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FROM COMMON LAW TO CONSTITUTION, SANCTIONED DISPOSSESSION AND SUBJUGATION THROUGH OTHERIZATION AND DISCRIMINATORY CLASSIFICATION

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I. INTRODUCTION

The American legal system is a product of capitalism and English social philosophy. Colonialization gave birth to colonies. Colonies constituted States. The States constituted a nation. The nation crafted a constitution contrived from its colonial composition. The Constitution, like its colonial composite, constitutes the legal system. The legal system has been used to define people and divide them into classifications. Those classifications have been used to extend or deny legal rights and protections of law. The laws have been, and continue to be, discriminatory.

This Note will discuss the colonial foundations of the American; specifically, the United States' (U.S.) legal system, and the capitalistic underpinnings of discriminatory laws. This Note will also reflect on some ways in which the United States' legal system has been used to acquire property, extract labor, and deny equal benefit of law to variously classified people through otherization, racism, and discrimination.

Contradiction and concealment enabled much of the discrimination that has, and still, permeates the United States' legal system. Acknowledgment and disclosure of wrongs, and rights, may accord the legal system a more credible endowment.

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II. COLONIZATION

Following Columbus' alleged discovery of the new world, fortune and fame seekers departed European shores and embarked on journeys for individual and national aggrandizement.[1] One such would-be opportunist was a man named Giovanni Caboto, an Italian who sought patronage for his proposed journey from private individuals, and national governments in several European countries.[2] Eventually, Giovanni relocated to England, changed his name to John Cabot and sought patronage from the crown.[3] After a few months of lobbying, King Henry VII gave letters patent to Cabot, endowing him with authority under the English flag to "find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world places, which before this time were unknown to all Christians."[4]

England was not alone in granting such blanket authority. The Spanish, Portuguese, French, and the Dutch governments granted similar letters of patent and charters to sailors and adventurers of their choosing. In 1497, John Cabot sailed across the Atlantic Ocean, from Bristol, England, and is believed to be the first Englishman to have sailed to North America. Claiming not to have encountered any inhabitants upon his arrival, and pursuant to the letters patent he had received from the English king, Cabot proclaimed his discovery property of the crown.[5]

During the sixteenth century, English sailors made more voyages to the new world, sailing as far south as Central and South America.[6] Other European governments also sent envoys and explorers in order to acquire territory and resources, "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."[7] European nations established trading posts, missions, settlements, and colonial territories in furtherance of their pursuits and interests.

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[1] *1497: John Cabot's voyage to America*, THE NATIONAL ARCHIVES (June 28, 2004), https://www.nationalarchives.gov.uk/museum/item.asp?item_id=10.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Sandra W. Meditz & Dennis M. Hanratty, *The Sugar Revolutions and Slavery*, COUNTRY STUDIES (1987), http://countrystudies.us/caribbean-islands/8.htm.
[7] Johnson v. M'Intosh, 21 U.S. 543 (1823).

The Spanish had a southern focus, establishing trading posts, missions, and settlements along modern-day southern United States, Mexico, Central, and South America. The Portuguese focused mostly on South America. The French established trading posts in Canada, and territories west and south of the Mississippi River. The English were sidelined in the colonization games for some time. Due to a civil war and uprising in Ireland that took lives, time, money, and attention, the English crown focused closer ashore than other European powers, however, things changed.

Through a charter granted to the London Company, England established a colony of its own, Jamestown, in Virginia, in the year 1609, under the leadership of Captain John Smith.[8] The English crown also established colonies, in the form of plantations, in the west indies; mainly Jamaica, and Barbados, dubbed "the Sugar Islands."[9]

The English crown granted charters in hope that, like Spanish sailors in southern America, who had annexed indigenous mines and forced the locals to extract resources for the benefit of the Spanish crown, English expeditions to northern America would likewise yield wealth for the English crown.

All European nations presumed themselves superior in intellect and might in comparison to the native inhabitants encountered. English colonists also presumed themselves superior in claim to the territory, over the claims and rights of indigenous inhabitants of the land, " 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 people over whom the superior genius of Europe might claim an ascendency."[10]

[8] *The Starving Time*, HISTORIC JAMESTOWNE, https://historicjamestowne.org/history/history-of-jamestown/the-starving-time/, (last visited Mar. 11, 2021).
[9] Meditz & Hanratty, *supra* note 6.
[10] *M'Intosh*, 21 U.S. at 543.

