and short"<sup>35</sup> life for those trying to survive in the state of nature is decidedly more extreme than Locke's belief that its dangers were more likely to involve the scarcity of resources,<sup>36</sup> but Jefferson evidently agreed with both philosophers that some form of enforced order was necessary to avoid the most tragic consequences of total anarchy. The monopoly on force that a government provides is the only sure way to

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<sup>35</sup> Hobbes, *Leviathan*, 1651, XIII.9.

<sup>36</sup> Zuckert, Michael, *The Natural Rights Republic*, 28.

protect natural rights, making its primary responsibility to protect the rights of its people. Zuckert concludes that, according to NRT, the *only* source for a government's legitimacy "is for the specified purpose of securing rights."<sup>37</sup>

This leads to the post-political conclusion the Declaration makes justifying the separation of the American colonies from their mother country. Should a government forego its responsibilities and deprive its people of their inherent rights, "it becomes necessary for one People to dissolve"<sup>38</sup> that government. Not only are a people justified to oppose tyranny within the confines of their current political system, but they also have a right "to alter or to abolish" the structure of that government in its entirety and "institute a new Government" that is more likely to protect them.

All these conclusions flow deductively from the premise given in the Declaration of Independence that men are in possession of inalienable rights, rights that cannot be given up, taken, or otherwise altered by any government or by the conscious choice of any individual. They simply exist as objective truths upon which men may decide to organize themselves politically. However, there is a need for the public to be both knowledgeable and supportive of NRT for it to properly function as a legal and moral framework. Since these truths are only easily recognizable through logical deduction, Zuckert notes that "the true ends of political society can be achieved only in a regime in which the citizens hold those truths." Without broad public support, especially in a democratic republic, NRT fades to be nothing more than an interesting collection of old-fashioned traditions. Without an understanding of and conviction in favor of these

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<sup>37</sup> Zuckert, Michael, *The Natural Rights Republic*, 47.

<sup>38</sup> Jefferson, Thomas, et al, July 4, Copy of Declaration of Independence. -07-04, 1776.

principles, they become unenforceable as other, newer interests, values, or ideologies become popular.

On a deeper level, NRT serves not only as a standard to legitimize government, but also as a moral framework with which citizens may rationalize other necessary individual rights and laws. As Zuckert argues, “rights appear to replace the moral sense as a more effective source of just social relations.”<sup>39</sup> According to Jefferson, a moral code built from rationalism is superior to an individual’s intuition for two main reasons, both practical and epistemological. Practically, human passions, the source of moral sense, do not necessarily prompt specific moral actions. They allow us to perceive right and wrong, but do not tell us what actions to take, if any. We may perceive that an action is wrong, but this intuition does not tell us what ought to have been done without a larger moral framework. This leads to the second objection, that moral perceptions are a poor source from which to deduce additional moral knowledge because they can vary widely person to person. This variability makes consistent moral standards impossible to implement uniformly. One person’s intuition for what ought to be done when their moral intuition is triggered can be entirely different than another’s. Thus, when looked at from a wider societal view, individual moral intuition “is ineffective not only in producing moral action but in producing valid moral standards.”<sup>40</sup> The solution to this moral ambiguity is a rational moral framework drawn from natural law.

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<sup>39</sup> Zuckert, Michael, *The Natural Rights Republic*, 70.

<sup>40</sup> Zuckert, Michael, *The Natural Rights Republic*, 71.

## Human Nature and Self-Interest

Natural rights theory is successful at replacing the vague moral sense because it attempts to include an understanding of the realities and vices of human nature and subsequently compensate for them through rational deductions. In the state of nature, men violate one another's natural rights out of self-interest, whether to preserve themselves or to gain power over each other. NRT's fundamental assumption that all individuals are subject to selfish passions gives it a head start in predicting political problems that are rooted in man's corruptible nature. This assumption is, for example, the basis for the principle of limited government. Man's greed and desire for power and wealth meant that the Founders needed a way to decentralize power to avoid despotism, prompting the inclusion of three separate branches of government inspired by Montesquieu's writings.

Human nature is a core consideration within NRT in addressing problems at both a societal and individual level. In Jefferson's *Notes on the State of Virginia*, he writes that one important purpose of rights is to inspire respect for "those rights in others which we value in ourselves." In a way, natural rights are an enlightenment version of the biblical golden rule; we do not violate the rights of others because we would hope others would forebear from violating our own rights. This network of individual rights is thus founded on a mutual, reciprocated respect. Jefferson believes it is possible to build upon individual self-interest to form moral boundaries across all individuals in society. It deductively forms a structure of moral and immoral actions, including rational justifications to violate another's individual rights under certain circumstances, such as



allowing someone to take the life of another in self-defense. The need to filter acceptable government or individual action through a system of rights means that “the declaration stands prima facie against class or race politics”<sup>41</sup> that place considerations of identity over all else.

### **Purposes and Forms of Government – NRT vs CRT**

While elements of the Founders’ principles make it tempting to believe that NRT is designed to exclusively function within a democracy or republic, there is a deliberate vagueness in the type of government the Declaration of Independence advocates for. Zuckert makes the point that NRT is much less concerned about the type of government in place than it is about how effectively that government protects natural rights.<sup>42</sup> For example, the Declaration describes a right to revolution “whenever any Form of Government becomes destructive of these Ends.”<sup>43</sup> The long list of harms outlined in the Declaration are not a condemnation of Monarchy, but rather a list of reasons as to why seceding from the monarchy under King George the III could be justly rationalized. The Declaration implies that, had King George properly protected the rights of his subjects, the colonies never would have needed to secede.

