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(RE)BUILDING THE MASTER’S HOUSE: DISMANTLING AMERICA’S COLONIAL POLITICS OF EXTRACTION AND EXCLUSION

*Marissa Jackson Sow**

INTRODUCTION

On February 10, 2021, and in the days thereafter, liberal American commentators showered Congresswoman Stacey Plaskett with superlatives and praise due to her masterful takedown of former President Donald Trump during his impeachment trial for incitement of the January 6, 2021 Capitol Riot.¹ Referring to a picture of Plaskett wearing a knee-length blue dress with draped sleeves, the political strategist (and daughter of House Majority Leader Nancy Pelosi) Christine Pelosi took to Twitter to note that “[n]ot all superheroes wear capes. This one does!”²

Plaskett is one of many Black Americans who has done the hard work of cleaning up the chaos left behind by former President Trump.³ This group includes Amanda Gorman, who rubbed balm into the nation’s weary soul at President Biden’s inauguration;⁴ the Senate Chaplain, Barry Black,

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1. See Colby Itkowitz, *Stacey Plaskett, a House Delegate Who Couldn’t Vote to Impeach Trump, Is Using Her Prosecutorial Background to Try to Convict Him*, WASH. POST (Feb. 10, 2021, 7:10 PM), <https://www.washingtonpost.com/politics/2021/02/10/stacey-plaskett-house-delegate-who-couldnt-vote-impeach-trump-is-using-her-prosecutorial-background-try-convict-him> [perma.cc/VUX9-KW3G].

2. Christine Pelosi, (@sfpelosi), TWITTER (Feb. 10, 2021, 3:04 PM), <https://twitter.com/sfpelosi/status/1359594124588929025?s=12> [perma.cc/3PVY-ZJ7J].

3. See Cate Young, *Who Cleans Up After a Coup Attempt?*, CUT (Jan. 8, 2021), <https://www.thecut.com/2021/01/essential-workers-cleaned-up-capitol-riot.html> [perma.cc/GLE5-LH72].

4. See Katie O’Malley, *Read Amanda Gorman’s Poem ‘The Hill We Climb’ in Full and Feel Immediately Inspired*, ELLE (Jan. 21, 2021), <https://www.elle.com/uk/life-and-culture/culture/a35276230/amanda-gormans-poem-the-hill-we-climb/> [perma.cc/QVV5-6Z6E].

who attempted to bring a sense of purpose and dignity to the tense impeachment proceedings with solemn prayer;⁵ Capitol Hill Police Chief Yogananda Pittman, who was appointed to her post two days after the Capitol Riot⁶ as part of a phenomenon known as the “glass cliff” whereby women and people of color (and certainly women of color) are named to positions of leadership in moments of crisis;⁷ and Capitol Police Officer Eugene Goodman, who heroically helped Senators evacuate the Capitol as it came under siege, while also diverting the mob away from the lawmakers.⁸ Still others, who remain nameless and largely faceless, were charged with quite literally cleaning up the Capitol after insurrectionists ransacked it⁹ and destroyed a tribute to the late Congressman John Lewis in the process.¹⁰

5. See Robin Givhan, *The Impeachment Trial Begins in a Moment of Prayer. One Can Only Hope It's Not in Vain.*, WASH. POST (Feb. 12, 2021, 6:52 PM), <https://www.washingtonpost.com/nation/2021/02/12/impeachment-trial-begins-moment-prayer-one-can-only-hope-its-not-vain> [perma.cc/9WFS-QWWD].

6. Brakkton Booker, *In Historic 1st, U.S. Capitol Police Name Yogananda Pittman as Acting Chief*, NPR (Jan. 11, 2021, 11:33 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/11/955598516/in-historic-first-u-s-capitol-police-name-yogananda-pittman-as-acting-chief> [perma.cc/2NFG-R5WE].

7. For an explanation of the glass cliff phenomenon, see Emily Stewart, *Why Struggling Companies Promote Women: The Glass Cliff, Explained*, VOX (Oct. 31, 2018, 7:00 AM), <https://www.vox.com/2018/10/31/17960156/what-is-the-glass-cliff-women-ceos> [perma.cc/PZ7V-MAF4]. For example, shortly after Pittman's appointment, the Capitol Police union issued what was effectively a rebuke of her handling of the Capitol Riot. Pittman also bore the burden of apologizing for the force's “failings” during the riot. Claudia Grisales, *U.S. Capitol Police Union Issues No-Confidence Vote for Top Leaders*, NPR (Feb. 16, 2021, 12:17 PM), <https://www.npr.org/2021/02/16/968307742/u-s-capitol-police-union-issues-no-confidence-vote-for-top-leaders> [perma.cc/2Z5X-QPK5].

8. Rebecca Tan, *A Black Officer Faced Down a Mostly White Mob at the Capitol. Meet Eugene Goodman.*, WASH. POST (Jan. 14, 2021, 1:42 PM), https://www.washingtonpost.com/local/public-safety/goodman-capitol-police-video/2021/01/13/08ab3eb6-546b-11eb-a931-5b162d0d033d_story.html [perma.cc/FEZ6-HJ4P].

9. See, e.g., Emma Nolan, *Video of Black Capitol Workers Cleaning up After Mob Mayhem Goes Viral*, NEWSWEEK (Jan. 7, 2021, 9:08 AM), <https://www.newsweek.com/video-black-capitol-workers-cleaning-capitol-riots-trump-supporters-1559674> [perma.cc/68NP-54DR]; Elvina Nawaguna & Kayla Epstein, *‘It Was Degrading’: Black Capitol Custodial Staff Talk About What It Felt Like to Clean Up the Mess Left on January 6 by Violent Pro-Trump White Supremacists*, BUS. INSIDER (Jan. 13, 2021, 9:28 AM), <https://www.businessinsider.com/capitol-riot-custodial-staff-cleanup-janitors-maga-trump-white-supremacists-2021-1> [perma.cc/2383-24D4]; Young, *supra* note 3.

10. Zack Budryk, *Hoyer Says Rioters Destroyed Display Commemorating John Lewis*, HILL (Jan. 7, 2021, 12:49 PM), <https://thehill.com/homenews/house/533142-hoyer-says-rioters-destroyed-display-commemorating-john-lewis> [perma.cc/YH7Q-286F].

While Brooklyn-born¹¹ Plaskett gave her best to the United States during her presentation of evidence during the trial, she did so from a relatively disempowered position. The congresswoman is a nonvoting delegate:¹² the U.S. Virgin Islands are an American territory,¹³ not a state.¹⁴ Though her work be queenly, neither she nor her fellow Virgin Islanders enjoy full legal personhood in the United States; they are excluded from full political participation because they remain American subjects.¹⁵ Plaskett is thus competent to give her labor and expertise to prosecute Donald Trump—but had no right to vote for or against him, or even in support of the impeachment proceeding over which she would preside.¹⁶

This Essay attempts to explain why Plaskett and her fellow nonvoting delegates from American Samoa, the District of Columbia, Guam, and the Northern Mariana Islands¹⁷ as well as the resident commission from Puerto

11. Aishvarya Kavi, *Stacey Plaskett: An Impeachment Manager Who Couldn't Vote to Impeach*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/01/13/us/politics/stacey-plaskett-impeachment-manager.html> [perma.cc/3KG9-XMDQ] (describing Plaskett as having been “[b]orn in Brooklyn to parents who hailed from the Virgin Islands”).

12. *Id.*

13. The U.S. Virgin Islands are an unincorporated territory of the United States. 48 U.S.C. § 1541(a) (2006); *see* Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706. For a definition of a territory, *see* Selden Bacon, *Territory and the Constitution*, 10 YALE L.J. 99, 101 (1901) (“It thus appears that ‘the territory of the United States’ includes impartially all territory outside the several States over which the United States exercises jurisdiction, sovereignty and dominion, without regard to character, form, kind, or even existence of local organization or government . . .”). Congress established the Virgin Islands’ local government under the Organic Act of 1936, as amended, 48 U.S.C. §§ 1405–1406m (2006), and the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541–1645 (2006). *See also* 48 U.S.C. §§ 1392–1397 (2006).

14. The U.S. Constitution provides for political representation in Congress for states. U.S. CONST. art. 1, § 2; *see also* John C. Fortier, *The Constitution is Clear: Only States Vote in Congress*, 116 YALE L.J. POCKET PART 403 (2007), <https://www.yalelawjournal.org/forum/the-constitution-is-clear-only-states-vote-in-congress> [perma.cc/R7QK-YQYK]. Fortier wrote in response to José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389 (2007), who wrote of the “undemocratic status” of the “colony” of Puerto Rico and the District of Columbia.

15. *See* Stacey Plaskett, *The Second-Class Treatment of U.S. Territories is Un-American*, ATLANTIC (Mar. 11, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/> [perma.cc/4AMN-BS6L]. The exclusion is not merely political, but also financial. Andrew Hammond has written about U.S. federal law’s exclusion of American citizens from welfare benefits because of their residency in United States territories, noting that residents of certain territories retain eligibility for some welfare benefits, while residents of other territories may be completely ineligible. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1641–42 (2021).

16. *See* Kavi, *supra* note 11.

17. *See* 48 U.S.C. §§ 1711–1757 (providing for delegates to represent Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands).

Rico¹⁸ are allowed to work for the United States—why, indeed, their work may be celebrated for its patriotism¹⁹—even as they are excluded by law from full political proprietorship. It challenges the notion that the United States is undergoing a racial justice awakening as it continues to perpetuate its subjugation of, and extraction from, its colonial territories—all of which are populated predominantly by Indigenous²⁰ people and people of African descent.²¹ Instead, this Essay claims that the United States’ refusals to grant statehood or the franchise to its colonial territories and Washington, D.C.²² reveal its commitment to white supremacy.

The Essay calls on readers to abandon the prevalent, romantic narrative of an America established for liberty and justice for all in favor of a sober confrontation of the brutality upon which the republic was formed and continues to operate. As such, it is both descriptive and prescriptive. Part I analyzes the construction of the United States via settler colonialism and the development of the racial contract. Part II discusses the service that Black people in the United States render to the nation using the contractual doctrine of promissory estoppel and reliance. Part III proposes ways to decolonize—and deconstruct—the structural racism fueling American governance, offering up statehood for Washington, D.C., and enfranchisement or emancipation for U.S. territories as solutions. The Essay concludes with a call for radical legal and political transformations and a decisive revocation of the colonialism upon which the racial contract was originally negotiated and continues to operate.

18. See 48 U.S.C. § 891 (providing for the election of a resident commissioner to represent Puerto Rico in the U.S. House of Representatives).

19. See, e.g., Itkowitz, *supra* note 1; see also Pelosi, *supra* note 2 and accompanying text (displaying a tweet celebrating Plaskett’s management of the impeachment proceedings).

20. In this Essay, I use the term “Indigenous” to account for members of American Indian nations, Indigenous peoples hailing from the United States’ colonial territories, and Latinx people of Indigenous/North American Indian heritage and descent. I recognize that all people are indigenous to a place, and so I have sought to use a term here that is respectful and which allows me to efficiently and effectively include the experiences of members of the many Native nations.

21. In this Essay, I primarily refer to people of African descent on the U.S. mainland and in U.S. territories interchangeably as Black and Black American, because not all identify as ethnically African American due the colonial status of some territories and their location on Caribbean islands.

22. In June 2020, the U.S. House of Representatives voted in favor of granting the District of Columbia statehood for the first time ever. See Jenna Portnoy, *D.C. Statehood Approved by U.S. House for First Time in History*, WASH. POST (June 26, 2020, 6:00 PM), https://www.washingtonpost.com/local/dc-politics/dc-statehood-vote/2020/06/25/c2ac1670-b6ee-11ea-a8da-693df3d7674a_story.html [perma.cc/R3UB-EVGY]. The Trump administration responded by confirming that it opposed the statehood initiative, and then-Senate Majority Leader Mitch McConnell refused to bring the bill to a vote in the U.S. Senate. *Id.*

I. AMERICA AND WHITENESS AS COLONIAL CONSTRUCTIONS

To help people depersonalize race and racism and understand both as features of white supremacy—a costly, brutal political system of oppression that is bargained-for as a means of hoarding capital and privileges—I have built upon the work of scholars such as Charles Mills and Cheryl Harris to form the theory of whiteness as contract. Charles Mills is known for his theory of the racial contract,²³ which writer Adam Serwer has artfully described as “a codicil rendered in invisible ink, one stating that the rules as written do not apply to nonwhite people in the same way”²⁴ and which I have described as “invisible common law.”²⁵ Cheryl Harris describes whiteness as property, and in so doing, she explains race as something that is not biological or natural, but a status that is conveyed and enjoyed—as capital that is possessed or owned.²⁶ Here, I journey just beyond Mills’s racial state to demonstrate the role of his racial *superstate* as the racial state’s progenitor.²⁷ In this Part, I define whiteness-as-contract as a system of public agreements that are operationalized by commercial contracting, authorized by law, and intentionally create a state in which white domination of land and capital was once the express law of the land and now remains so informally. I discuss the contracting of whiteness through the lens of traditional contractual elements, using those elements to describe just how the United States’ white-supremacist social contract was bargained for through settler-colonial conquest. Finally, I challenge the prevalent hagiography of the United States—as a nation borne out of a liberation struggle—through an analysis of American courts’ concretization of whiteness; in other words, I argue that judicial negotiations and codifications of settler colonialism (and all the brutality inherent thereto) served racial contractors.