III. RELIGION AND ENGLISH COMMON LAW, PROFFERED JUSTIFICATIONS FOR COLONIZATION AND SUBJUGATION.

Since indigenous inhabitants were not Christians, colonists asserted and relied on the documents they had been granted by the crown, which were legal and binding under English law, to subsume and subvert Indigenous customs and laws. Non-European traditions were disrespected "while the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion 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."[11]

Unfortunately for the English, there were scarce mineral resources such as gold, silver, or copper in Virginia. Additionally, the indigenous population was not readily subjectable to the whims of early colonists, who were few in numbers, lacking in tradeable goods, and not well acclimated to the new climate and topography.[12]

Several decades earlier, the English legal system had created a new legal entity called joint-stock companies.[13] Joint-stock companies allowed for the pooling of private and public resources to finance endeavors such as money lending, establishing of industry, and exploration.[14] In 1606, King James I of England chartered the Virginia Company with the purpose of colonizing North America.[15] The Plymouth Company was chartered the same year and would later colonize New England.[16]

Although charters under the English crown were granted only to a few wealthy merchants, few of the early colonists in America were men of means; many sojourners across the Atlantic were indentured servants who had been lured by the promise of wealth and riches, many signed on with merchants and wealthy planters in need of manual labor. Also, in order to populate the colony, a system was implemented to reward both solicitor and solicited, "any person who settled in Virginia or paid for the transportation expense of another

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[11] *Id.*
[12] *The Starving Time*, *supra* note 9.
[13] The Editors of Encyclopaedia Britannica, *Joint Stock Company*, BRITANNICA, https://www.britannica.com/topic/joint-stock-company, (last visited Mar. 11, 2021).
[14] *Id.*
[15] The Editors of Encyclopaedia Britannica, *Virginia Company*, BRITANNICA, https://www.britannica.com/topic/Virginia-Company, (last visited Mar. 11, 2021).
[16] *Id.*

person who settled in Virginia should be entitled to fifty acres of land for each immigrant. The right to receive fifty acres per person, or per head, was called a headright."[17]

The Indenture, another colonial capitalistic scheme, was a means through which a poor or outcast British subject could, voluntarily or compulsorily, contract to serve a master for several years, after which the servant would be legally be unbound from service to the master. The servant would be given a certain sum, resource, or acreage of land, and allowed to pursue an individual quest for property and wealth:

> Prominent merchants and colonial officials received headrights for themselves each time they returned to Virginia from abroad. As a result of the abuses and of the transferable nature of the headrights, the system, which may have been intended initially to promote settlement and ownership of small plots of land by numerous immigrants, resulted in the accumulation of large tracts of land by a small number of merchants, shippers, and early land speculators.[18]

Wealthy colonists in Virginia began to plant crops for harvest, through trial and error; a planter by the name of John Rolfe developed a profitable tobacco crop.[19] The crop, however, required a significant amount of labor to be planted, cultivated, harvested and transported, therefore, wealthy planters began to contract for many more indentured servants to labor on their lands which led to exponential growth in the population in the colony.[20]

Developing on the European continent at the time was the age of enlightenment. European philosophers proselytized adherence to dictates from a sovereign, king, monarch, pope, or dictator. Colonists in Virginia followed English laws and pronouncements and remained loyal to hierarchical orders as established under the English common law system.