In fact, it could be argued from a natural right standpoint that, before the enlightenment of the public, monarchy could be preferable to a democratic system. This

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<sup>41</sup> Zuckert, Michael, *The Natural Rights Republic*, 31.

<sup>42</sup> Zuckert, Michael, *The Natural Rights Republic*, 30.

<sup>43</sup> Jefferson, Thomas, et al, July 4, Copy of Declaration of Independence. -07-04, 1776.

is possible if we were to assume that the monarch in question was enlightened and committed to enforcing the prospect of natural rights. This enlightened monarch would presumably be better able to protect the rights of his people than his subjects could themselves. However, as enlightenment ideas spread across Europe and the new American nation, rule by consent of the governed was clearly a surer way to safeguard rights in the eyes of the Founders. While the type of government can vary, in the end “the criterion of good government has far more to do with securing the end than with some universal test of form.”<sup>44</sup>

For CRT, the preferable model of government is up for debate as well. It is much more concerned with critiquing the current liberal order than it is with proposing an alternative form of government. This attitude gives it a kind of ideological flexibility, so it doesn’t necessarily have to rely on a broader, more structured philosophy like socialism or communism. CRT scholars are allowed to mix and match policies that may fit perfectly well into the current liberal system as well as policies that advocate for profound changes that conflict with some of liberalism’s core principles without worrying about internal conflict within the CRT movement. The deliberate ambiguity as to what kind of society could successfully accomplish racial equity gives its advocates wiggle room to pick and choose whichever laws and practices that deliver the best results. Forms of government or policy are neither inherently good nor bad unless they in some way relate to racial equity. This view of the ultimate societal good encourages advocates to connect as many aspects of government to racial equity as possible, whether it be medical care, the justice system, education, economics, or religion. In the end, the

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<sup>44</sup> Zuckert, Michael, *The Natural Rights Republic*, 30.

most important measure of good governance and commendable social structure for CRT will always be whether it provides the greatest measurable benefit for the least advantaged racial group.

NRT is decidedly broader than CRT in its goals to create a functioning society because it establishes clear boundaries, allowing for personal autonomy within them. With NRT, individuals can be assured that their natural rights are secure, which consequently allows them to pursue their own version of the good life. Its principles are meant to extend to the individual, social, and legal levels. It is utterly unconcerned with material inequity as long as everyone can be reasonably assured that there is a general equality of opportunity. The material inequalities that arise can even be seen as a positive aspect of a society that rewards its participants according to their merits, encouraging others to compete, innovate, and excel. However, given its skepticism that humans are naturally self-serving, problems with discrimination and unfair competition become grounds for government intervention.

In its original Jeffersonian interpretation, NRT on its own is far from being a bare bones night-watchman state relegated to merely observing society and providing a few basic services. Its ability to fit within a wide variety of social and economic contexts makes it adaptable to many different political views. There is a plethora of political ideologies that incorporate principles of NRT and attempt to answer questions of government involvement in balancing socio-economic issues. Early in its history, NRT was adopted into the 18<sup>th</sup> century Whig party and, over time, found its way into various other ideologies such as Ayn Rand's Objectivism, Neo-liberalism, or even the more recent conservative Tea-Party movement in 2008. No one ideology or party in today's

modern political arena controls the natural right perspective because it is an intentionally broad framework meant to adapt with the ongoing issues and interests of society. This makes NRT both versatile and applicable to any political climate or social context.

### **Limited Government – NRT vs CRT**

NRT’s assumptions regarding human nature also clearly proscribe basic limits for government authority. As Madison expressed in Federalist 51, “If men were angels, no government would be necessary.”<sup>45</sup> Due to the shortcomings of human nature, the principle of limited government is essential regardless of the form of government adopted. Although NRT’s framework neither advocates nor prohibits government action in relation to social or economic affairs, any action that even potentially restricts individual rights can be grounds to question its legitimacy.

One clear application of limited government within the United States Constitution is the separation of the judiciary branch from the legislative and executive. To preserve the sanctity of an individual’s inalienable rights, the Founders created the Supreme Court to act as the final arbiter of the law. Its express purpose as the highest court in the land, insulated from transitory political pressures and other branches of government, was to determine whether controversial laws or actions conflicted with the Constitution and often, by extension, an individual’s inalienable rights. For the United States, the judicial branch represents an essential component of limited government that is present

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<sup>45</sup> Madison, James, Federalist 51.

throughout the structure of traditional American governance. The importance of this principle is evident in its profound integration in democratic governments throughout the world.

These inherent limits on government authority are entirely absent in CRT and its offshoot branches of identity politics. Since CRT has no specific form of government to advocate for and no measurable way to confirm if it has accomplished its goal, there is nothing to stop government overreach. Its implicit trust in government is surprising given that its grievances are founded on systemic injustices created by an unjust government. How exactly CRT could prevent a new political hierarchy from forming under its newly enlightened leaders is unclear, which makes its utilitarian tendencies more worrisome when imagining its mindset implemented on a broad scale.

For example, one of Ibram X. Kendi's more controversial ideas is his advocacy for an anti-racist constitutional amendment to create a federal Department of Anti-racism. This department "would be responsible for preclearing all local, state and federal public policies to ensure they won't yield racial inequity, monitor those policies, investigate private racist policies when racial inequity surfaces, and monitor public officials for expressions of racist ideas."<sup>46</sup> This particularly worrying suggestion clearly violates nearly every foundational liberal concept such as principles of the rule of law, individual rights, and the purposes of government. A single executive agency with the power to enact or change any law at any level whether federal, state, or local is exactly the type of unilateral authority the Founders hoped to avoid entirely, not to mention the worries that

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<sup>46</sup> Kendi, Ibram X., "Pass an Anti-Racist Constitutional Amendment," Politico, 2019, <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/>.

arise with contention between individual rights and the monitoring and disciplining of any public officials for expressing potentially controversial ideas. The capacity to do good may be expanded with unilateral, unchecked authority, but the capacity to do great harm is expanded to the same degree.