A. *Contracting Whiteness*

Whiteness-as-contract serves as the paradigmatic foundation for this Essay. Whiteness-as-contract conceptualizes race as a social, political, and economic agreement that has been given the express force of statutory law,

23. See CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

24. Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, ATLANTIC (May 9, 2020, 12:25 PM), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [perma.cc/Z8TY-UXKT].

25. Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1879 (2022).

26. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714–16 (1993).

27. See MILLS, *supra* note 23, at 33 (“Globally, the Racial Contract creates Europe as the continent that dominates the world; locally, within Europe and the other continents, it designates Europeans as the privileged race.”).

and which also governs society through private ordering.²⁸ A contract is a legally enforceable agreement²⁹ requiring an offer, acceptance of the offer, bargained-for consideration, legality, contractual capacity, and contractual intent.³⁰ Contract theory also provides defenses to breaches of contractual performance.³¹ The sociopolitical contracting of whiteness throughout American history—from colonial expansion to present-day colonial maintenance—involves these elements, and it also relies upon remedies for, and defenses against, breaches of contractual performance.

Whiteness-as-contract is an agreement among colonizers—bargained for, by, and among themselves, as discussed below—to perpetuate expropriation of real property, extraction of natural resources and human or other capital, and exclusive dominion over the sociopolitical franchise.³² The theory highlights the role that commercial contracting plays in facilitating and enforcing the United States' racist social contract: Whiteness is operationalized and sustained by a “system of separate yet interrelated and coordinated commercial (and legally enforceable) contracts and social contracting, which is often tacit though given force through the law.”³³ The contractors intentionally bargained for exclusively white economic, political, and social power—in other words, full personhood for white people. They also then bargained for the exclusion of Black people from full personhood, including the right to contract with the white body politic or exercise personal, social, or political proprietorship.³⁴ In constructing race as a performance mechanism for the contract, the contractors gave exclusive social and contractual capacity and full citizenship rights (and thus privity, or a relationship recognized by law, with their government) to landowning white people.³⁵ The contractors then relied upon the courts to

28. See Marissa Jackson Sow, *Whiteness as Contract as a Framework for Understanding America's Police Problem: Part I*, CONTRACTSPROF BLOG (Apr. 27, 2021), https://lawprofessors.typepad.com/contractsprof_blog/2021/04/guest-blogger-marissa-jackson-sow-on-whiteness-as-contract-and-the-police-part-i.html [perma.cc/2TFK-3GC5] (describing whiteness as a “matter of law and policy” and noting that “[w]hiteness is not inherently biological, though it is biologized over time, so long as the terms of whiteness remain stable”).

29. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981).

30. See *id.* §§ 12, 17, 21, 22, 71, 368.

31. Marissa Jackson Sow, *Coming to Terms: Using Contract Theory to Understand the Detroit Water Shutoffs*, 96 N.Y.U. L. REV. ONLINE 29, 35 (2021) (“Classical contract theory requires a bargained-for exchange resulting in mutual benefit to the contracting parties, and it provides for defenses to breaches in performance of the contract.”).

32. See *id.*

33. Jackson Sow, *supra* note 28.

34. See Jackson Sow, *supra* note 25, at 1810–11, 1825.

35. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (codifying the right of European settlers to conquer and expropriate Indigenous land on the basis of settlers' statuses as Europeans and Christians, which quickly became defined as whiteness); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional*

codify and legalize the terms and benefits of whiteness, along with the burdens and penalties of nonwhiteness.

In earlier work, I have made the claim that the United States' racial contract "constructs Blackness such that Black people lack the capacity to contract with the state, and therefore have no claims to property they may possess, or even own, at any given time or place."³⁶ Using the example of the Detroit water crisis, I discussed the presence of an illusory social contract between the city's predominantly Black population—that the local and state government and federal courts have portrayed as valid and enforceable—in contrast to the invisible, but very real, social contract that the local and state government maintains with suburban Detroit's white body politic via commercial and government contracting for material resources that they extract from Detroit's Black citizenry.³⁷ Whiteness-as-contract necessarily excludes non-white people from the social contracting process and the mutual benefits of the contract's performance, including privity or rights owed to them by the state. But what is remarkable about the contracting of whiteness is that it is also wholly dependent upon an inability of Black and Indigenous people to engage in independent contracting, as such contracting would lead to proprietorship and the amassment of financial, social, and political capital by Black and Indigenous people—thus undermining the ability of the white body politic to exercise dominance over them or efficiently and effectively exploit them. As such, non-white proprietorship—whether that is ownership of real property, political enfranchisement,³⁸ or even ownership of social capital (such as the

amendment, U.S. CONST. amend. XIV (formally excluding Black people from U.S. citizenship and defining citizenship as the province of white Americans).

36. Jackson Sow, *supra* note 31, at 36.

37. *Id.*

38. In the wake of the 2020 elections, Republicans in state legislatures have ramped up efforts to curb voting rights by voting in favor of measures that disproportionately affect Black voters. Georgia and Florida passed legislation curbing voting rights in early 2021. See Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [perma.cc/2FBA-HM3W] (noting that measures similar to those enacted in Georgia "have depressed voting mostly among people of color"); Adeel Hassan, *What's in Florida's New Voting Law?*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/article/florida-voting-law.html> [perma.cc/277Y-DMWF] (noting that "[c]ritics said the law will disproportionately affect people of color").

ability to be present in the public square without being subject to harassment³⁹ or elimination by private citizens⁴⁰ or law enforcement⁴¹)—is always at risk of white seizure and cannot be counted upon as a right by

39. Amy Cooper's infamous harassment of Christian Cooper in New York City's Central Park on Memorial Day 2020 stands as evidence of the risk that Black people face by simply being alive in public when private citizens target them for surveillance, police contact, and other forms of harassment and violence. See Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html> [perma.cc/9EC5-26BK]. On that same day in Minneapolis, Minnesota, a store clerk called the police on George Floyd on suspicion of passing counterfeit money, and Floyd was murdered by Minneapolis Police Department officer Derek Chauvin. See Heidi Stevens, *Column: George Floyd, Killed in Minneapolis, Is Why Amy Cooper's Central Park Call Was So Repugnant*, CHI. TRIB. (May 27, 2020, 11:45 AM), <https://www.chicagotribune.com/columns/heidi-stevens/ct-heidi-stevens-amy-cooper-george-floyd-weaponized-whiteness-0527-20200527-voun4un45zarte3zdayulr573m-story.html> [perma.cc/NWS3-BXUT]; John Eligon, Shaila Dewan, Tim Arango & Nicholas Bogel-Burroughs, *Clerk Who Questioned \$20 Bill Watched Floyd Arrest With 'Disbelief and Guilt'*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/03/31/us/chauvin-trial-floyd.html> [perma.cc/E56J-3XSK].

40. Black people are at risk of being killed by private citizens while in public. Michael Dunn murdered 17-year-old Jordan Davis for playing music loudly at a gas station in Jacksonville, Florida in 2012. See Richard Luscombe, *Michael Dunn Sentenced to Life Without Parole for Killing of Florida Teenager*, GUARDIAN (Oct. 17, 2014, 1:42 PM), <https://www.theguardian.com/us-news/2014/oct/17/michael-dunn-sentenced-life-without-parole-florida> [perma.cc/CE8E-78EL]. In 1998, the white supremacist John William King and two friends murdered James Byrd, Jr., beating him, chaining him to the back of a truck and dragging him along a road for a mile and a half until his head and other body parts tore away from the rest of his body. See Shane Croucher, *The Lynching of James Byrd Jr.: Two Decades Ago This Racist Murder Shocked America. Now His Killer Faces Execution*, NEWSWEEK (Apr. 20, 2019, 5:00 AM), <https://www.newsweek.com/james-byrd-jr-lynching-texas-death-row-execution-1394474> [perma.cc/495G-28ES]. In 2020, a group of men, at least one of whom was wearing clothing featuring the Confederate flag, attacked Black human rights advocate Vauhxx Booker and attempted to lynch him near Lake Monroe in Indiana, on July 4. See Steve Gorman & Mark Hosenball, *FBI Investigates Reported July 4 Lynching Attempt in Indiana*, REUTERS (July 9, 2020, 9:18 PM), <https://www.reuters.com/article/us-indiana-lynching/fbi-investigates-reported-july-4-lynching-attempt-in-indiana-idUSKBN24B042> [perma.cc/FK32-TR68].

41. Black people are also at risk when in the private domain, and law enforcement officers have recently killed unarmed and unwitting Black people in their own private residences, including Botham Jean, Atatiana Jefferson, and Breonna Taylor—all of whom were young Black professionals in their twenties who were shot to death in their homes. See Erik Ortiz, *Amber Guyger Found Guilty of Murder at Trial in Fatal Shooting of Neighbor Botham Jean*, NBC NEWS (Oct. 1, 2019, 5:29 PM), <https://www.nbcnews.com/news/us-news/amber-guyger-found-guilty-murder-trial-fatal-shooting-neighbor-botham-n1060506> [perma.cc/X36K-FUJ6]; Erik Ortiz, *Fort Worth Police Officer Who Fatally Shot Atatiana Jefferson Indicted on Murder Charge*, NBC NEWS (Dec. 20, 2019, 2:02 PM), <https://www.nbcnews.com/news/us-news/fort-worth-police-officer-who-fatally-shot-atatiana-jefferson-indicted-n1105916> [perma.cc/GY45-WUPN]; Richard A. Opper, Jr., Derrick Bryson Taylor & Nicholas Boel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [perma.cc/9XL9-9BZD].

Black and Indigenous people. Whiteness-as-contract brings into sharp focus the fact that while human rights spring forth from nature, the laws protecting them do not: law, too, is human construction, and in a democracy, it is the product of human negotiation.

America's formal social compact—the Constitution—reflects the negotiations of a body politic organized around the construction and terms of whiteness. Out of those negotiations, that body politic carved out for itself a dominion known as America that would be fueled and enriched by the labor of Black and Indigenous peoples in its territories, with whom the benefits of citizenship and citizenship's rights would not be shared. Whiteness-as-contract thus contributes to traditional contract theory while also existing as an inherent critique thereof.⁴² It decolonizes contract and commercial law scholarship, but, as a framework, it may also serve as an intellectual underpinning of what I argue is a much-needed decolonization of America itself. Whiteness-as-contract, therefore, is useful to lawmakers, policymakers, advocates, and activists who seek a progressive articulation of race—and who, more importantly, want to move beyond talking about the dismantling of white supremacy and toward actually dismantling it.⁴³

B. *Settler Colonialism and the Construction of the United States*

America's hagiographers portray the United States as a revolutionary anti-colonial project, wherein the Founders stood up to King George and vanquished his loyalists to create a rugged Land of the Free.⁴⁴ This narrative fails to highlight that the mere idea of America was premised upon colonial settlement and expansion justified by the creation of race and racial hierarchy.⁴⁵ American colonialism is so fundamental to American law that even first-year law students can scarcely avoid learning about the doctrine of discovery⁴⁶ as the cornerstone of American conceptions of property rights via Chief Justice Marshall's opinion in *Johnson v. M'Intosh*.⁴⁷ An

42. See Jackson Sow, *supra* note 28.

43. See *id.* at 1881, 1887–88.

44. See ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 1–7 (2014) (deconstructing the American “origin myth” as one that fundamentally embraced colonialism—instead of rejecting it—through the colonization of indigenous people).

45. See *id.* at 2 (“The history of the United States is a history of settler colonialism—the founding of a state based on the ideology of white supremacy, the widespread practice of African slavery, and a policy of genocide and land theft.”).

46. Roxane Dunbar-Ortiz describes the doctrine of discovery as “a narrative about Puritan settlers who had a covenant with God to take the land.” *Id.* at 3. In *Johnson v. M'Intosh*, Chief Justice John Marshall describes the doctrine in detail, relying upon it to reach the Court's decision that private citizens could not purchase land from Indigenous Americans. 21 U.S. (8 Wheat.) 543 (1823).