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[17] *Headrights (VA-NOTES)*, LIBRARY OF VIRGINIA, http://www.lva.virginia.gov/public/guides/va4_headrights.htm, (last visited Mar. 11, 2021).
[18] *Id.*
[19] Brendan Wolfe, *Colonial Virginia*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/Colonial_Virginia, (last visited Mar. 11, 2021).
[20] *Id.*

The colony in Virginia came precipitously close to failing due to colonists' initial lack of ability to properly provide for themselves, and because of communicable diseases.[21] Colonists were able to establish trade with some indigenous tribes, however, attempts at the subjugation of indigenous inhabitants proved difficult. Many native inhabitants that the colonists attempted to subjugate died resisting or simply escaped after capture, retarding imposition of common law.[22]

Fortunately for colonists, reinforcement came in the form of provisions. Brought by new waves of arriving Englishmen, who added to the number of settlers and enabled English customs and culture to gain a defendable foothold on the continent, new arrivals bought water, food, guns, cannons, and most importantly, strength in numbers.[23]

Subsequent colonists, having been motivated by either the pursuit of fame and fortune or religious autonomy, arrived in the new world inculcated in the theories of John Locke. One of Locke's theories, on property stated:

> Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labor of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the that nature had provided, and left it in, he has mixed his labor with and joined to it something that is his own and thereby makes it his property. It being removed by him from the common state nature placed it in, has by his labor annexed to it, that excludes the rights of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.[24]

Central to Locke's ideas, was the Hobbesian notion of a sovereign in control, to settle disputes and administer justice as societally envisioned.[25] Hobbes suggested that the natural state of

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[21] *The Starving Time*, *supra* note 9.
[22] *Id*.
[23] *Id*.
[24] JOHN LOCKE, SECOND TREATISES OF GOVERNMENT ch. V (The Project Gutenberg Ebook 2010).
[25] THOMAS HOBBES, LEVIATHAN, OR THE MATTER, FORME, & POWER, OF A COMMON-WEALTH; ECCLESIASTIC AND CIVIL (Cambridge at the University Press 1904).

man was savagery in perpetual conflicts, while Locke posited that natural man was content in his small amalgamation of chooses required for sustenance and survival.[26] With Hobbesian assurance and Lockean theories, early colonists aspired for greater self-autonomy, while at the same time, they asserted dominance over others deemed non-Christian and non-European.

Indigenous ownership and usage of land were discarded to accommodate English notions of property and ownership. Private ownership, usurping public lands, having been accepted in England, motivated colonists to endeavor to acquire property rights in land by excluding others.

Also, because indentured servants were contractually unburdened from service after their contractual term, the perpetual importation of new laborers was constant.[27] The growing population needed more land for expansion, this, in turn, lead to encroachment upon visibly occupied native abodes, resulting in numerous skirmishes and wars with the indigenous people.[28]

The series of skirmishes and wars culminated in the Treaty of 1646, a treaty through which the English victors forced indigenous inhabitants to cede fertile lands to colonists, restricted indigenous movements to predetermined areas, and punished indigenous trespassers with death or enslavement.[29]

> The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and yet in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the white[30]

The treaty of 1646 enshrined colonial notions of European superiority and established a two-tiered system of justice. For the same offense, the indigenous offenders were punished more severely

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[26] LOCKE, *supra* note 24.
[27] Wolfe, *supra* note 19.
[28] *Id.*
[29] *Id.*
[30] *M'Intosh*, 21 U.S. at 543.

than colonial offenders.[31] The treaty also permitted colonists non-reciprocal access to indigenous land, for activities such as felling timber and the hunting of game, the taking of indigenous children under the age of 12 for service or training and rearing by colonists.[32]

To minimize the potential for future skirmishes, wealthy planters turned to increase use of slave labor. Planters increased the numbers of indentured Africans contracted for and began to rely more heavily on African slave labor. Colonists motivated by gain would eventually, through legislation, fabricate a more enduring system of slavery as a commodifiable source of labor

Starting in 1643, the House of Burgess, colonial Virginia' governing body, comprising of monied elites, began enacting a series of discriminatory laws to reclassify people by placing them on lower rungs of the hierarchical ladder.[33] The legislature implemented a law which allowed for the taxation of free black women, other women were not taxed.[34]

Since its founding, the Virginia colony had operated under the assumption that Christians could and should not be enslaved by other Christians. The various charters granted under the English crown were for colonization of land belonging to heathens, infidels, and land unknown to Christians. The charters and their justifications, which were previously used to justify exploration, colonization and conversions, were used to deny the extension of legal rights and protections, "potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity."[35]

Where once the indigenous population and indentured Africans had been forced to convert to Christianity through baptism, in 1667, the colony of Virginia passed legislation declaring that baptism would not shield blacks and natives from slavery. The legislation did not affect the status of Europeans.[36]