Because CRT is so ambiguous in both its end goals and methods to reach them, one crucial weakness of CRT is its vulnerability to extreme radicalization. There are few actions that cannot be justified as long as it is done in the pursuit of its ultimate societal good. In Delgado's words, "When we are tackling a structure as deeply embedded as race, radical measures are in order—otherwise the system merely swallows up the small improvement one has made..."<sup>47</sup> CRT becomes openly revolutionary in practice as it advocates for "radical measures" to change liberal democracy with broad, unilateral solutions.

Let's imagine that Ibram Kendi's Anti-Racism department came into being, that CRT advocates had every position of power and authority they desire to mold society to their liking. CRT and its extended identity politics give us no reasons to trust that these new political elites would be more moral, fair, or honest than those that serve within whatever hierarchy currently exists. Even if these new elites are well meaning, NRT predicts that human nature will inevitably lead to arbitrary abuse of power. Understanding how far is too far is something built into NRT to promote political stability, but with CRT, going too far is never something its scholars seem to address even as a possibility. It simply critiques the bad in the current system and replaces it with a new, untested political structure.

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<sup>47</sup> Delgado and Stefancic, *Critical Race Theory*, 64.

## Natural and Artificial Aristocracy – NRT and CRT

Who ought to rule is often a central question in political philosophy. NRT was the first political theory to suggest that there was no natural or divine authority that gave an individual the right to rule others. How then, could a people know who should rule? Recalling the ambiguity regarding what form of government should be adopted by a people, the most practical government stemming from NRT principles will nevertheless be a democracy of some kind. Although some form of enlightened despotism or aristocracy is possible under the NRT framework, democracies are by far the single best way to decentralize power, which, in turn, better protects rights.

Furthermore, because NRT accepts that talent and ability are distributed unequally, it also accepts that some are more capable to represent than others. Although the natural aristoi, as Jefferson calls them, possess greater abilities, this does not grant them a legitimate claim to rule. Nevertheless, there are certainly some people who are more competent than others. NRT encourages the aristoi to lead by allowing them to prove their worth within the meritocracy through methods such as elections for important government positions. The Founders argued for differing approaches to filter through the citizenry to find these natural rulers. Thomas Jefferson argued, for example, that there was a difference between a natural and artificial aristocracy. While members of the natural aristocracy have great talent or ability and may be born in any strata of society, an artificial aristocracy can unfortunately be established through the inheritance of wealth or well-connected familial relations, which would in turn determine societal position even if they lack talent or virtue themselves. John Adams was skeptical that a natural aristocracy

could be reliably filtered without creating a hereditary class of artificial aristocrats, as had been the case in European countries. Adams worried that a noble class would inevitably form, since in his view “an hundred other foreign Aristocracies have sown...their Seeds in this Country: and We have an Abundance of them springing up in this Country not from Virtues and Talents so much as from Banks and Land Jobbing.”<sup>48</sup> According to correspondence between John Adams and Thomas Jefferson, we know that Adams advocated for a kind of oligarchic republic in which the aristocracy, inevitably jumbled between the truly talented and artificial aristocrats, would be placed “into a separate chamber of legislation”<sup>49</sup> to have to itself in order to “chain it”<sup>50</sup> under the “Watchful Sentinel”<sup>51</sup> of the other branches of government.

While Jefferson agreed “that form of government is the best, which provides the most effectually for a pure selection of these natural aristoi into the offices of government,” he also believed that “the best remedy is...to leave to the citizens the free election and separation...of the wheat from the chaff. In general, they will elect the real good and wise.”<sup>52</sup> In other words, Jefferson was an optimist, a believer that the citizenry could be trusted to choose the natural aristoi and keep an artificial aristocracy from forming, unless “corruption in elections becomes dominant and uncontrollable [sic].”<sup>53</sup> Jefferson’s approach ended up being adopted, meaning that today’s democratic elections are open to all and not restricted explicitly by class.

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<sup>48</sup> Cappon, Lester J., ed. *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, (University of North Carolina Press, 1987), [http://www.jstor.org/stable/10.5149/9780807838921\\_cappon](http://www.jstor.org/stable/10.5149/9780807838921_cappon), 409.

<sup>49</sup> Cappon, *The Adams-Jefferson Letters*, 387-8.

<sup>50</sup> Cappon, *The Adams-Jefferson Letters*, 409.

<sup>51</sup> Cappon, *The Adams-Jefferson Letters*, 343.

<sup>52</sup> Cappon, *The Adams-Jefferson Letters*, 387-8.

<sup>53</sup> Cappon, *The Adams-Jefferson Letters*, 400.



However, one persistent modern critique of the American system is also found in CRT, which is that, despite Jefferson's optimism, an artificial aristocracy has already formed and keeps undeserving elites in power. The twist CRT literature puts on this classic complaint is that the modern American aristocracy is comprised of all Whites as a broad racial group. This is why Delgado asserts that "by every social indicator, racism continues to blight the lives of people of color"<sup>54</sup> and implicitly rejects the idea that "class today is more important than race."<sup>55</sup> In CRT's perspective, the primary oppressors are not the wealthy, but the white class and the system of laws that have been created by them. Thus, while natural virtues may benefit individuals, agreeing with the principles of CRT and its accompanying views is even more important. If the biggest problem in America is the White dominance of the social hierarchy and one claims that the most important focus in the political realm is its deconstruction, the greatest virtue becomes like-mindedness.