47. 21 U.S. (8 Wheat.) 543 (1823). *Johnson v. M'Intosh* forms part of an “anticanon” of cases that law school students are taught to regard unfavorably; however, because it is still regularly taught to first-year law students as the cornerstone of American property rights,

excavation of early American case law demonstrates that American courts relied upon racial formations for the success of the Euro-American colonial project, upon which, in turn, the establishment and sustainability of the republic also depended.⁴⁸ In order to promulgate and secure the desired racial hierarchy, the courts used religious doctrine as a basis for constructing into law an inalienable right of contract for people of European descent, while simultaneously constructing into law the denial of the right of contract to non-Europeans⁴⁹—Indigenous Americans, who lost their proprietorship of their lands, and enslaved Africans, who were themselves the personal property of Europeans. The holding in *M'Intosh*, in which the Supreme Court decided that private citizens could not enter into contract with Indigenous Americans to purchase their lands,⁵⁰ is a prime example of how commercial contracting—and the stripping of the rights to contract from people raced as nonwhite—supported the colonial American project and the formation of the United States and guaranteed perpetual racial hegemony by enshrining the terms of the racist social contract into law.⁵¹

In *M'Intosh*, Chief Justice Marshall relied upon “principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man,”⁵² to justify his analysis and conclusion, without explaining how exactly the Creator confirmed to him and his peers what such principles were or how they should be applied.⁵³ Reliance upon the divine provided a convenient guise for the Court to justify—and more importantly, legalize and codify—the ability of Europeans to extinguish Indigenous occupancy rights of lands that the Europeans sought to expropriate.⁵⁴ The Court’s tortured logic, once sheltered beneath an inherently racialized delegation of rights that was itself sheltered beneath convenient claims of religious revelation to “civilized nations,” allowed it to give force to:

and because it is still cited as authority by courts, the case’s Eurocentric and anti-Indigenous perspective is still centered as standard American political ideology and legal doctrine. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 11–12 (2005).

48. *E.g.*, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (reserving U.S. citizenship for white Americans); see also ANIA LOOMBA, *COLONIALISM/POSTCOLONIALISM* 4 (3d ed. 2015) (“Is racial difference produced by colonialist domination, or did colonialism generate racism?”).

49. See *supra* note 46.

50. *M'Intosh*, 21 U.S. (8 Wheat.) at 604–05.

51. *Id.* (declaring that “such purchases are opposed by the soundest principles of wisdom and national policy”).

52. *Id.* at 572.

53. See DUNBAR-ORTIZ, *supra* note 44, at 3–4 (discussing the origin narrative of the United States reinforced by the doctrine of discovery, which Dunbar-Ortiz traces back to “a series of late-fifteenth-century papal bulls,” which determined that “Indigenous inhabitants lost their natural right to . . . land after Europeans arrived and claimed it”).

54. See *id.*

[T]hose principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.⁵⁵

Because the lands that the Court claimed were discovered by European settlers were in fact already occupied by Indigenous Americans, the doctrine of discovery makes no sense without the construction of race and, more specifically, white supremacy. The contracting of whiteness was thus central to the doctrine of discovery articulated by the Court. Though the doctrine of discovery was codified as public law in the United States in *M'Intosh*, the doctrine itself dates back to the fifteenth century.⁵⁶ It was promulgated for the explicit purpose of justifying the conquest of land outside of Europe by Europeans.

The doctrine has manipulation, intellectual dishonesty, and gaslighting at its core, which is apparent even in its discursive tools. The use of the term “discovery” as it relates to European arrival upon such lands is a guise that purposely centers the European as the only possible discoverer, as the arbiter of the land’s purpose, value, and history—the existing and previous occupation of the land by non-Europeans notwithstanding. Likewise, the use of the term “settle” to describe European conquest and occupation means to indicate that the status of the lands was up for grabs before European arrival, and was to be hopelessly “unsettled” unless and until Europeans conquered them. The doctrine specified (arbitrarily) that colonization of the land turned on whether it was occupied by Christians—an identifier which quickly became racialized. The *M'Intosh* Court’s holding reflects this racialization:

This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

55. *M'Intosh*, 21 U.S. (8 Wheat.) at 572–73; see also MILLS, *supra* note 23, at 2–13 (1997) (“In the white settler state, [the] role [of the ‘state of nature’] is not primarily to demarcate the (temporarily) prepolitical state of ‘all’ men (who are really white men), but rather the permanently prepolitical state, or, perhaps better, *non*political state . . . of nonwhite men.”).

56. See DUNBAR-ORTIZ, *supra* note 44, at 3.

....

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. . . .

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.⁵⁷

Indeed, men felt entitled to journey across the Atlantic, find land occupied and labored upon by Indigenous peoples, and—to justify their forcible expropriation—declare that land and the people thereupon wild and in need of European Christian domination. They would kidnap, purchase, insure, and import Africans to cultivate the land and build capital for them under persistent threat of death, in what Republican Senator Tom Cotton has recently described as the “necessary evil,”⁵⁸ or the price of American liberty. The “tyrannical rule of some by others”⁵⁹ is therefore a key element of American democracy, as it is of settler colonialism. Colonialism and enslavement were essential material for the construction of the American project; America would not have been possible without them.⁶⁰ Colonialism and enslavement, for their parts, would not have been possible without the construction of race and the implementation of a social, legal, and economic system we now call racism or, more specifically, white supremacy.⁶¹

Mills’s racial contract is operationalized by physical violence and ideological conditioning.⁶² Colonialism is operationalized by gaslighting, a merger of the two. Colonialism calls upon the colonized to forget about—to get over—colonialism, to stop living in the past, as if colonialism does not still impact nearly every aspect of the colonized person’s life. White supremacy—colonialism’s lifeblood—makes the same demands of those negotiated out of whiteness: stop playing the race card, pull yourselves up

57. *M’Intosh*, 21 U.S. (8 Wheat.) at 573–74.

58. Anthony Zurcher, *US Senator Tom Cotton Defends Slavery Remarks*, BBC (July 27, 2020), <https://www.bbc.com/news/world-us-canada-53550882> [perma.cc/59Y2-4V2E].

59. Jackson Sow, *supra* note 25, at 1831 (citing ACHILLE MBEMBE, *NECROPOLITICS* 17 (2019)). Mbembe describes “pro-slavery democracy” as bifurcated into a “community of fellow creatures governed . . . by the law of equality,” and a “category of nonfellows” governed “by the law of inequality.” MBEMBE, *supra* (emphases omitted).

60. *See generally* CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 41 (1998) (describing Western philosophy’s neglect of race as an “evasion” given that “[t]he modern world has been profoundly affected by race for several centuries, not merely in the United States and the Americas . . . but . . . through the shaping of the planet as a whole by European colonialism”); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (articulating the relationships between colonial expansion and expropriation of Indigenous land, the creation of race, and the prohibition of interracial contracting (marriage), and Black privity with the state).

61. MILLS, *supra* note 60, at 41, 100.

62. *Id.* at 83.

by your bootstraps, and stop talking about race if you want racism to end.⁶³ White supremacy never ends the card game, which it has forced Black and Brown people to play under threat of whipping, hanging, scalping, or gunpoint; it never provides boots or even considers that boots themselves are undesirable colonial attire. And it never considers dismantling racism—a system of its own creation.

Race became necessary to justify the violence and cruelty of European land grabbing and the kidnapping, enslavement, and thorough dehumanization of Africans on what is now American soil. It also proved essential to the design and maintenance of capitalism, for which the institution of slavery served, quite literally, as labor, material, engine, and fuel. “Central to the racial contract is the bifurcated construction of race in a manner that supports economic exploitation and extraction.”⁶⁴ “Those raced as white are considered human and political and regarded as citizens, shareholders, contractors, and proprietors; those raced as non-white are considered sub-human and apolitical and regarded as strangers, trespassers, criminals, leeches, and contracted-for property.”⁶⁵ Again, the courts would create a legal justification for the colonizers’ purchasing and selling of slaves, as well as find a way to protect and sustain the industry that was building the American economy: by constructing legal and perpetual enslaved status into Black bodies, and by formalizing and legalizing a definition of Blackness and the exclusion of Blackness from the American body politic. The creation of race and racism by European colonizers—formally established and codified in the United States by statutes such as Virginia’s colonial-era Hereditary Slavery Law⁶⁶—ensured that the wages of American liberty

63. Chief Justice Roberts traffics in this type of conservative colorblind rhetoric and famously claimed that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

64. Jackson Sow, *supra* note 25, at 1831; *accord* Martin Espada, *Colonialism is Anti-Democratic Puerto Rico Bears the Tag of World’s Oldest Colony*, *BALT. SUN* (July 26, 1998, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1998-07-26-1998207151-story.html> [perma.cc/EQ4M-VL3J] (“In Puerto Rico, the population cannot vote for president of the United States but can be drafted to fight and die in the wars of the United States. The island is represented in Congress only by a nonvoting resident commissioner; yet Congress controls virtually all significant aspects of Puerto Rican political life”).

65. Jackson Sow, *supra* note 25, at 1831.

66. *See, e.g.*, Act XII: Negro Women’s Children to Serve According to the Condition of the Mother (Dec. 1662), *reprinted in* 2 WILLIAM WALLER HENING, *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 170 (1823) (legislating that a child’s status as enslaved or free depended upon the status of the child’s mother—meaning that slavery would become perpetuated through birth, and that enslavement would thus become racialized); Act III: An Act Declaring that Baptisme of Slaves Doth Not Exempt Them from Bondage (Sept. 1667), *reprinted in* HENING, *supra*, at 260. (legislating that Christian baptism could not elevate the status of a child who was born enslaved to that of a free person); *see also* MILLS, *supra* note 23, at 13–14 (“[T]he Racial Contract establishes a racial polity, a racial state, and a racial juridical system, where the status of whites and nonwhites is clearly demarcated . . .”).

would always be paid by those raced as Black and Indigenous to those raced as white.

The success of the colonial American project—and the development of the United States’ white-supremacist social contract—depended largely upon private commercial contracting by which those who had raced themselves as white would extract resources and capital from those they raced as nonwhite, which would be validated and legalized by courts. The relationships between commercial contracting, racial contracting, and colonial expansion in the United States become clearer still when considering the following: As Europeans continued to forcibly expropriate Indigenous lands to create the United States, they even entered into commercial contracts with certain Indigenous nations, such as the Cherokee nations, for enslaved Africans.⁶⁷ Wealthy Cherokee planters purchased the enslaved Africans from Europeans and brought them westward, as white Europeans displaced the Cherokee planters on the basis of the Europeans’ negotiations among themselves. These negotiations turned on the Europeans’ God-given right of conquest and dominion at the expense of those they had excluded from whiteness.⁶⁸ These commercial transactions also sustained and reinforced the American racial contract. They solidified the physical exclusion of Indigenous peoples from the white body politic, which did not always require total social subjugation of the Indigenous person (as evidenced by the willingness to engage in commercial activity with them and witness Indigenous proprietorship).⁶⁹ These transactions also relied on the physical inclusion—and forcible exploitation—of African labor and the social subjugation of African people (including an intolerance of African proprietorship) for the white body politic’s financial gain.⁷⁰

Teri McMurtry-Chubb explores how overseers bargained for their place as white men in society through the negotiation of their employment contracts as managers of enslaved Africans on forcibly expropriated Indigenous lands.⁷¹ Centuries later, government and commercial contracting in Detroit is directly responsible for the water shutoff and mortgage foreclosure crises that have dispossessed Black Detroiters of their water and homes

67. See Lolita Buckner Inniss, *Cherokee Freedmen and the Color of Belonging*, 5 COLUM. J. RACE & L. 100, 103–06 (2015).

68. See *id.*; Mark Walker, *Cherokee Nation Addresses Bias Against Descendants of Enslaved People*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/us/politics/ Cherokee-nation-black-freedmen.html> [perma.cc/3RXG-MV8K].

69. Inniss, *supra* note 67.

70. See LOOMBA, *supra* note 48, at 22 (qualifying colonialism as “the midwife that assisted at the birth of European capitalism [and] that without colonial expansion the transition to capitalism could not have taken place in Europe”). This Essay contends that colonialism also supported Euro-American capitalism, and that America’s present-day colonial arrangements continue to support racial capitalism.

71. See TERI A. MCMURTRY-CHUBB, RACE UNEQUALS: OVERSEER CONTRACTS, WHITE MASCULINITIES, AND THE FORMATION OF MANAGERIAL IDENTITY IN THE PLANTATION ECONOMY (2021).

(sometimes in tandem).⁷² As evidenced by the plight of Black Detroiters, the residents of the District of Columbia and other disenfranchised American colonial territories, Black and Indigenous people still have no rights that the state is bound to reliably respect, because they actually function as the objects of the contracting carried forth by the white body politic vis-à-vis the various arms of the state.⁷³ The political exclusion of the Black and Indigenous people concentrated in the nation's capital⁷⁴ and its colonial territories, and the subordination of their hardworking representatives, punctuates this appalling reality and apparent betrayal of American ideals.