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[31] Wolfe, *supra* note 19.
[32] *Id.*
[33] *Primary Document Parishes and Tithes (1643)*, ENCYCLOPEDIA VIRGINIA, (last visited Mar. 11, 2021), https://www.encyclopediavirginia.org/Parishes_and_Tithes_1643.
[34] *Id.*
[35] *M'Intosh*, 21 U.S. at 543.
[36] *Id.*

The Virginia legislature also passed legislation proclaiming children born to enslaved women slaves from birth.[37] These series of legislations turned the socio-economic status of slavery into a racial category and sought to rebrand the black womb as a factory for vessels of service. Prior to the enactments of these laws, under English law, children were presumed to derive their status from their father's lineage.[38] The passage of the law signified a major schism between English common law on the European continent, and English common law on the American continent.

Tension in English common law governance of the colony of Virginia erupted into a rebellion in the year 1676.[39] Following treaties with various indigenous tribes, colonial authorities had agreed to restrict individual colonists' expansion into indigenous land. Indentured servants, released after completing their contractual obligations under the indenture, clamored for land of their own. They organized under the leadership of Nathaniel Bacon, a relative of the then governor of Virginia, and revolted against the colonial authority which had been reluctant to recognize unsanctioned claims of adverse possession of indigenous land.[40] Although the rebellion was successfully defeated, it led to planters' almost exclusive reliance on the labor of indentured Africans and slaves for the cultivation of their plantations.[41]

Restrictions on European migration and limitations on territorial expansion through appropriation of indigenous land would later play a pivotal role in the American Revolution, when allegations against King George III would include, "He has endeavored to prevent the Population of these States; for that Purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the conditions of new Appropriations of Land."[42]

In 1679, to secure an additional labor pool, the Virginia legislature passed legislation to classify the indigenous population as

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[37] *Id.*
[38] *Id.*
[39] The Editors of Encyclopaedia Britannica, *Nathaniel Bacon*, BRITANNICA, https://www.britannica.com/biography/Nathaniel-Bacon, (last visited Mar. 11, 2021).
[40] The Editors of Encyclopaedia Britannica, *House of Burgesses*, BRITANNICA, https://www.britannica.com/topic/House-of-Burgesses#ref1277451, (last visited Mar. 11, 2021).
[41] *Id*.
[42] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

slaves, however, the legislation was repealed eleven years later due to colonists' inability to prevent escape.[43]

Codification of discriminatory laws was again furthered through legislation passed by the Virginia legislature in 1691.[44] Included in the legislation were ordinances providing compensation to owners of slaves, and ordinances restricting interracial marriages and declaring that couples in interracial marriages could not stay longer than three months in the Virginia colony after marriage.[45]

To further discourage interracial relationships, the colony levied a fifteen-pound sterling tax on any English women who gave birth to a mulatto child.[46] If the woman was unable to pay the fine, she would be ordered to serve five years as an indentured servant.[47] If the woman, was already an indentured servant, an additional five-year term was added onto her original term of service, the birthed mulatto child would also be bound to a thirty-year term of indentured servitude.[48] Consequentially, the statutes "gave cover to the power relationships by which white planters, their sons, overseers and other white men took sexual advantage of enslaved women."[49] Children begotten from such relations were deemed mulatto. "Officials did not know how to treat children in the colony born to parents of whom one was not an English subject."[50]

Whereas, before the enactment of legislation decreeing lineage was maternally derived, English communities "could require the father to acknowledge illegitimate children and support them," such requirement no longer existed. [51] The situation was advantageous to capitalistic planters, as they had a steady stream of labor through coercion, force, and rape. Many plantation owners, and masters procreated with their slaves and servants. The relations further complicated delineations of people for hierarchical classification

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[43] Brendan Wolfe, *Indentured Servants in Colonial Virginia*, ENCYCLOPEDIA VIRGINIA, https://encyclopediavirginia.org/entries/indentured-servants-in-colonial-virginia, (last visited Mar. 11, 2021); RALPH RICHARD BANKS ET. AL., RACIAL JUSTICE AND LAW: CASES AND MATERIALS (Foundation Press 2016).
[44] *Partus Sequitur Ventrem*, WIKIPEDIA (Dec. 29, 2020), https://en.wikipedia.org/wiki/Partus_sequitur_ventrem.