Rejecting the superiority of the natural aristocracy as the preferable method to determine the traits of good leadership means other virtues will fill the void for the most desirable traits. The smartest, most honest, most capable leader for liberalism is second to an activist that furthers the goals of CRT. A similar sorting already occurs between political parties today, where voters prioritize issues and attitudes that match their own party over an opposing candidate who may have greater talent or ability, but the two modern political parties both operate in support of liberalism. However, we should keep in mind that CRT does not consider itself as an actor operating within the bounds of liberalism, but as a movement that is antagonistic towards liberalism as a whole,

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<sup>54</sup> Delgado and Stefancic, *Critical Race Theory*, 12.

<sup>55</sup> *Ibid.*

including both of its parties. This means that CRT forces followers to evaluate its leaders not based on virtue, but primarily by who is the most dedicated to the movement. More important than congruent, rational legal doctrine is balancing racial equity. Changing the status quo is always more important than preserving any concept that comes from liberalism, however beneficial it may have been. Instead of voters choosing between ideas within liberalism, CRT expects voters to choose between liberal oppression and reducing racism.

Essentially, CRT frees itself from common valuations of efficacy or goodness. By rejecting liberal virtues, and the rationalist framework they come from, it makes itself unfalsifiable. Although there is some disagreement over some aspects of CRT, its conclusions on a variety of topics are already clearly defined. Racism, as the central focus of all CRT commentary, can be used to retroactively explain any system and consequently justify opposition to any value.

The centrality of racism and the concept of racial hierarchy is brought to its logical extreme in the book *White Fragility* by Robin DiAngelo. In the book, DiAngelo continually makes the point that the term “white fragility” is exemplified by any negative reactions from Whites such as anger, guilt, arguing, silence, or withdrawal when confronted with racial discomfort caused by discussions of racism. DiAngelo unironically concludes that any disagreement or negative reactions to her or other scholars’ assertions that the principles and goals of CRT are categorically, undeniably, correct means that their opponents themselves have internalized racism and have merely been “socialized into a deeply internalized sense of superiority.”<sup>56</sup> Any discomfort caused by the topics

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<sup>56</sup> DiAngelo, Robin, *White Fragility*, (Boston: Beacon Press, 2018), 23-24.

DiAngelo explores are examples of white fragility, which, though “triggered by discomfort and anxiety...is born of superiority and entitlement...[and] is a powerful means of white racial control and the protection of white advantage.”<sup>57</sup> Value assessments become impossible because all individuals either agree with CRT principles and DiAngelo’s assertions or have some measure of internalized racism that causes them to think that way.

After rejecting the value structure of NRT, the logic of CRT is not based on what political system would be most sustainable or fair, but what will most reduce inequity. Like Ibram X. Kendi’s principle of non-neutrality, DiAngelo makes explicit and operationalizes the binary moral metrics implied by CRT by simply identifying whether something or someone is racist or not.

### **Educating the Masses – NRT and CRT**

Both NRT and CRT rely on broad, unified support to effectively promote their goals. While either perspective can at least survive if enough of the ruling class is convinced of their principles, they function much more efficiently if supported by the public. Rights, either for individual persons, corporations, or other entities only exist if they are properly enforced. Similarly, radical legal and social changes prioritizing racial equity can only occur if judges, lawyers, politicians, and the general public are all convinced that it ought to be prioritized over those individual rights. It is for this reason

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<sup>57</sup> DiAngelo, *White Fragility*, 24.

Zuckert declares that “a healthy nation requires the conviction in the minds of the people that [their] liberties are the gift of God.”<sup>58</sup> However, political support is not the only factor that ensures the survival of NRT. Whether one views history from the perspective of NRT makes a difference as well.

Just as CRT makes an attempt to frame history from a particular perspective, NRT has its own outlook on US history. It is this viewpoint that we are most familiar with and that has been traditionally part of public-school curriculum. These are the textbooks brimming with subtle patriotism, defending the morality of the revolution against Great Britain and presenting the Founders as great, almost holy, men. According to this perspective, although the promises of the Declaration and Constitution were woefully unfulfilled for large segments of its population, it was also the first time that those disenfranchised peoples had a moral claim to equality. In fact, “as the Americans more and more thought in terms of natural rights, the institution of slavery seemed to more and more of them to be intolerable and unjust,” even though it was justified “under English colonial law.”<sup>59</sup> From the traditional understanding of US history, it was a larger application of natural rights that prompted the change of heart causing people to condemn slavery or consider women deserving of the right to vote. The more enlightened a people becomes to the idea of natural rights, the less justification any type of discriminatory oppression has to stand on.

The philosophical tension between CRT and NRT has obvious implications for our national culture as well. One reason that conservatives offer such fierce resistance to revising the historical perspective in the form of the 1619 Project is because they agree

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<sup>58</sup> Zuckert, Michael, *The Natural Rights Republic*, 88.

<sup>59</sup> Zuckert, Michael, *The Natural Rights Republic*, 116.

with the sentiment expressed by historian Gordon Wood, who wrote that “the stakes in these historical arguments about 18<sup>th</sup> century political culture are...nothing less than the kind of society we have been, or ought to become.”<sup>60</sup> In essence, the way we view our past helps us to judge if we are on the right track to a brighter future. If our past is seen as a dark, unseemly road to a modern dystopia, our collective response will be to take a radical departure from this well-worn path of individual rights. If we view American history in a more favorable light, even in acknowledging the nation’s sins we can see a bright, hopeful present and future directed by the principles of natural rights. Zuckert agrees with Gordon that our views of history help us determine “how we have come to where we are and to where we might be going,” but notes that while our perspective of our national history lets us subjectively judge whether we come from a “good” or “bad” society, our founding documents do not tell us what type of society we ought to become, only by which principles we should operate.<sup>61</sup> Deciding on the meaning and order of principles that serve as a framework to judge the legitimacy of future policy is crucial, especially when deciding on the meaning of foundational principles such as justice.