C. *The Purposeful Persistence of American Empire*

Whiteness only has power when it is associated with innocence; when the atrocities and human rights violations it requires for its existence are too atrocious to be excused, whiteness will seek to erase them from America's cultural collective memory. Evidence of the same exists in the current

72. See Jackson Sow, *supra* note 31, at 34–43 (describing the direct connection between Detroit's water shutoff and unconstitutional mortgage foreclosure scandals, and the role that government and commercial contracting played in creating both scandals—which resulted in dispossession of Black Detroiters' water and homes and their financial ruin); see also Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020); Jackson Sow, *supra* note 25, at 1860 (establishing the concept of the predatory city by discussing the extraction of wealth and expropriation of property from Black Detroit residents via illegal tax assessments, which “escalated over the same period of time and emerged out of the same set of transactions” as the water shutoffs); Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism* 3 (Wayne State Univ. L. Sch., Working Paper No. 2016–17, 2016) (defining strategic racism as the manipulation of intentional racism, structural racism, and unconscious biases for political and economic purposes and offering it as a motivating factor in the Flint Water scandal). Professor Hammer has also cited strategic racism as a motivating factor for the Detroit water shutoff scandal. See Rose Hackman, *What Happens When Detroit Shuts Off the Water of 100,000 People*, ATLANTIC (July 17, 2014), <https://www.theatlantic.com/business/archive/2014/07/what-happens-when-detroit-shuts-off-the-water-of-100000-people/374548/> [perma.cc/F8H4-KTYX] (quoting Professor Hammer).

73. This is a reference to Chief Justice Taney's infamous declaration in *Dred Scott v. Sandford* that Black people in the United States “had no rights which the white man was bound to respect.” 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

74. The population of the District of Columbia, which stands at over 705,000 people, is 46 percent Black. *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/DC> [perma.cc/3823-EREP].

attacks on the 1619 Project⁷⁵—a long-form journalism project on the consequences of American slavery developed by Nikole Hannah-Jones⁷⁶—and on Critical Race Theory⁷⁷ by those invested in growing Eurocentric and casually racist narratives that characterize the United States as benevolent⁷⁸ and even divine, despite its settler colonial, slavery-based foundation.⁷⁹ That the United States downplays or otherwise romanticizes⁸⁰ its colonial history should surprise no one, even though colonialism is still very much a tangible part of its present. Colonialism is a human rights violation,⁸¹ and its dependency upon exploitation and force guarantee that it results in atrocity.⁸² Colonialism is also, of course, antidemocratic.⁸³ The narrative of America as the product of post-colonial liberation supports America’s macronarrative concerning its benevolence, its magnanimity, and, above all else, its innocence.⁸⁴ But America’s continued operation as a colonial empire instead reveals its guilt. Indeed, as qualified by Roxanne

75. See *GOP Demands Removal of “1619 Project” from Grant Programs*, CBS NEWS (May 6, 2021), <https://www.cbsnews.com/video/gop-demands-removal-of-1619-project-from-grant-programs/> [perma.cc/8UCM-HYRC]; Catie Edmondson, *McConnell Attacks Biden Rule’s Antiracism Focus, Calling It ‘Divisive,’* N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/04/30/us/politics/mitch-mcconnell-1619-project.html> [perma.cc/D59G-QTPT]; Valerie Strauss, *Why Republican Efforts to Ban the 1619 Project from Classrooms Are So Misguided*, WASH. POST (Apr. 7, 2021, 7:00 AM), <https://www.washingtonpost.com/education/2021/04/07/why-republican-efforts-to-ban-1619-project-classrooms-are-so-misguided/> [perma.cc/9RRE-7658] (criticizing efforts by “Republican legislators in a handful of states . . . to cut funding to schools and colleges that use the New York Times’ award-winning 1619 Project for classroom lessons”).

76. *The 1619 Project*, N.Y. TIMES MAG. <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [perma.cc/3MQE-PY4V].

77. See William Saletan, *The Cynical Republican Attack on “Critical Race Theory,”* SLATE (Apr. 22, 2021, 5:56 AM), <https://slate.com/news-and-politics/2021/04/gop-cynical-attack-critical-race-theory.html> [perma.cc/UCF6-FMFB] (discussing the political right’s conflation of any discussion of American racism with the critical race theory discipline); Duncan Agnew, *GOP Lawmakers Want to Ban “Woke Philosophies” like Critical Race Theory in Texas Schools*, TEX. TRIB. (May 5, 2021, 5:00 AM), <https://www.texastribune.org/2021/05/05/texas-critical-race-theory-schools-legislature/> [perma.cc/Z7DX-9SLA] (discussing the efforts by Republican state legislators’ in Texas to ban critical race theory, implicit-bias training, unconscious-bias training, and the 1619 Project from being taught in Texas’ public schools).

78. EDDIE S. GLAUDE JR., *BEGIN AGAIN: JAMES BALDWIN’S AMERICA AND ITS URGENT LESSONS FOR OUR OWN* 8 (2020) (saying of the narratives concerning American history, “According to these lies, America is fundamentally good and innocent The United States has always been shadowed by practices that contradict our most cherished principles”).

79. See DUNBAR-ORTIZ, *supra* note 44, at 3–5.

80. See *id.*

81. See *id.* at 6 (“Settler colonialism is a genocidal policy.”).

82. See *id.* at 2.

83. See Espada, *supra* note 64 (“Colonialism is inherently anti-democratic.”); see also MBEMBE, *supra* note 59 (highlighting the hypocrisy, or “bifurcation,” of “pro-slavery democracy”).

84. See DUNBAR-ORTIZ, *supra* note 44, at 2–5.

Dunbar-Ortiz, “North America is a crime scene,”⁸⁵ as “[s]ettler colonialism, as an institution or system, requires violence or the threat of violence to attain its goals.”⁸⁶ As such, the true and complete history of the United States is one of colonial expansion and the brutality and atrocities endemic thereto. Because the racial contract is unsustainable when visible, Americans have trained themselves not to see colonialism, or much of any of Whiteness’s machinery, even as it works and builds in plain sight.

That colonialism remains a part of the American project stands as proof of the persisting presence and force of white supremacy. The Land of the Free still holds colonies—in the U.S. Virgin Islands,⁸⁷ Guam,⁸⁸ American Samoa,⁸⁹ the Northern Mariana Islands,⁹⁰ Puerto Rico,⁹¹ and, in what could plausibly be categorized as an example of internal colonialism,⁹² the nation’s capital. Indigenous people and people of African descent predominantly populate all of these territories.⁹³ The two American colonies that were granted statehood some seven decades ago—Alaska and Hawaii—are not. Alaska is now 65 percent white,⁹⁴ while Hawaii is 25.5 percent white, 38 percent Asian, and only 10 percent Native Hawaiian and Pacific Islander.⁹⁵ That the individuals in these territories are not given rights commensurate with the resources that the United States extracts from them is

85. *Id.* at 228.

86. *Id.* at 8.

87. *See* 48 U.S.C. §§ 1391–1408(e).

88. *Id.* §§ 1421–1428e.

89. *See id.* §§ 1661–1670. The United States does not grant American citizenship to American Samoans at birth. American Samoans are noncitizen U.S. nationals unless one of their parents is a U.S. citizen. Ann M. Simmons, *American Samoans Aren't Actually U.S. Citizens. Does That Violate the Constitution?*, L.A. TIMES (Apr. 6, 2018, 2:50 PM), <https://www.latimes.com/nation/la-na-american-samoan-citizenship-explainer-20180406-story.html> [perma.cc/98RS-RCYP].

90. *See* 48 U.S.C. §§ 1801–1846.

91. *See id.* §§ 731–916.

92. The theory of internal colonialism is actually a theory of race, one that seeks to describe the subordinated political and economic status of Black and Latinx peoples in the United States. *See* Ramón A. Gutiérrez, *Internal Colonialism: An American Theory of Race*, 1 DU BOIS REV. 281 (2004). Here, I use the term to describe the same dynamic as a theory of race and place/space. Politically, the status of the District of Columbia is nearly indistinguishable from that of the United States’ organized unincorporated territories, and like all of the territories, the people populating the District of Columbia are predominantly of African and Indigenous descent and heirs of the American legacies of slavery and military occupation. *See id.*

93. *See* Melissa Locker, *Watch John Oliver Cast His Ballot for Voting Rights for U.S. Territories*, TIME (Mar. 9, 2015, 11:40 AM), <https://time.com/3736845/john-oliver-last-week-tonight-voting-rights/> [perma.cc/B3AJ-6LTA]; *supra* note 74.

94. *QuickFacts: Alaska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/AK> [perma.cc/4XFX-X4BL].

95. *QuickFacts: Hawaii*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/HI> [perma.cc/D6PN-GNUK].

not just the continuation of settler colonialism, but a deeply racialized process and structure that is written into the laws of the land.

That race is political, economic, and legal, but *not* biological,⁹⁶ is crucial information for anyone interested in eradicating racism. That race has been constructed means that it may be possible to deconstruct. Plaskett is Black because law and society decided, well before she was born, that whiteness exists, that whiteness matters, and that she was to exist in opposition thereto. Nature gave her dark-brown skin; the courts of the United States decided, on behalf of a white body politic invested in the extraction of her labor and the permanent disenfranchisement that makes such extraction possible, that she is Black.⁹⁷ She, as a Black woman, might use the law to order society differently; she might decide that race and racism are unnecessary, as they were on the African continent before colonial invaders carried her ancestors off in shackles and left systems of apartheid in their place. Should the United States ever decide to stop denouncing white supremacy and begin dismantling it, it will have to acknowledge its status as a colonial construction. Should it tire of hearing that Black Lives Matter,⁹⁸ it will need to dismantle and transform those laws and institutions that ensure that White Lives Matter More. But mostly, it will need to deconstruct whiteness, which will require, as a prerequisite, the deconstruction of colonialism via the full enfranchisement of the colonies.⁹⁹ America must draw up a new contract. And this time, Indigenous people and people of African descent must be contracting parties instead of contractees.

96. I view race as a very real political and legal creation by Europeans, who needed a way to justify colonial expansion (including expropriation of Indigenous land and enslavement of Africans) and solidify the creation and sustenance of capitalism. MILLS, *supra* note 60, at 48 (rejecting racial realism in favor of constructivism, which accepts race as “real,” though “not foundational: in different systems, race could have been constructed differently or indeed never have come into existence in the first place”).

97. See MILLS, *supra* note 23, at 11 (describing the creation of race as “agreements . . . between the members of one subset of humans, henceforth designated . . . as ‘white,’ and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status”); see also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–07 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

98. The phrase “Black Lives Matter” gained traction in the United States in 2013 after George Zimmerman was acquitted of shooting Trayvon Martin to death. The phrase is believed to have first originated with activist Alicia Garza who posted it to her Facebook account in response to Zimmerman’s acquittal. See *July 13, 2013: The Hashtag #BlackLivesMatter First Appears, Sparking a Movement*, HISTORY (July 10, 2020) <https://www.history.com/this-day-in-history/blacklivesmatter-hashtag-first-appears-facebook-sparking-a-movement> [perma.cc/DP28-5JT8].

99. See Todd N. Tucker, *Give Nonstates Full Congressional Representation*, POLITICO MAG., <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/participation/give-nonstates-full-congressional-representation/> [perma.cc/4W6T-SY2L].

II. BUILDING THE MASTER'S HOUSE: PROMISSORY ESTOPPEL AND THE PARADOX OF BLACK PATRIOTISM

The right of enjoyment of contract and property is and has historically been central to whiteness and citizenship in the United States.¹⁰⁰ Indeed, prior to Reconstruction, whiteness and citizenship were interchangeable statuses under U.S. federal law.¹⁰¹ Despite formal changes to the letter of the law, not much has changed; the racial contract endures. Because the contract constructs Black and Indigenous people below and outside of personhood, it follows that they cannot expect the racial state to allow them meaningful political proprietorship. Insofar as Black proprietorship breaches the terms of whiteness, Black people should expect the racial state to continue to resist their enfranchisement, seeing as it would result in a greater stake in the government and the possibility that Black Americans would be able to engage in meaningful social contracting—either by successfully demanding participation in the larger, white body politic (thus destroying it) or by engaging in independent, subaltern contracting that would compete with, and therefore threaten, white social contracting.

Black Americans' continued engagement of the state is explained, and perhaps remedied, by the doctrine of promissory estoppel.¹⁰² In the law of contracts, a claim of promissory estoppel is established by demonstrating four elements: a promisor, a promise, a reasonable reliance upon a promise, and a detriment suffered by the promisee.¹⁰³ As I have written elsewhere,¹⁰⁴ while Black people do not have the capacity to contract with the state¹⁰⁵

100. See generally Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421 (2021) (discussing the invisibility and centrality of whiteness in the United States, made visible in U.S. federal law by 42 U.S.C. § 1981 and § 1982); Harris, *supra* note 26, at 1715–16.

101. See *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896) (discussing the notion that whiteness is property); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407, 451 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (permanently excluding Black people and their descendants from U.S. citizenship based on the right of white people to “property in a slave . . . [as] expressly affirmed in the Constitution”); Harris, *supra* note 26, at 1744.