[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

purposes, "men could sell their issue or put them to work."[52] In 1692, Virginia enacted legislation denying slaves the right to a jury trial for capital offenses, the legislation also denied slaves the right to own property such as land, horses, cattle, and hogs.[53]

The eighteenth century ushered in more discriminatory and racial laws. Because of wealthy planters' reliance on indentured Africans and slaves for planting, cultivation, and harvesting of crops, the black population, (free, indentured, and enslaved), ballooned from nineteen in 1619, to more than 10,000 by the year 1700.[54] The increased black population began to concern wealthy planters, therefore, through their control of the legislature, they devised further means of subjugation through legislation. Virginia enacted more stringent laws to encumber the indigenous, African, and enslaved inhabitants within its territory.

In 1705, Virginia passed legislation barring free men of color from holding public office. Virginia also passed legislation which barred both free and enslaved people of color from testifying as witnesses in court cases.[55] That same year, 1705, Virginia enacted legislation proclaiming all black, Indian, and mulatto slaves, property of their masters/owners, akin to land and chattel.[56] The Virginia legislature increased penalties imposed on interracial marriages, and further levied a fine of ten thousand pounds of tobacco upon any minister who officiated the marriage of an interracial couple.[57] The legislature statutorily defined mulatto as the child, grandchild, or greatgrandchild of an interracial couple.[58] Before the end of the century, in 1785, Virginia legislators would redefine mulatto to mean any person with a quarter or more of negro blood.[59] The reclassification in 1785 extended legal protection to individuals who eighty-years prior would have been considered mulattos because of one black or indigenous grandparent but could in 1785 be deemed white.[60]

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[52] *Id.*
[53] Wolfe, *supra* note 19.
[54] *Id.*
[55] *Disfranchisement in Virginia*, VIRGINIA PLACES, http://www.virginiaplaces.org/government/disfranchisement.html, (last visited Mar. 11, 2021).
[56] *Id.*
[57] *Id.*
[58] BANKS ET. AL., *supra* note 43.
[59] *Id.*
[60] *Id.*

The 1785 reclassification furthered discrimination, it also furthered notions of racial superiority and entitlement that had previously been seeded through religious dogma and socio-economic theories. These discriminatory laws passed in Virginia in the eighteenth century are collectively known as the Virginia Slave Codes.[61]

IV. CONSTITUTIONALIZED DISCRIMINATION THROUGH JUDICIAL DEFERENCE TO ENGLISH COMMON LAW. DISPOSSESSION OF INDIGENOUS OF THEIR PROPERTY AND PROPERTY RIGHTS.

The American constitution incorporated many notions and theories of British common law, "the British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies."[62]

The newly founded United States thus assumed many obligations and duties of colonial governance that the British crown had previously undertaken.[63] Early colonial authority had concluded that "the tribe of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession was to leave the country a wilderness; to govern them as a distinct people, was impossible because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[64] This meant that indigenous people were subjected to the authority of colonial powers but not accorded the rights and protections extended to British subjects under the same rule.

Early American jurisprudence mimicked and often deferred to British judicial interpretations; in fact, one of the grievances alleged in the Declaration of Independence as justification for revolution against the rule of King George III was "for abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it

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[61] *Primary Resource "An act concerning Servants and Slaves" (1705)*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/_an_act_concerning_servants_and_slaves_1705, (last visited Mar. 11, 2021).
[62] *M'Intosh*, 21 U.S. at 543.
[63] *Id.*
[64] *Id.*

at once an Example and fit Instrument for introducing the same absolute Rule into these colonies."[65] The contradiction was incubated into the American legal system before its inception and has continued to journey with it.

The American Constitution did not restrict immigration, migration of Europeans resumed in earnest, the headrights incentives still existed, the states' populations grew rapidly. The continued growth entailed a necessity for more land, "a recurring problem arose when states granted white men rights to land still occupied by Indians, and the federal government later promised those same lands to Indian tribes by treaty."[66] This led to confusion and litigation.