### **John Rawls, The Meaning of Justice, and Modern Identity Politics**

Rawls developed a new foundation for a conception of justice that prioritized what one is owed by society rather than what natural rights government must forbear from infringing upon. Using this new version of justice, Rawls sought to justify the

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<sup>60</sup> Zuckert, Michael, *The Natural Rights Republic*, 122.

<sup>61</sup> *Ibid.*

legitimacy of the modern welfare state. Rawls's Theory of Justice marks a key point where classical liberalism transitioned to become today's welfare state liberalism. This new form of liberalism allowed further slippage from its Lockean foundations and ultimately allowed identity politics to legitimize itself based on Rawlsian liberalism.

Delgado describes the manner in which CRT seeks to evaluate laws through the recommendations of a scholar who suggests "...that society 'look to the bottom' in judging new laws. If they...[do] not relieve the distress of the poorest group...we should reject them."<sup>62</sup> In comparing John Rawls's Theory of Justice, this argument reads like a reformulated version of his second principle of justice, namely that "social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged members of society."<sup>63</sup> Rawls's Theory of Justice is in many ways the inspiration for modern identity politics. Critical race theorists took Rawls's difference principle several steps further by clearly defining who were the least advantaged members of society, namely racial minorities, and interpreting all laws in relation to how they benefitted or harmed that particular group. Rawls's "justice as fairness" was redefined by CRT as "equity." Therefore, in order to achieve justice within the framework of CRT, there must be material equity.

This places very different constraints and measurements concerning what should be expected of government and is in stark contrast to liberal principles of equality of opportunity, which accepts that unequal outcomes will naturally arise due to differences in ability. Classical understandings of justice relied on determining an individual's just deserts while critical theories, beginning with philosophers like Jacques Derrida, began to

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<sup>62</sup> Delgado and Stefancic, *Critical Race Theory*, 27-28.

<sup>63</sup> Rawls, John, *A Theory of Justice*, (London, England: Belknap Press, 2005), 53.

cast doubt on *who* was determining what constituted just deserts and whether those judgements were truly reflective of justice.

For Rawls, the morality of government action depends on the fairness of those actions as it relates to the individual, and, more importantly, the least advantaged group. If what is “fair” is derived from one’s “legitimate expectations”<sup>64</sup> of society as agreed upon in the original position, meaning rights or claims that can be made of government, the fulfillment of one’s expectations becomes the new measurement of justice. Therefore, for Rawls “the rights of each derive from justice,”<sup>65</sup> rather than justice being derived from individual rights as is the case in NRT. Justice can be potentially redefined to include additional rights and demands of government and is only fixed by what is agreed upon by society at large in the hypothetical original position. This means Rawls would implicitly reject the supremacy of just deserts if it ever came into conflict with the expectations the least advantaged group is owed as a condition of justice.

Since Rawls’s ideal state is materially redistributive according to what the least advantaged group claims they are owed, justice becomes receiving a standard of care rather than receiving only what one merits. Undoubtedly Rawls’s reconfiguration and defense of the liberal welfare state in such moderate terms would take exception to identity politics’ radicalized version of a right to equity, since he himself writes that “each person possesses an inviolability...that even the welfare of society as a whole cannot override.”<sup>66</sup> However, the justification prioritizing material wellbeing over rights is nonetheless prominent in his Theory of Justice.

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<sup>64</sup> Zuckert, Michael, *Launching Liberalism: On Lockean Philosophy*, (Lawrence: University Press of Kansas, 2002), 321.

<sup>65</sup> Zuckert, *Launching Liberalism*, 321.

<sup>66</sup> Zuckert, *Launching Liberalism*, 312.

Today, CRT casts doubt that liberalism was ever truly just and seeks to reform not only specific policies but also to remove the ideology that allowed for unequal outcomes to come about in the first place.

NRT and CRT differ not only in their plans to accomplish justice, but their understanding of the meaning of justice itself. Justice is accomplished in NRT through the protection of rights. As rights are better protected, justice is better provided for. In a NRT perspective of history, for example, the United States did not fulfil its promise to protect the natural rights of all its people, but as the nation became more convinced of the importance and legitimacy of natural rights, it became more willing to afford those rights to outgroups. The greater the support for natural rights, the more justice is accomplished for disaffected groups. For NRT, justice can be measured through the valuation of inalienable rights.

Zuckert, coming from a more Lockean view of justice, fundamentally disagrees with Rawls on the purpose and definition of rights. Zuckert refers to Locke's explanation of justice, where "every man has a Property in his own Person. This no body has a Right to but himself...And where there is property, there can be justice and injustice."<sup>67</sup> Therefore, justice can be measured as a consequence of valuing individual rights, which has its source in nature.

Zuckert suggests that a viable definition of a right is "a justified claim to do or to have something...a moral power."<sup>68</sup> In having any given right, a person may elect to assert their right or not. Furthermore, there is delineation between positive and negative rights. Negative rights create a limit on government action and do not necessarily suppose

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<sup>67</sup> Zuckert, *Launching Liberalism*, 323.

<sup>68</sup> Zuckert, *Launching Liberalism*, 312.



that the government is obligated to provide any service or benefit. The basic, natural rights to life, liberty, and property are negative rights because they impose limits of forbearance where the individual possessing the rights cannot be deprived of them by legitimate government action. There are no natural positive rights because positive rights are defined by what is owed to an individual. Zuckert uses the right to legal protection as an example of a generally accepted positive right because the government is obligated to provide citizens proper law enforcement, judges, and other essential judicial services. Other examples of positive rights afforded to US citizens would be government programs like social security or Medicare.