102. See Jackson Sow, *supra* note 25, at 1844–45. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 317 (1986) (“In sum, bargained-for consideration and nonbargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound.”); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 59–62 (1936) (“The difficulties in proving reliance and subjecting it to pecuniary measurement are such that [people] knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to [them].”).

103. RESTATEMENT (FIRST) OF CONTRACTS, § 90 (AM. L. INST. 1932) (“A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

104. See Jackson Sow, *supra* note 25, at 1843–46.

105. See Jackson Sow, *supra* note 31, at 36.

and therefore have no enforceable contracts with the state per the terms of whiteness, they reasonably rely upon §§ 1981 and 1982 of the Civil Rights Acts of 1866 (guaranteeing that nonwhite American citizens shall enjoy the rights to contract and property on equal terms with white citizens),¹⁰⁶ § 1964 (outlawing Jim Crow racial segregation in places of public accommodation, in employment, and within federally funded programs),¹⁰⁷ § 1968 (outlawing racial discrimination in housing),¹⁰⁸ the Voting Rights Act of 1965 (outlawing racially discriminatory voting practices),¹⁰⁹ and the Fifth¹¹⁰ and Fourteenth Amendments¹¹¹ for the rights to contract, proprietorship, and due process rights.¹¹² Promissory estoppel doctrine provides remedies for Black Americans for this reasonable reliance, which offers a path toward the nation's adoption of remedial and reparatory measures.¹¹³

This Part of the Essay explores the contractual doctrine of promissory estoppel as the foundation for remedies and reparations for Black and Indigenous people who rely—in vain, due to the superseding power of the terms of whiteness—upon the formal promises of equality made to them under the letter of law. In so doing, I admittedly attempt to use the master's tools to tear down and rebuild the master's house.¹¹⁴

106. 42 U.S.C. §§ 1981–1982. Section 1981 provides nonwhite people with the right to make and enforce contracts “as is enjoyed by white citizens.” *Id.* § 1981. Section 1982, similarly, provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” *Id.* § 1982.

107. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000d–2000e.

108. Fair Housing Act, 42 U.S.C. § 3604.

109. Voting Rights Act, 52 U.S.C. § 10301.

110. The Fifth Amendment to the United States Constitution requires the United States government to practice equal protection of the laws and forbids the government from unlawful discrimination on the basis of race or other protected classes. *See* U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

111. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires states to practice equal protection of the laws and forbids them from unlawful discrimination on the basis of race or other protected classes. *See* U.S. CONST. amend. XIV.

112. Jackson Sow, *supra* note 25, at 1844–45.

113. I have also written about promissory estoppel as a remedial measure for Black Americans living under the threat of police brutality, arguing that “[c]ommunities targeted by police brutality have a right, per the doctrine of promissory estoppel, to seek remedies from the state based on their reliance upon an agreement that the police would protect and serve them in exchange for their municipal funding.” Marissa Jackson Sow, *Whiteness as Contract as a Framework for Understanding America's Police Problem: Part II*, CONTRACTSPROF BLOG (Apr. 30, 2021), https://lawprofessors.typepad.com/contractsprof_blog/2021/04/guest-blogger-marissa-jackson-sow-on-whiteness-as-contract-and-the-police-part-ii.html [perma.cc/Q3S7-JMPZ].

114. I am making a reference to Audre Lorde's famous quote. *See* AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110, 110–13 (1984).

A. *Cut Out of the Deal: Black Americans and the Illusion of Political Privity and Proprietorship*

The signatories to the United States' racial contract regularly resist any attempts to interfere with the contract's performance and any breach of its terms.¹¹⁵ In the run-up to and in the wake of the 2020 election cycle, the efforts of Republicans to discount, reject, and exclude Black voters—such as by trying to refuse to certify the votes of Black voters after the 2020 elections¹¹⁶ and through legislative measures aimed at driving down Black voter participation¹¹⁷—have been the subject of much attention. However, anyone interested in understanding just how difficult the task of achieving increased Black political franchise is need only consider the Republicans' resistance to District of Columbia statehood. Before Trump's impeachment trial began under Plaskett's management, calls for admission of the District of Columbia as a state had already begun to swell, and Republicans had already begun to respond in stalwart opposition to the idea of statehood for the District.

Months earlier, Republican Senator Steve Daines supported his objections to D.C. statehood by claiming that residents of the D.C. suburbs were not in favor of D.C. statehood and alleging that those suburbs are “where the real people are.”¹¹⁸ His statements, which were criticized as “dehumanizing,”¹¹⁹ reflect the blunt realities of the relationship between race, citizenship, and political personhood in the United States—that Black and Indigenous people, politically speaking, are not “real people” and are therefore not entitled to full political representation. Post-trial, as the Biden administration and a Democratic-led Congress began to push through their legislative agenda, Republican lawmakers ramped up their use of racist

115. See Jackson Sow, *supra* note 28 (“American history shows that no breach of the racial contract is ever left unpunished.”).

116. See Tarisai Ngangura, *Trump Wants to Steal the Election by Disenfranchising Thousands of Black Voters*, VANITY FAIR (Nov. 18, 2020), <https://www.vanityfair.com/news/2020/11/trump-wants-to-steal-the-election-by-disenfranchising-thousands-of-black-voters> [perma.cc/4D95-HPAW] (detailing the Trump administration's targeted efforts to challenge election results in predominantly Black cities and locales, such as Detroit).

117. Chelsey Cox, *Georgia Voting Law Explained: Here's What to Know About the State's New Election Rules*, USA TODAY (Apr. 12, 2021, 4:29 PM), <https://www.usatoday.com/story/news/politics/2021/04/10/georgia-new-voting-law-explained/7133587002/> [perma.cc/4G4B-4GVR] (noting that activists claim the law “includes restrictions . . . [not] seen since the Jim Crow era” and is “aimed at voter suppression, particularly for Black voters”).

118. See Fenit Nirappil & Julie Zauzmer Weil, *Senate GOP Critics of D.C. Statehood Call for Floor Vote to Put Democrats on Record*, WASH. POST (July 1, 2020, 3:22 PM), https://www.washingtonpost.com/local/dc-politics/senate-gop-critics-of-dc-statehood-call-for-floor-vote-to-put-democrats-on-record/2020/07/01/c39785aa-bbb3-11ea-bdaf-a129f921026f_story.html [perma.cc/CQ35-AC9Q].

119. *Id.*

dog-whistling with respect to the issue of statehood for the District. For example, Senator Tom Cotton, who has qualified the institution of American slavery as a “necessary evil” in support of his crusade against the 1619 Project,¹²⁰ called Wyoming a “well-rounded, working-class state,” while attempting to make the case for why the overwhelmingly white state of Wyoming (which is more lightly populated than the District) deserved to be a state and the District did not.¹²¹ Per Cotton, because Wyoming has more workers in logging, mining, construction, and manufacturing than does D.C., the District could not be “a well-rounded, working-class state.”¹²² Congressman Mondaire Jones later retorted, “I had no idea there were so many syllables in the word ‘white.’”¹²³ Congressman Jody Hice argued that D.C. did not qualify for statehood because it did not possess a landfill.¹²⁴ To that claim, Jones replied, “with all the racist trash my colleagues have brought to the debate, I can see why they’re worried about having a place to put it.”¹²⁵

Jones and Plaskett exemplify the paradoxical patriotism of Black people in the United States, which is matched by their palpable frustration¹²⁶

120. Devan Cole, *Tom Cotton Describes Slavery as a ‘Necessary Evil’ in Bid to Keep Schools from Teaching 1619 Project*, CNN POL. (July 27, 2020, 11:11 PM), <https://www.cnn.com/2020/07/27/politics/tom-cotton-slavery-necessary-evil-1619-project/index.html> [perma.cc/R6GZ-G9UL] (reporting on the Senator’s remarks to the *Arkansas Democrat-Gazette*, in which Cotton said “[a]s the founding fathers said, [slavery] was the necessary evil upon which the union was built”).

121. Veronica Stracqualursi & Nicky Robertson, *Cotton Says Wyoming’s ‘Well-Rounded Working-Class’ Population More Worthy of Statehood than DC*, CNN POL. (June 27, 2020, 7:14 AM), <https://www.cnn.com/2020/06/26/politics/tom-cotton-wyoming-dc-statehood/index.html> [perma.cc/QSA2-FTA3].

122. *Id.*

123. Morgan Gstalter, *Heated Argument Erupts After Rep. Mondaire Jones Calls GOP Objections to DC Statehood ‘Racist Trash’*, HILL (Apr. 23, 2021, 8:10 AM), <https://thehill.com/homenews/house/549895-heated-argument-erupts-after-rep-mondaire-jones-calls-gop-objections-to-dc> [perma.cc/8K6Q-F7WV]; Mary Papenfuss, *Sen. Tom Cotton Comes up with Novel Way to Hail Whiteness, Gets Harsh Smackdown*, HUFFPOST (Apr. 24, 2021), https://www.huffpost.com/entry/tom-cotton-mondaire-jones-racism-wyoming-dc-statehood_n_60833b06e4b09cce6c10c2aa [perma.cc/3646-AYNV].

124. Papenfuss, *supra* note 123.

125. *Id.*

126. Plaskett has expressed her frustration over US colonies’ disenfranchisement on a number of occasions. *See, e.g.*, Stacey E. Plaskett, *Disenfranchisement on Display*, HILL: CONGRESS BLOG (Feb. 1, 2021, 11:45 AM), <https://thehill.com/blogs/congress-blog/politics/536711-disenfranchisement-on-display> [perma.cc/U3K9-3ZGG] (linking the disenfranchisement of the U.S. Virgin Islands to the U.S. Supreme Court’s decisions in the Insular Cases, which “justified racist, imperialist policy toward U.S. territories”); Stacey Plaskett, *Op-Ed: The Left and Right’s Blind Spot in Systemic Racism: The U.S. Colonies*, ST. JOHN SOURCE (June 29, 2020), <https://stjohnsource.com/2020/06/29/op-ed-the-left-and-rights-blind-spot-in-systemic-racism-the-u-s-colonies/> [perma.cc/XDV9-YMT8] (decrying the failure of the political Left and Right to remedy its exclusion and subjugation of the colonies even as it claimed to be engaged in a reckoning concerning systemic racism in the wake of George Floyd’s murder).

over being gaslit by rights that remain unperformed and unaccompanied by remedies. The Republican reaction to Jones's retort was to blast his remarks as "unbecoming" of a U.S. Representative¹²⁷ and to demand that his remarks be stricken from the record.¹²⁸ Despite their baseless and—in the view of many—obviously racially-motivated case against statehood for the District of Columbia, Republicans were offended that Jones called them out on their dog-whistling. Such are the terms of whiteness, which require civility as a response to racist exclusion and disenfranchisement, and which insist upon a veil of innocence behind which to hide. Jones, for his part, has remained defiant, reassuring the public that he meant exactly what he said.¹²⁹

Jones' position on statehood for D.C. is clear: "The truth is there is no good faith argument for disenfranchising 700,000 people, most of whom are people of color . . ." ¹³⁰ His reasoning can be extended to America's colonial territories, including the U.S. Virgin Islands. That Plaskett could do the incredibly hard work of presenting flawless, compelling testimony on behalf of the rule of American law but could neither vote to impeach Donald Trump, nor vote in any presidential election is a striking-yet-altogether-common example of how the labor of Black people on American soil is extracted (and expected) from them in service of the country. This process occurs even as the law constructs them—contracts them—out of the benefits of formal citizenship promised to them. The process is based on a tacit colonial agreement about their subordinated natural personhood and exclusion from political life.¹³¹

In the United States, nonwhite people, and Black people in particular, are not parties to the racial contract (they are, by definition, excluded, as the racial contract is an agreement on the terms and benefits of whiteness). As such, they cannot rely upon their formal rights to contract and proprietorship, including rights to political franchise and privity with the state. The promise of equality under federal law camouflages the terms of the racial contract, which categorically exclude Black people from the full and reliable exercise of the benefits of American citizenship despite the acceptance (and, indeed, the expectation) of Black American service to the nation. But the reliance of Black Americans such as Jones and Plaskett

127. See Gstalter, *supra* note 123.

128. *Id.*

129. See Mondaire Jones (@MondaireJones), TWITTER (Apr. 26, 2021, 10:08 AM), <https://twitter.com/MondaireJones/status/1386683633092775939> [perma.cc/XWX9-SB2R] ("I meant it, though."); see also Jon Skolnik, *House Democrat Stands Defiant After Drawing Heat for Blasting Tom Cotton's "Racist Trash" Speech*, SALON (Apr. 24, 2021, 12:30 PM), <https://www.salon.com/2021/04/24/house-democrat-stands-defiant-after-drawing-heat-for-blasting-tom-cottons-racist-trash-speech/> [perma.cc/JW7R-SY75] (noting that despite the uproar from Republicans regarding his remarks, Jones "did not back down").