The US constitution, federal, state, and local laws guarantee a vast array of both positive and negative rights, which, according to NRT, is justifiable. Not every right a citizen has must be a natural one and the details as to which civil rights a society should create to best protect their natural rights is up for debate according to what seems them good. It is impossible to use natural rights alone to structure an entire society, even in using the most stringent interpretations of NRT which still expect governments to provide basic positive rights like law enforcement.

However, for Rawls there is a more extensive array of positive rights which legitimize the existence of social supports that are seen as equally essential as the natural negative rights. Thus, “Rawls is much friendlier to Big Government than Locke is.”<sup>69</sup>

We’ve examined both the origin of CRT, its identity politic offshoots, and a Jeffersonian interpretation of NRT. To better understand Delgado’s critiques of

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<sup>69</sup> Zuckert, *Launching Liberalism*, 316.

liberalism, we will examine another critical perspective from author Patrick Deneen's book *Why Liberalism Failed*.

### **Deneen's Critique of liberalism**

Deneen's view of modern liberalism is equally as critical as Delgado's, but for different reasons. The primary message of *Why Liberalism Failed* is that liberalism failed because it succeeded, that it fell short of its promises "because it was true to itself."<sup>70</sup> According to Deneen, there have been a number of important commitments made by liberalism that haven't been fulfilled. Instead of achieving economic equality among citizens, liberalism has exacerbated the wealth differences between the rich and the poor, which has only widened in recent decades.<sup>71</sup> Instead of cultivating a healthy diversity of viewpoints, it "enforces uniformity and homogeneity."<sup>72</sup> Rather than encouraging spiritual centeredness, it fosters material and spiritual degradation. Liberalism promised limited government to guarantee individual autonomy, but endlessly enacts additional restrictions that undermine freedom. This limited government was meant to be ruled by the people, yet its citizens feel ever more disconnected from their representatives. Faith in the election cycle has degraded, particularly in America, as seen with the mass movements that considered the 2022 election to be fraudulent and the conspiracies that floated around the 2020 election and its purported connections to foreign powers. The overall extent of control exerted by liberal governments today over the economy and

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<sup>70</sup> Deneen, Patrick, *Why Liberalism Failed*, (New Haven: Yale University Press, 2018), 20.

<sup>71</sup> Deneen, *Why Liberalism Failed*, 25.

<sup>72</sup> Deneen, *Why Liberalism Failed*, 20.

sociality of their countries through regulation and surveillance would “provoke jealousy...from tyrants of old.”<sup>73</sup>

Deneen doesn't see his critique of liberalism so much as a prediction as it a manifesto on the failure of liberalism as an ideology. Deneen does not suppose that society has or will soon end in some apocalyptic event. While society as we know it will continue, it is uncertain whether the political regime we find ourselves under in the future could truly be considered “liberal.” Because of its failures, liberalism is not just in need of an adjustment; it needs to be done away with entirely. The ideology is not merely dying, it is already dead and rotting, evidenced by today's economic inequalities. Deneen seems to consider himself less like a prophet predicting an apocalyptic end to liberalism and more like a coroner diagnosing its cause of death. He generally shies away from offering a comprehensive alternative to liberalism but suggests that we “pursue more local forms of self-government” or else suffer “an oscillation between growing anarchy and the increasingly forcible imposition of order by an increasingly desperate state.”<sup>74</sup>

Deneen reasons that liberalism inevitably failed because of its extreme obsession with individual autonomy, which dissolved the social fabric that keeps communities united. It encourages self-interest to the point that it simultaneously undermines community obligation. Thus, the first chapter of the book is titled *Unsustainable Liberalism*, as he considers liberty to be the primary purpose of liberalism as an ideology. It is possible to have too much of a good thing, and liberalism's philosophical basis in natural law reversed traditional conceptions of what society should aspire to. Instead of implementing the classical philosophies' emphasis on the shared cultivation of virtue as a

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<sup>73</sup> Deneen, *Why Liberalism Failed*, 23.

<sup>74</sup> Deneen, *Why Liberalism Failed*, 52.

community, natural rights focus on recognizing and accepting the vices of human nature. It promotes individual self-interest by continually asking what an individual deserves rather than what an individual ought to become. Deneen blames this shift in focus from the unsustainable high virtues to the low and reliable human faults on Machiavelli, who wrote that “the gap between how people actually behave and how they ought to behave is so great that anyone who ignores everyday reality in order to live up to an ideal will soon discover that he has been taught how to destroy himself, not how to preserve himself.”<sup>75</sup> Machiavelli declared that the virtuous societies that were conceived by Plato and Aristotle had such unrealistically high expectations of behavior that they were counterproductive for the average person to pursue. Instead of promoting a life-long quest for virtue, Deneen suggests that “Machiavelli proposed grounding a political philosophy upon readily observable human behaviors of pride, selfishness, [and] greed.”

According to Deneen, Machiavelli laid the foundation of modern liberalism, and though there is certainly a connection between Lockean NRT and Machiavelli’s cynical booklet advising how a prince could maintain power, the extent to which Locke took inspiration from these remarks is beyond the scope of this paper. Asserting that Machiavelli was correct in arguing that basing a political philosophy on human vices was unsustainable marks Deneen’s first connection between the failure of liberalism and what he considers to be a fundamental flaw in natural rights philosophy. He laments that thinkers decided to give up the hope of human potential to accomplish virtue and instead rely on the consistency of common human vices.

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<sup>75</sup> Deneen, *Why Liberalism Failed*, 38.