130. See Gstalter, *supra* note 123.

131. See generally Espada, *supra* note 64 (describing the politics of extraction applied by Congress to Puerto Rico).

upon a sociopolitical contract to which they are not actually party is reasonable, precisely because of the rights of equal protection guaranteed to them under law.¹³²

To the extent that Black people continue to engage with America's political processes and in social and economic life more broadly, their participation is in reliance on their formal citizenship—a reliance that is regularly betrayed. Whiteness-as-contract is an agreement of colonizers—bargained for, by, and amongst themselves, as discussed below—to perpetuate expropriation of real property; extract natural resources, human labor, or other capital; and retain exclusive dominion over the socio-political franchise. The contractors bargained for exclusively white economic, political, and social power—or full personhood. They also then bargained for the exclusion of Black people from full personhood, including the rights to contract with the white body politic or exercise personal, social, or political proprietorship. The doctrine of promissory estoppel provides remedies for those who have been performing in reliance on the terms of a contract. They have been investing capital into the republic—capital that the republic has consumed. Plaskett, her constituents, the residents of the District of Columbia, and all others similarly situated thus have a claim for enfranchisement—and reparation—that must be honored.

B. *“The Founders Knew What They Were Doing”: Black Americans’ Reasonable Reliance on American Democracy*

On the Sunday morning after Donald Trump was acquitted of the charge of incitement of an insurrection, Plaskett gave a round of interviews on major media networks in defense of the work that she and her fellow managers did to prosecute the former President.¹³³ Many members of the public were particularly frustrated by the Senate's decision not to call witnesses, believing—mistakenly, in the view of Plaskett—that calling witnesses might have altered the outcome of the vote.¹³⁴ In response, the congresswoman demonstrated that her faith in the federal government

132. See *supra* notes 106–111 and accompanying text for a description of antidiscrimination legislation and constitutional amendments that guarantee Black Americans equal rights to white American citizens in employment, housing, public accommodations, and commerce.

133. ‘Disappointed’: Impeachment Manager Reacts to McConnell’s Remarks, CNN POL. (Feb. 14, 2021), <https://edition.cnn.com/videos/politics/2021/02/13/stacey-plaskett-intv-impeachment-trial-two-vpx.cnn> [perma.cc/5PKF-D9X8] (capturing an interview between CNN correspondents Dana Bash and Abby Phillip and Plaskett after former President Trump was acquitted of inciting the Capitol Riot).

134. *Id.*

that she had served for years—including prior service as a Republican during the George W. Bush administration¹³⁵—was unwavering. Of the impeachment procedures requiring a supermajority for a conviction, which ultimately undermined her masterful presentation of her case, Plaskett stated with confidence that “the founders knew what they were doing.”¹³⁶

What could warrant such faith in a group of men who would not have even recognized her humanity, much less any claim to citizenship or even simple self-determination? It is true that the founders knew what they were doing when they, in their eighteenth-century constitutional drafting, contracted and constructed Black, Brown, and Indigenous people outside of political personhood and therefore outside of the franchise and any other human rights.¹³⁷ Critics of Democrats’ pushes for D.C. statehood have correctly cited the initiative as a violation of the Founding Fathers’ wishes.¹³⁸ So, what could undergird Plaskett’s resolute faith in a nation that had such resolute faith in her inferiority and unfitness for physical, economic, and political proprietorship? Even when formal law made attempts to construct legal rights in the Black body, such as the rights to contract and property, the racial contract persisted in undermining the ability of Black people to exercise commercial contract and property rights as well as their ability to enjoy privacy with the State or assert proprietorship in democratic governance. Nevertheless, as demonstrated through their persistent agitation for human rights protections¹³⁹ and by Plaskett’s work and words, Black Americans are consummate patriots. Her statements are demonstrative of her reliance upon the promises of American democracy—promises that she believes the State owes to her as an American citizen, despite the racial contract’s exclusionary terms.

Plaskett’s management of the impeachment trial was not the only demonstration of Black American superpatriotism on display during the

135. See Kavi, *supra* note 11 (noting Plaskett’s past political affiliation and service in the George W. Bush administration).

136. *Impeachment Manager Stacey Plaskett: We Proved Our Case*, CNN POL. (Feb. 14, 2021), <https://www.cnn.com/videos/politics/2021/02/14/sotu-plaskett-full.cnn> [perma.cc/F8PA-J4CS].

137. See Jackson Sow, *supra* note 25, at 1820 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–05 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (ruling that Black people were to be permanently excluded from the United States’ “political community”)).

138. See Chris Cioffi, *Republicans Push Back on Democrats’ DC Statehood Bill*, ROLL CALL (July 1, 2020, 5:00 PM), <https://www.rollcall.com/2020/07/01/republicans-push-back-on-democrats-dc-statehood-bill/> [perma.cc/UY8F-BPS9].

139. Consider, for example, the tradition of Black-women-led voting rights activism, which has received increased attention as Stacey Abrams has come to national and international prominence. See Olivia B. Waxman, *Stacey Abrams and Other Georgia Organizers Are Part of a Long—but Often Overlooked—Tradition of Black Women Working for the Vote*, TIME (Jan. 8, 2021, 10:00 AM), <https://time.com/5909556/stacey-abrams-history-black-women-voting/> [perma.cc/A2SJ-TFPH] (describing “a long—and often overlooked—tradition of voting-rights activism led by Black women”).

proceedings. Video footage of the insurrection shown at the trial displayed the heroics of U.S. Capitol Police Officer Eugene Goodman, a native of Southeast D.C.,¹⁴⁰ who served in the U.S. military. On January 6, he successfully removed federal lawmakers from harm's way and diverted the violent rioters away from the lawmakers' chambers, placing his own life at risk in the process.¹⁴¹ Of his feats, Officer Goodman noted that his mandate as a police officer is to "protect and serve."¹⁴² On that day, Goodman said, "I was protecting."¹⁴³ How ironic then that he, a federal worker, and his family are not granted the full protections and benefits of American law because of D.C.'s status as an internal colony.

Long after Officer Goodman went home on the night of the dreadful insurrection, Black and Brown workers would don masks and other equipment in hopes of reducing exposure to COVID-19 as they entered into the Capitol premises through the employees' entrances to collect debris left behind by the rioters.¹⁴⁴ That the residents of D.C. pay federal taxes and are denied full political representation is unconscionable—both morally and with respect to the terms of the social contract upon which they rely. The residents of D.C. are compelled to pay their federal taxes and do not receive the vote in exchange for their performance of their responsibilities as American citizens. Taxation without representation propelled genocidal, slaveholding European settlers to demand independence from England's King George in the name of liberty; today, Republicans expect the residents of the nation's very capitol to accept such an exploitative arrangement in perpetuity. The residents of the District may, in addition to their claim for promissory estoppel, contend that insofar as any social contract does exist between them and the U.S. government, such a contract is unconscionable.¹⁴⁵ Officer Eugene Goodman is sufficiently American to save

140. Tan, *supra* note 8.

141. *See id.*

142. *Id.*

143. *Id.*

144. *See* Young, *supra* note 3.

145. This Essay contends that Black people are constructed out of America's social contract. However, approximately 45 percent of the District of Columbia's residents are white, and they could hypothetically benefit from seeking remedies based on the doctrine of unconscionability. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (holding that when one party lacks meaningful choice and the terms of the contract are unreasonably favorable to the other party, such a contract may be set aside). Moreover, that Black people are constructed out of the racial contract is unbeknownst to the vast majority of Black Americans, which is why they continue to rely upon the government to protect and avail them of their rights. Black Americans could hypothetically make a claim of unconscionability buttressed by a claim for damages based on reliance, should a hypothetical court determine that no social contract—unconscionable or otherwise—actually existed between them and the government because of their race.

Senator Mitt Romney's life¹⁴⁶ but yet (should he happen to live in the District where he honorably served) somehow not enough of an American to be represented by a voting member of the House of Representatives or the Senate. This is wrong. Such a breach of values—emblematic of colonialism, and of America's relationship with her Black and Indigenous citizens—must be rectified.

III. TEARING DOWN THE MASTER'S HOUSE: TOWARD DECOLONIAL RE-CONSTRUCTION

What does one do with a home built on a poor foundation? The traditional American response has been denial and the saving of face—constant renovation of the façade, even as the structure crumbles into quicksand. Eddie Glaude refers to this, “the American condition,” as “the lie.”¹⁴⁷ Just as the racial contract relies on a system of contracts, the lie “is more properly several sets of lies with a single purpose.”¹⁴⁸ Glaude describes the lie as “a broad and powerful architecture of false assumptions” by which the idea that white lives have always mattered more than the lives of others is “maintained.”¹⁴⁹ In his exhortation to Americans to “begin again,”¹⁵⁰ Glaude offers a searing critique of American racial hypocrisy, and he also exhorts Americans to transcend its tradition of denying its racist foundation and do the uncomfortable work of reckoning. This Essay moves still further beyond reckoning, calling upon Americans to pick up their sledgehammers to demolish the lie and reconstruct a republic that comports with its stated ideals. The solution to a poor construction that endangers the lives of those within and in the surrounding areas is a planned demolition. If, as Glaude claims, America can, and must, begin again, the most effective and efficient way to do so is through the deconstruction of the hopelessly colonial project engineered by the racial contract and the new construction of a just, antiracist, and decolonial republic.¹⁵¹ This final Part of the Essay sets forth a work plan for deconstructing America's racist and brutal colonial foundation and designing a just and equitable democracy in its place.

146. See Dareh Gregorian & Julie Tsirkin, ‘*I’m Very Fortunate*’: *Capitol Officer Saved Sen. Mitt Romney from the Mob*, NBC NEWS (Feb. 10, 2021, 8:13 PM), <https://www.nbcnews.com/politics/donald-trump/i-m-very-fortunate-hero-officer-capitol-riot-also-saved-n1257384> [perma.cc/JF3Y-3JY].

147. GLAUDE, *supra* note 78, at 7 (emphasis omitted).

148. *Id.*

149. *Id.*

150. *Id.* at 202.

151. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826–27 (2021) (advocating for “scholarly thinking and writing about law, justice, and social change” done in solidarity with social movements “that posit wholesale transformation rather than reform as their end goal”). This Essay eschews reform-focused racial justice efforts in favor of revolutionary transformations; as such, I join them in their call for movement law.

A. *The Necessity of Demolition and Reconstruction*

Here, it is important to distinguish this Essay's recommendation from prominent scholars' calls for a third Reconstruction.¹⁵² The United States' first two periods of Reconstruction—the first occurring after the Civil War and the second occurring with the civil rights movement—have been reliant upon the grant of formal rights and have failed to rescind—or even acknowledge—the existence and operation of the racial contract. Accordingly, Reconstruction has never been able to withstand the fury of white retrenchment. Glaude describes the despair James Baldwin felt witnessing “white America reorganizing its defenses” in backlash against the civil rights movement.¹⁵³ American society has confused¹⁵⁴ Black people's incremental and ephemeral political and economic gains during periods of political and legal elevation as moving from contractee to contractor; but in fact, the signatories to the racial contract were only licking their wounds and preparing to not only recover their lost property and proprietorship, but also take vengeance on Black people who acquired too much capital and power in the interim, thereby punishing them for their tortious interference with whiteness and its performance.¹⁵⁵

Glaude recalls James Baldwin's declaration that “[t]he horror is that America . . . changes all the time, without ever changing at all.”¹⁵⁶ My proposal does not involve reforms vulnerable to racist, reactionary revenge, but rather a complete transformation that requires a firm rescission of the racial contract. It requires demolition and rebuilding—on different soil, using different techniques, employing different designers and builders, and with different proprietorship. Reconstruction of America means that Plaskett, as an envoy of the people she represents, will have a say in America's new blueprint and in the construction itself. It also means that she

152. Several renowned legal scholars have called for a Third Reconstruction in recent years. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 785 (2021) (citing Paul Butler, Bennett Capers, and Tracy Meares as scholars who “have all called for us to think of police reform as a ‘Third Reconstruction’”); see also Tracey Meares, *A Third Reconstruction?*, BALKINIZATION (Aug. 14, 2015), <https://balkin.blogspot.com/2015/08/a-third-reconstruction.html> [perma.cc/ETU5-AT2J] (describing the gap between formal rights and the invisible common law sustaining the racial contract as a “formal curriculum” taught to white people versus a “hidden curriculum” by which people of color are taught to abide, and making the case that when the differences between the formal and hidden curricula are no more, that a Third Reconstruction will have been achieved).

153. GLAUDE, *supra* note 78, at 148.

154. Despite the prevailing narrative of the southern civil rights movement as a definitive period of political and social gains for Black Americans, Glaude recalls that both James Baldwin and Dr. Martin Luther King, Jr. recognized “bitter failures” of the movement, including “[d]eepening poverty” and a “raging carceral state.” *Id.* at 149.

155. See *id.* at 149–51 (describing such retrenchment as a refusal of the United States to give up “the lie” of white supremacy and observing of white reactions to the southern civil rights movement—that “[t]he nation[,] . . . in the growing energy of reactionary conservatism, actually seemed to be working harder than ever to secure it”).

156. *Id.* at 150 (quoting statements made by James Baldwin in 1979).

will not be called to come in from the outside to clean the house when it is dirty, but that she and her constituents will be part owners on an equal basis with the other proprietors.

Plaskett's service in managing Donald Trump's impeachment brings present-day American colonialism into focus and should also bring it under harsh scrutiny. When confronted with the horrors that flow from American brutality, the American public most always succumbs to the temptation to hold up the formalities of American law before crying out, "that's not who we are!"¹⁵⁷ In the case of Plaskett's disenfranchisement and that of her constituents, the law provides no semblance of absolution. It is the law that guarantees the careful structuring and systematizing of her oppression, and the oppression and exclusion of all who are similarly situated, on and off the American mainland.

American colonialism is written into federal statutes and built into the structure of its federal government. The impeachment trial of a former president who openly glorified, and advocated on behalf of, white supremacy brought America's coloniality into glaring relief. Yet the nation's colonial history was also romanticized by Trump's favorite nemesis, Barack Obama,¹⁵⁸ years before Trump would set out on his white-nationalist crusades. Colonialism and the human rights violations upon which the United States depends are as much a part of its present as its past; the nature of time dictates that whether it is part of America's future is a choice Americans must make now.

Future work will offer a fulsome exploration and articulation of the racial contract's costs, not just to the exploited but also to the contract's signatories and beneficiaries. Whiteness costs everyone;¹⁵⁹ rescinding the

157. See *id.* at 7–9 (defining the gap between American ideals and its public branding as innocent and benevolent and the horrific realities of American racism as "the lie").

158. See DUNBAR-ORTIZ, *supra* note 44, at 115 (quoting President Obama's 2009 inaugural address, which characterized colonialism, slavery, and labor exploitation as sacrifices necessary for liberal American democracy).

159. Professor Glaude has also discussed the human costs of whiteness in the context of the American mass-shooting epidemic and with respect to the white-nationalist terrorists' embrace of President Trump's racist rhetoric. Following a mass shooting in El Paso, Texas, carried out by one such terrorist, Glaude discussed the casualties of racist acts of violence as the consequences of white people's protectiveness of their whiteness. See Eugene Scott, 'This Is Us': Eddie Glaude's Comments on America and White Supremacy, *Annotated*, WASH. POST (Aug. 6, 2019, 11:57 AM), <https://www.washingtonpost.com/politics/2019/08/06/this-is-us-eddie-glaudes-comments-america-white-supremacy-annotated/> [perma.cc/SX7Y-9PYC]. A study by Citigroup found that the United States' economy lost sixteen trillion dollars as the result of systemic and institutional discrimination against Black Americans. See Dana M. Peterson & Catherine L. Mann, *Closing the Racial Inequality Gaps*, CITI GPS (Sept. 2020), <https://www.citivelocity.com/citigps/closing-the-racial-inequality-gaps/> [perma.cc/N9UD-SN25]. This loss of gross domestic product arguably impacts Americans of all races, including white people. *Id.*

racial contract will, necessarily then, benefit all Americans—economically, socially, politically, and legally.¹⁶⁰ Doing so requires intentionality and radical action.

Scholarship by Carliss Chatman and Najarian Peters on law schools' faculty-hiring initiatives has shone a bright light on how a commitment to incrementalism—what they call the “soft-shoe and shuffle”—as opposed to radical racial justice action, allows institutions to maintain their investments in the racial status quo while appearing to do otherwise:

Legal academic hiring follows a script that is steeped in racist practices, because the legal academy is one of the last safe spaces for white supremacist ideas to flow freely under the cover of academic freedom and distorted First Amendment arguments. Around and around the tables of faculty meetings, heads nod in agreement to the delivery of a homily of regret, confounded but nonetheless resigned to the poised self-reverence that gives the straight-faced and well-meaning faculty the spine to say unspeakable things about how much they tried.¹⁶¹

This dynamic is microcosmic of American society and government more broadly, and the cycle of racing to innocence without atoning for colonial guilt will continue but for a complete legal overhaul.¹⁶² With respect to the process of American decolonization, diversity and inclusion won't do; transformation is required. Each of the proposals for transformation that follows is controversial, if not scary, precisely because it threatens America's racial contract.¹⁶³ Each offers an opportunity for the United States to confront its colonial reality, and dispense of it, for the sake of a brighter future for all.

B. Statehood

The most straightforward path to full political participation and enfranchisement of Americans and U.S. nationals in American colonies is through statehood. Nevertheless, statehood is a controversial solution;

160. See *supra* note 159; see also Akbar et al., *supra* note 151, at 830–32 (envisioning the COVID-19 pandemic as a “moment of possibility” in which people might adopt new modes of response to the “failures of the neoliberal social contract” in order to build a new, just society).

161. Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 U.C.L.A. L. REV. DISCOURSE 2, 5, 9 (2021) (footnotes omitted).

162. See GLAUDE, *supra* note 78 (“[T]he lie is the mechanism that allows . . . America to avoid facing the truth about its unjust treatment of black people . . . [and] secure[] our national innocence in the face of the ugliness and evil we have done.”).

163. *Id.* at 9 (“For white people in this country, ‘America’ is an identity worth protecting at any cost.”). This Essay supports Glaude's proposition with respect to the signatories to the racial contract, but remains hopeful that white people who, while existing as beneficiaries of the contract, are willing to divest from the narrative of American innocence and the terms of whiteness will join non-white Americans who are committed to justice in order to create new American futures.

while statehood for the District of Columbia has gained support among Democrats, who have argued that the residents of the District are relegated to second-class citizenship despite performing the responsibilities of citizens, Republicans have resolutely and vociferously opposed the idea and related legislation.¹⁶⁴ It is difficult to imagine that they would support statehood for the territories either.

Presently, the Twenty-Third Amendment to the U.S. Constitution extends to residents of the District of Columbia the right to vote in presidential elections.¹⁶⁵ As U.S. citizens and federal taxpayers,¹⁶⁶ the District is entitled to full political participation and full political representation. It is therefore difficult to understand resistance to fuller political representation for the nation's capital outside of the contexts of partisanship and racism.¹⁶⁷ Assuming a desire for statehood on the part of the United States' present-day colonial subjects, statehood would grant them the fullest swath of civil and political rights—home rule, two Senate seats, and proportional representation in the House of Representatives with full voting rights. It would do the same for the residents of the District of Columbia.

Statehood is a racial justice issue,¹⁶⁸ and grants of statehood to American colonies are opportunities for the United States to close its “value gap”¹⁶⁹ by extending the benefits of democracy to those from whom it extracts capital on the basis of racialized conquest. The District of Columbia must be granted statehood with all deliberate speed. The U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Island, and Guam must also be given a permanent right of statehood—and they must also have the option to demand that they be liberated and granted total independence, on their time, on their terms. If the United States citizens and nationals in these territories are interested in statehood, willing to pay federal taxes, and otherwise willing to continue their contributions to the

164. See Rebecca Shabad, *Democrats, Republicans Clash over D.C. Statehood Effort*, NBC NEWS (Mar. 22, 2021, 2:27 PM), <https://www.nbcnews.com/politics/congress/d-c-statehood-moves-front-center-house-hearing-n1261713> [perma.cc/NT96-VNYY] (detailing Congressional Democratic legislation to admit the District of Columbia as the United States' fifty-first state and describing Republican opposition to the measure as “staunch”).

165. U.S. CONST. amend. XXIII.

166. See Meagan Flynn & Teddy Amenabar, *Will D.C. Become a State? Explaining The Hurdles To Statehood.*, WASH. POST (April 22, 2021, 3:31 PM), <https://www.washingtonpost.com/dc-md-va/2021/01/08/washington-dc-statehood-faq/> [perma.cc/CTN8-8GGR]; Emily Cochrane, *In Historic Vote, House Approves Statehood for the District of Columbia*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/dc-statehood-house-vote.html> [perma.cc/2ZBT-W6EG].

167. See Cochrane, *supra* note 166 (capturing the characterization of statehood by pro-statehood advocates as a racial justice issue); see also Hammond, *supra* note 15, at 1691 (discussing the exclusion of residents of U.S. Territories from welfare benefits in the context of the predication of the American welfare state on a white-supremacist racial order).

168. See *id.*

169. GLAUDE, *supra* note 78, at 7 (defining the “value gap” as “the idea that in America white lives have always mattered more than the lives of others”).

public, it is difficult to imagine a legitimate reason for withholding the opportunity.¹⁷⁰

C. Representation, Liberation, Reparations

Whether or not expanded representation comes via statehood, enfranchisement is necessary as a matter of racial justice and in fulfillment of the American promise of popular democracy. Some constitutional law scholars have frowned upon initiatives to grant greater political representation to the District of Columbia and Puerto Rico without statehood, relying on the text of the Constitution to reject such initiatives as constitutionally “dubious.”¹⁷¹ This Essay makes the straightforward claim that racial justice and decolonization require an abandonment of the view of the Constitution as sacrosanct and immutable—a view that is inexorably tied to the lie “about America being a divinely sanctioned nation.”¹⁷² That the Constitution is amendable should suffice as proof that the Constitution remains a living document; that it has been amended should certainly suffice as proof that the aristocratic slaveowners who drafted it were neither fortune-tellers nor deities whose vision for the country is worthy of any particular worship.

Demands for reparations from African American activists are not new, and within the last decade they have become mainstreamed as part of the nation’s racial justice conversation.¹⁷³ Though no national plan exists for the definition and payment of reparations, Evanston, Illinois became the first American city to pay reparations to its Black residents, via its Local Reparations Restorative Housing Program.¹⁷⁴ Thus, the demand for reparations for Black Americans is no longer viewed as fringe;¹⁷⁵ where one stands on reparations is now a litmus test by which Black American voters can judge a political candidate’s expressed commitment to racial justice,

170. See Gstalter, *supra* note 123 (quoting Mondaire Jones as characterizing D.C. statehood as a racial matter and declaring that no legitimate objection to statehood for the District of Columbia exists).

171. See Fortier, *supra* note 14.

172. GLAUDE, *supra* note 78; accord DUNBAR-ORTIZ, *supra* note 44 and accompanying text (discussing the settlers’ use of religion to justify their atrocious colonial exploits).

173. See Maya King, *Reparations Bill Tests Biden and Harris on Racial Justice*, POLITICO (Feb. 17, 2021, 2:47 PM), <https://www.politico.com/news/2021/02/17/slavery-reparations-bill-469165> [perma.cc/AF58-74B4].

174. See Bre’Anna Grant, ‘More Hopeful Than Ever:’ Biden’s Lead on Racial Equity Is a Promising Signal for Reparations, Experts Say, BUS. INSIDER (Apr. 13, 2021, 5:25 PM), <https://www.insider.com/reparations-for-black-americans-more-hopeful-under-biden-admin-2021-4> [perma.cc/Y8YB-6F5M].

175. See *id.* (discussing the increased momentum around reparations for Black Americans emerging out of the post-George Floyd racial justice movement and the COVID-19 pandemic).

and the Biden administration, for example, expressed some support for studying reparations shortly after Biden's inauguration.¹⁷⁶

It is precisely because “[t]he history of the United States is a history of settler colonialism—the founding of a state based on the ideology of white supremacy, the widespread practice of African slavery, and a policy of genocide and land theft”¹⁷⁷—that the United States owes reparations to its colonial territories, the descendants of enslaved Africans, and members of Indigenous nations. These reparations are owed—and are due—independently of these parties' continued participation in the republic, or any option they should exercise to chart their own courses as independent polities. The U.S. has extracted labor, land, and other capital; and conversely, residents of the territories have invested and paid into the republic in expectation of equal protection of American laws. As such, the United States should consider itself liable against any claims for reliance damages brought by these communities, per the doctrine of promissory estoppel.¹⁷⁸ The United States must treat Black and Indigenous people like people, and doing so requires that the nation revoke the invisible common law that hypocritically governs, tortures, and kills them while pretending to respect their rights under public law as if they were parties to the nation's whites-only social contract. But while changing course is mandatory, it is not enough; damages have been sustained, and damages are thus owed to the injured parties. Reparative justice requires that colonial expropriation and all of its accompanying atrocities be met now with belated compensation.

D. *Legislative Restructuring and Constitutional Amendments*

This Essay is neither the first,¹⁷⁹ nor will it be the last, to make a case for a complete renovation of the American project. Sometimes a paint job and new flooring are not enough. Decades of research on the human costs of structural and institutional racism have recently been highlighted by the COVID-19 pandemic; the warring revolts against anti-Black police brutality by social justice activists and against democracy by the far right; and the path to environmental, economic, and human destruction carved out by energy deregulation and states' rights governance. An obvious, but inaccurate, metaphor is racism rotting away at the wood holding the master's

176. *See id.*

177. DUNBAR-ORTIZ, *supra* note 44, at 2.

178. *See supra* Part II for a discussion of how the doctrine of promissory estoppel can provide reparative remedies to Black people who have been relying on the rights enshrined in public antidiscrimination law to help them realize the full benefits of citizenship, not realizing that those benefits are reserved for white people as a term of the racial contract.