We can concede that the Constitution of United States was developed with the mindset of “expect the worst and hope for the best” and it is likely that the Founders would agree with Deneen that the natural rights philosophy relies on the untrustworthy nature of humanity. It would seem that Zuckert agrees with Deneen to a degree here as well. Advocates for NRT understand that their perspective on human nature is skeptical, if not downright cynical. Limited government was necessary because men were more reliably imperfect than they were virtuous. NRT refused to give those in power the benefit of the doubt that many could aspire to a higher morality and instead decided to group all men by the lowest common denominator, self-interest.

Deneen continues by explaining that the rejection of shared conceptions of virtue created a fracture in shared community values. The idea of natural rights became a “new science of politics” separate from religion. Religion became a pretext for arbitrary tyranny instead of being a source of morality in governance. Liberty was redefined as “the liberation of humans from established authority.”<sup>76</sup> Instead of viewing liberty as the ability to choose the Good willingly, it now promoted freedom “from particular duties, obligations, debts, and relationships.”<sup>77</sup>

Increasing freedom from obligation means an increase in individualism, which results in a widening gap between the citizenry and society. This prompts the seemingly contradictory assertion from Deneen that “individualism and statism advance together, always mutually supportive.”<sup>78</sup> Somehow, both in America and Europe, modern liberal democracies are managing to become both increasingly individualistic as well as

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<sup>76</sup> Deneen, *Why Liberalism Failed*, 40.

<sup>77</sup> Deneen, *Why Liberalism Failed*, 31.

<sup>78</sup> Deneen, *Why Liberalism Failed*, 56.

increasingly statist. Deneen explains that the modern political divide in America between conservative individualism and progressive statism is misunderstood, that they are two sides of the same coin. Most policy debates between the two parties can be simplified into an argument over whether its ends “are best achieved by market forces...or by government programs that can distribute benefits...more justly than the market.”<sup>79</sup> They are both ultimately still unified in their support of liberalism because any changes either side advocates for can only come into practical existence through state enforcement. Essentially, both progressives and conservatives rely on the state to “[create] the individual by providing the conditions for the expansion of liberty.”<sup>80</sup> Just as NRT accepts that government is necessary to protect one’s natural rights, it also accepts that any additional civil rights or expansion of freedoms must be enforced by government in some form or another. If freedom is expanded through law, government is subsequently empowered to enforce it. More rights, especially positive rights, mean more government power and authority.

These assertions lead to the conclusion that liberalism is predetermined to end in an intolerably oppressive regulatory state where people continually expand in their self-interested expectations for individual rights while any shared sense of moral virtue fades away. The dissatisfaction with this type of political structure starts to manifest itself through the creation of warring political movements and factions created by the moral vacuum that appears in liberal societies that have used up their moral foundations. Each of these warring political factions are vying to fix the problems of liberalism and better fulfil what they see as its empty promises.

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<sup>79</sup> Ibid.

<sup>80</sup> Deneen, *Why Liberalism Failed*, 59.

Thus, we see today, as Deneen described, that “advanced liberalism is eliminating liberal education with keen intent and ferocity, finding it impractical both ideologically and economically.”<sup>81</sup> It’s no secret that universities across the United States have long been teaching their students to doubt the legitimacy of liberalism, opting to highlight the philosophical advantages of socialism or communism. Therefore, once liberalism uses up its moral foundations, eventually leading to civil and economic dissatisfaction, it also creates its own antagonists in the form of dissatisfied political factions.

### **Delgado and Deneen**

Delgado agrees with many of Deneen’s critiques of liberalism, especially regarding his overall conclusion that liberalism has already failed as an ideology. CRT is similarly discontented with liberalism’s unfulfilled promises. If every increase of freedom means an increase in state power, it follows that the greatest freedoms require the most radical government intervention. There are few positive rights that could be greater in scope than the redistribution of wealth to be equally allocated among racial groups. Thus, it should be no surprise that the radical changes for which CRT advocates would require government power to grow exponentially to make them enforceable.

CRT seems to be an example of the factions that Deneen implies come about as a result of oscillating between anarchy and authoritarianism. It, like many other political movements that are antagonistic towards liberalism, remains disenchanted with the results liberalism has produced, especially economic inequality. This matches Deneen’s observation perfectly in that “civic unhappiness is mirrored in economic discontent.”<sup>82</sup>

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<sup>81</sup> Deneen, *Why Liberalism Failed*, 27.

<sup>82</sup> Deneen, *Why Liberalism Failed*, 25.

However, instead of moving towards communitarian politics, CRT doubles down on individualism and statism to the point of twisting liberalism into unrecognizability. It focuses on what one is owed based on one's racial group and uses the state to enforce those expectations. If man cannot be trusted to treat their fellow citizens equally, the government must step in to ensure equality in every measure. Deneen would fervently disagree that the problem with liberalism is a White hierarchy and likely claim that such a perspective merely masks the larger problem of radical individualism, since "...reflecting upon what follows liberalism's self-destruction [does not] imply that we must simply devise its opposite or deny what was of great and enduring value in the achievements of liberalism"<sup>83</sup> as CRT is apt to do. Rather than solving liberalism with more individualism and statism, Deneen suggests we retreat from both and reembrace a more classical conception of virtue through communitarian societies focused on cultivating moral values.

### **Deneen and Zuckert**

Deneen's primary criticism of liberalism is its fascination with an ever-increasing amount of individualism. Zuckert agrees, noting that America is created out of a fusion balancing republican interests with the individualism found in natural rights theory, further worrying "if American institutions are born from the soil of Puritanism, what resources have they to survive and thrive as that soil loses its nutritive power?"<sup>84</sup> Unlike Deneen, Zuckert believes it is possible to balance these opposing requirements. How, exactly, America is supposed to stay religious or keep some sense of shared virtue in an

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<sup>83</sup> Deneen, *Why Liberalism Failed*, 33.