179. *See, e.g.,* Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 156, 190–92 (2009) (calling for constitutional revision as a path forward to racial justice in the United States).

house together, but such a metaphor succumbs to the myth of American innocence and benevolence. In fact, racism—whiteness, colonialism, and genocide—is the poor foundation upon which America was originally constructed. On top of racism, America is sinking, and the sinking is quickening.¹⁸⁰

Better to build a new home entirely, with a new design and new architects—one using sustainable materials and top-of-the-line engineering. This will require a new constitution, or at the very least, a host of new amendments codifying multiracial democracy, rejecting colonialism, and ensuring full enfranchisement and representation for all people lawfully present upon American soil. Other contemporary democracies have overhauled and completely rewritten their constitutions on a number of occasions in order to respond to the evolving zeitgeists and needs and demands of their citizenry. France,¹⁸¹ South Africa,¹⁸² and Brazil¹⁸³ are among these nations, and so doing has allowed them, at the time of the constitutional redrafting, to enter into new epochs with a government equipped to better reflect and respond to popular will.¹⁸⁴

180. See generally Akbar et al., *supra* note 151, at 830–31 ([T]he “failures of the neoliberal social contract” have “reverberated in a particular way in the United States. Tens of millions of Americans have been without work during the [COVID-19] crisis—and as a result many lack health care, experience food insecurity, and face eviction . . . All of this disproportionately devastates Black and brown communities, as well as poor white people.”).

181. France has adopted a number of constitutions since its founding. In the twentieth century alone, France adopted four constitutions. *French Legal Research Guide: Constitution*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=362135&p=2446094> [perma.cc/DAX5-9P5C]. The current constitution established the Fifth French Republic and was adopted in 1958. *Id.*

182. The Republic of South Africa adopted its most recent, and highly acclaimed, constitution in 1996. See generally *The Constitution*, S. AFR. GOV'T, <https://www.gov.za/constitution> [perma.cc/DAZ7-LWS3]. The constitution entered into force in 1997, and it superseded the Interim Constitution of 1993. *Id.* Since the constitution's entry into force, it has been amended seventeen times. *Constitution of the Republic of South Africa, 1996*, S. AFR. GOV'T, <https://www.gov.za/documents/constitution-republic-south-africa-1996> [perma.cc/PY3U-4TVS].

183. Brazil has adopted seven constitutions, and its current constitution was adopted in 1988. *Constitutional History of Brazil*, CONSTITUTIONNET, <https://constitutionnet.org/country/constitutional-history-brazil> [perma.cc/SFG5-ABW6]. The constitution has been amended more than 100 times since its adoption. See *Emendas Constitucionais*, PRESIDÊNCIA DA REPÚBLICA, http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/quadro_emc.htm [perma.cc/8YU2-QBEH] (listing all 109 Brazilian constitutional amendments).

184. See Dorothy Pickles, *The Constitution of the Fifth French Republic*, 22 MOD. L. REV. 1 (1959) (describing the effects of the new French constitution, including the enhanced power of the President); *The South African Constitution*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/confronting-apartheid/chapter-4/south-african-constitution> [perma.cc/6BKV-3TCW] (describing enactment of the 1996 Constitution in postapartheid South Africa); Arturo Alvarado, *The Brazilian Constitution of 1988: A Comparative Appraisal*, 5 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. RSCH.] 137 (2018) (de-

An example of how constitutional revision might work in the United States may be found in the Supreme Court of the Cherokee Nations, where a 2021 amendment to the Cherokee Constitution effectively codified a 2017 U.S. federal court case holding that Black Cherokee Freedmen should have all of the rights of other tribal citizens.¹⁸⁵ The Cherokee Supreme Court removed from its constitution a provision that required Cherokee nation members to be descended “by blood” from tribal members listed on a nineteenth-century census and thus excluded Freedmen from Cherokee identity on the basis of their membership in the Black race.¹⁸⁶ A legal holding, combined with a constitutional amendment, sufficed to change the Freedmen’s racial and national identity by legal designation by simply reconstructing its conception thereof. The decision to reconstruct Cherokee identity is the development of a new Cherokee social contract—one that is inclusive of the Freedmen and enfranchises them as contractors vis-à-vis the Cherokee Nations. The measure offers material benefits to the Freedmen, but also strengthens the numbers of the Cherokee Nations. Beyond material benefits, the decision by the Cherokee Supreme Court to recognize Cherokee Nation identity in the Freedmen allows the Cherokee Nations and the Freedmen to move beyond a history fraught with the twin brutalities of exploitation and exclusion to a place that is socially and psychologically restorative for all parties involved.

Restructuring the U.S. federal legislature should be part of a constitutional review. Progressive commentators, frustrated with the Senate’s role

scribing how the Brazilian Constitution of 1988 came about as a reaction to military dictatorship and sought to codify prodemocratic social movements in a new constitutional contract).

185. Walker, *supra* note 68.

186. *See id.*; Inniss, *supra* note 67, at 114.

as obstructor (as opposed to populism retardant), have questioned the necessity of the Senate or a bicameral legislature more generally.¹⁸⁷ The Senate, they argue, is meant to prevent too much democracy, but is instead quashing democratic governance altogether.¹⁸⁸

Perhaps the vision for a restrained upper chamber is also intrinsically problematic; if more, instead of less, popular democracy is a goal—and a necessity for racial justice—an antipopulist Senate will always delay radical social and political progress. Conversely, in the post-Trump era, those who occupy the American left should certainly appreciate the role that a Democratic-led Senate might be able to play as a check on a House of Representatives dominated by members who subscribe to QAnon conspiracy theories.

This Essay proposes, as a solution, the full enfranchisement of the District of Columbia and American colonies, as well as of Indigenous nations, in both chambers of Congress. The Constitution must be revised to remove the requirement that only states be so represented. Each territory represented in Congress must have Representatives proportional to their populations and two Senators, all of whom must, in turn, be vested with full

187. See Chris Maisano, *It's Time to Fight for a Truly Democratic Republic*, JACOBIN (Oct. 30, 2020), <https://www.jacobinmag.com/2020/10/democratic-republic-bernie-sanders-socialism-supreme-court> [perma.cc/GNL7-PYBH] (calling for a number of other measures—including the abolition of the Senate—that would democratize American governance, which the author argues is currently designed to protect a system of governance by an elite minority). Calls to abolish the Senate have grown louder in the post-Trump era, but they are not exactly new. See, e.g., John D. Dingell, *I Served in Congress Longer than Anyone. Here's How to Fix It*, ATLANTIC (Dec. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/john-dingell-how-restore-faith-government/577222/> [perma.cc/E9ER-E9A3] (calling for automatic voter registration, the public funding of elections, and the abolition of the Senate as ways to restore public trust in the U.S. federal government); Jay Willis, *The Case for Abolishing the Senate*, GQ (Oct. 16, 2018), <https://www.gq.com/story/the-case-for-abolishing-the-senate> [perma.cc/V6AK-VHDZ] (claiming that the Senate is “far more undemocratic than the Constitution’s framers could ever have imagined”); John Bicknell, *Abolish the Senate. It's the Only Way to Rein in Modern Presidents*, WASH. POST (Aug. 30, 2016, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/08/30/abolish-the-senate-its-the-only-way-to-rein-in-modern-presidents/> [perma.cc/L7H6-5BEB] (calling for the abolition of the Senate as a way to strengthen Congressional power and curtail executive power). Indeed, the first Socialist member of the House of Representatives, Victor Berger, introduced a resolution to abolish the Senate in 1911 because of the Senate’s reluctance to require direct popular election of Senators. See *House Member Introduces Resolution to Abolish the Senate*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/House_Member_Introduces_Resolution_To_Abolish_the_Senate.htm [perma.cc/UW3C-RH2G]. Legal scholars have also weighed in on this debate. For example, see Brandon Hasbrouck, *The Case for Overhauling the Constitution*, BOS. GLOBE: EMANCIPATOR (July 5, 2022, 2:55 PM), <https://www.bostonglobe.com/2022/07/05/opinion/democracy-take-2/> [perma.cc/4AZE-K4HH] (proposing the abolition of the Senate and the establishment of a unicameral legislature).

188. See, e.g., Dingell, *supra* note 187.

voting and committee privileges. While other scholars have called for abolishing the Senate,¹⁸⁹ merely shortening Senate terms from six years to two, three, or four would also serve as a helpful check on the oligarchical power currently held by Senators—forcing them to become more responsive to the demands of their constituents. As currently structured, the American legislature perpetuates the racial contract by entrenching political power in the hands of those raced as white—and in the Senate, for a lengthy six years at a time. Of course, constitutional review and revision could have undesirable results as well, as boldly racist forces are increasingly invested in broad legal, political, and social change in the United States, and conservatives are themselves pushing for a constitutional convention.¹⁹⁰ Still, it remains true—as, perhaps, proven by conservative advocacy therefore¹⁹¹—that constitutional revisions can offer a path to the construction of a new American government with an expanded vision of who is an American and who is entitled to citizenship's benefits.

CONCLUSION

Are you sure, sweetheart, that you want to be well? . . . Just so's you're sure, sweetheart, and ready to be healed, cause wholeness is no trifling matter. A lot of weight when you're well.
—Toni Cade Bambara¹⁹²

Strides toward racial justice will remain out of reach until Americans are prepared to abandon whiteness as a term of full citizenship and as an article of the United States' incorporation. Likewise, meaningful progress with respect to racial justice requires an honest assessment of the United States as a colonial project and a commitment to decolonization with all deliberate speed. The United States must confront the reality that its brutal colonial past is still an all-too-real part of its present. Rescission of the racial contract, and of the system of colonial rule that it supports, requires a

189. See Hasbrouck, *supra* note 187.

190. See Grace Panetta & Brent D. Griffiths, *Republicans' Next Big Play Is to 'Scare the Hell out of Washington' by Rewriting the Constitution. And They're Willing to Play the Long Game to Win.*, BUS. INSIDER (July 31, 2022, 6:55 AM), <https://www.businessinsider.com/constitutional-convention-conservatives-republicans-constitution-supreme-court-2022-7> [perma.cc/LC9S-DY8G]; Ewan Palmer, *Will Republicans Pushing for a Constitutional Convention Succeed?*, NEWSWEEK (Aug. 3, 2022, 8:33 AM) <https://www.newsweek.com/constitutional-convention-republican-movement-congress-amendments-1730441> [perma.cc/68DQ-UZ8U].

191. See *supra* note 190.

192. TONI CADE BAMBARA, *THE SALT EATERS* 3, 10 (First Vintage Contemporaries Ed. 1992).

transformation of American ideals and conceptions concerning personhood, proprietorship, and citizenship. It also requires the structural demolition, renegotiation, and reconstitution of American laws and governmental institutions.

Understanding that race is neither a personal birthright nor a curse, but a designation reflecting a society's arrangement of capital—that it reflects society's decisions about how to delegate labor and resources and not a person's inherent worth—is also personally empowering for anyone willing to commit to antiracism. It allows all people to recognize race, and certainly racism, as real, while placing both outside of oneself as opposed to internalizing the pain or guilt of white supremacy.

Racism is expensive;¹⁹³ by contrast, racial justice and expanded democracy benefits everyone. Those who are impressed with Plaskett's performance need only consider how her enfranchisement and the enfranchisement of all nonvoting delegates and their territories would expand democracy and do the hard work of atoning for the sins of colonialism. Antiracism is incompatible with the politics of extraction and expropriation: of deeming the labor performed by Black, Brown, and Indigenous Americans "essential"¹⁹⁴ without offering them a share of the profits they generate and of exploiting their superheroic service while not extending to them the benefits of full legal personhood. Hashtags are not enough; Black and Indigenous Americans are more than memes, and, more importantly, superheroic patriotism on their part should not be required before the state recognizes their personhood. As per the U.S. Constitution, the benefits of citizenship enumerated should be theirs simply because they are America's. The time is now to renegotiate America's social contract and to fully construct Americans of color into the nation's body politic—extending to them not only the right to commercial contract and real property ownership, but also to fully contract with the state and exercise proprietorship over the country's affairs. People of color have been sown into this country, both under the threat of the whip, and with joyful hope and expectation. Harvest time is now upon us.

193. See Akbar et al., *supra* note 151, at 830–32; Heather C. McGhee, *Racism Has a Cost for Everyone*, TED (Dec. 2019) https://www.ted.com/talks/heather_c_mcghee_racism_has_a_cost_for_everyone [perma.cc/LN7W-L8GF] (outlining the negative economic impacts of racism, which “drain[] our economic potential”).

194. See Young, *supra* note 3 (describing essential workers as “the most disenfranchised of us who are forced to keep the wheels [of America] turning and the engine running”).