<sup>84</sup> Zuckert, Michael, *The Natural Rights Republic*, 123.



increasingly secularized society that simultaneously contends with the moral virtue of its history is unclear in Zuckert's writings.

In comparing Richard Delgado's explanation of critical race theory, Michael Zuckert's defense of the fusion of natural rights and republicanism, and Patrick Deneen's critique of modern liberalism, we've found a variety of intersecting ideas. All three authors agree that unrestrained self-interest is destructive, but their solutions to avoid its uncontrolled growth are radically different.

Delgado's dissatisfaction with liberalism results in a suggestion to tear apart liberalism from the inside through policy and structural changes. It intends to force the modern liberal order to make good on its implicit promises of equality by enforcing material racial equity through various methods of government redistribution. It embraces individualism by asking for what an individual is owed, their positive rights to social support, although its racial identity politics simultaneously require group conformity to achieve these lofty goals. Delgado agrees with Deneen that liberalism is hopeless, but lacks an alternative ideology to comprehensively replace it that can limit the arbitrary use of power.

Patrick Deneen is sure that liberalism is already dead and that we're merely awaiting its collapse entirely. His commentary regarding the problems liberalism has produced has merit, but the overall impact of his predictions about what will happen in the future are unclear. Deneen does not clearly explain whether liberalism will go out with a bang or a whimper. Will it end in a bloody civil war fought by dissatisfied political factions, or will it slowly morph into an unrecognizable totalitarian state that hypocritically proclaims to protect individual freedoms? Although Deneen seems to

imply that he agrees with Tocqueville's conclusion in *Democracy in America*, namely that the US's experiment in democracy would end in despotism<sup>85</sup>, the message is unclear. The future of liberalism aside, Deneen also fails to provide a viable solution for his predicted political apocalypse. For Deneen, "the impulse to devise a new and better political theory in the wake of liberalism's simultaneous triumph and demise is a temptation that must be resisted," since "the search for a comprehensive theory is what gave rise to liberalism...in the first place."<sup>86</sup> This means that our focus should not be on finding a better ideology, but on creating better moral practices within communities. Not wanting to leave his readers on an entirely depressing note, though, he seems express some hope for some type of small communal societies that take more after the ideas given in Plato's *Republic*. To avoid the depersonalization of liberalism, efforts to create a postliberal society "should focus on building practices that sustain culture within communities, the fostering of household economics, and "polis life," ...[from] which habits of memory and mutual obligation arise."<sup>87</sup> Whether he believes that it is possible for large nations to ever exist in the future sustainably as they do under the current political system is also unclear.

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<sup>85</sup> Deneen, *Why Liberalism Failed*, 173.

<sup>86</sup> Deneen, *Why Liberalism Failed*, 186.

<sup>87</sup> Deneen, *Why Liberalism Failed*, 183.

## Conclusion

Although CRT is incompatible with many of the fundamental aspects of natural rights, there are still instances where CRT and NRT do not conflict. Using racial equity as a rough estimation of fairness is not out of the question for NRT. For example, there are plenty of modern libertarian groups who are strong supporters of NRT advocating for systemic changes to the US criminal justice system for the sake of removing racial discrimination. Racial inequity present in criminal sentencing would certainly be worth examining under an NRT framework to root out any discriminatory laws or procedures. It is very possible that discriminatory policies still exist in many different parts of the US legal system that ought to be changed to conform to NRT's promises of equality under the law. Racial equity can still be a useful tool to shape public policy under NRT, but the conflict between the two theories comes in value priorities. NRT places inalienable rights before all other considerations while CRT values racial equity, even at the expense of liberal principles like rights.

Liberalism, with its NRT core, should be preferred over CRT as a system of government and ideology because it is more reliable, more sustainable, and far more developed than CRT in its current state as a worldview. It would be a mistake to take apart the current liberal order without even having an idea with what should stand in its place. Furthermore, the rational moral framework of liberalism, natural rights, is a superior system to judge the morality of both governments and individuals because of its relative consistency in contrast to humanity's natural, vague moral senses and urges.

In comparing these different perspectives, Zuckert remains the cautious optimist between the two extremes expressed by the other authors. Addressing the tension between community obligation and individual rights, Zuckert expresses his belief that the amalgamation that made the natural rights republic possible was a balancing of elements such as “republicanism and the natural rights philosophy.”<sup>88</sup> Although this fusion “is surely not...a seamless and unproblematic whole...their irrevocable splitting apart...might be the signal of the decline of America.”<sup>89</sup> Zuckert ends his book by saying “I know of no simple way to resolve this tension- perhaps it should not be resolved. The American amalgam, perhaps, is just such a tension....”<sup>90</sup>

It is not impossible to both embrace natural rights philosophy and accept some of the unique criticisms offered by Delgado and Deneen. The natural rights republic certainly has its flaws, but if we are to believe Michael Zuckert, perhaps the collapse of liberalism is not as inevitable as the other authors would have us believe. Maybe it can even be reversed. Restoration of a common understanding of virtue and morality is absolutely vital if the United States intends to continue existing sustainably. A united culture, whether through religious beliefs or shared ideals of natural rights, is a necessary element for a nation filled with so many diverse identities and backgrounds to keep itself from falling apart. The societal scale weighing the communal obligations found in republicanism against America’s original devotion to individual, natural rights must be

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<sup>88</sup> Zuckert, Michael, *The Natural Rights Republic*, 95.

<sup>89</sup> Ibid.

<sup>90</sup> Zuckert, Michael, *The Natural Rights Republic*, 243.

rebalanced by making the decision to reevaluate what we owe to each other, rather than asking what rights are owed to us.

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