Finally, in *Johnson v. M'Intosh*, the Supreme Court of the United States dispossessed the indigenous population of their rights to real property. In the opinion by Justice Marshall, the court stated:

> All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.[67]

The court held that "title to lands…made by Indian tribes or nations…cannot be recognized in the Courts of the United States," effectively denying indigenous tribes the autonomy to devise tribal and individual land.[68]

[65] THE DECLARATION OF INDEPENDENCE (U.S. 1776).`
[66] Wolfe, *supra* note 43; JESSE DUKEMINIER, ET. AL., PROPERTY 17, (Wolters Kluwer 2018).
[67] *M'Intosh*, 21 U.S. at 543.
[68] *Id.*

V. JUDICIAL ORDINATION OF RACIAL CLASSIFICATION FOR PURPOSES OF SUBJUGATION

The American Constitution was riddled with ambiguities, interpretation of its terms relied on common law precedents, and the divergent values of the former colonies and emergent states promulgated through statutes. Clauses such as, " Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their representative Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Person."[69] These clauses were interpreted differently in different states and questions of citizenship started to arise.

Some states had free populations of European, African, and indigenous inhabitants. Some states had vast numbers of inhabitants bound to service for a term of years, some states had less. Some states had abolished slavery, others had not. The various compositions led to varying methods of counting the population to determine who could, and who could not avail themselves of governmental protections, discrimination permeated them all.[70]

There were free blacks, whites, and indigenous people in all states. In early colonial times, indentured servants of all hues lived and worked closely together, which led to unions of various compositions. Because indentured servants were free after completing their terms of service, many blacks, whites, and indigenous were free people, therefore, at the time of the adoption of the constitution, blacks, whites and indigenous had the right to vote. Free people of color were included in the censuses conducted after the revolution.[71]

In *Hudgins v. Wrights*, the Supreme Court began the process of constitutionally defining race and citizenship.[72] The Court did so by resorting back to the Doctrine of Partus adopted by the house of

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[69] U.S. CONST. art. 1 § 2.
[70] *Primary Resource Denying Free Blacks the Right to Vote (1724, 1735)*, ENCYCLOPEDIA VIRGINIA, (last visited Mar. 11, 2021), https://www.encyclopediavirginia.org/Denying_Free_Blacks_the_Right_to_Vote_1724_1735.
[71] *1790 Overview*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/overview/1790.html, (last visited Mar. 11, 2021).
[72] Hudgins v. Wrights, 11 Va. 134 (1806).

burgess.[73] The plaintiff in *Hudgins,* Jackie Wright, daughter of an enslaved Indian woman and an undisclosed Indian or European man, sued her master for freedom.[74] Wright contended that she was Indian and, pursuant to the repeal of the legislation enabling the enslavement of Indians in 1691, was illegally being held in slavery. Her then master, Hudgins, alleged that Wright was the progeny of an enslaved woman. Hudgins also alleged that Wright was mulatto, not fully Indian, and therefore was legally a slave under the doctrine of partus.[75] The court's opinion, written by Justice Tucker, stated:

> From the first settlement of the colony of Virginia to the year 1778, all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land were slaves. And by the uniform declarations of our laws, the descendants of the females remain slaves, to this day, unless they can prove a right to freedom…consequently, I draw this conclusion that all American Indians are prima facie free; and that where the fact of their nativity and descent, in a maternal line, is satisfactorily established, the burden of proof thereafter lies upon the party claiming to hold them as slaves. To effect which … he must prove the progenitrix of the party claiming to be free, to have been brought into Virginia, and made a slave between the passage of the act of 1679, and its repeal in 1691.[76]

The court, in determining the question of Wright's ancestry relied almost entirely on anecdotal descriptions of the physical features of Wright's grandmother, such as the color of her skin, "copper complexion" and her "straight hair."[77] The court concluded that people with such features could not be of African descent, and consequently, Wright was deemed non-African.

The court further went on to declare in dicta that; "all white persons are and ever have been free in this country. If one evidently white, be notwithstanding claimed as a slave, the proof lies on the

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[73] Martha S. Santos, *"Slave Mothers", Partus Sequitur Ventrem, and the Naturalization of Slave Reproduction in Nineteenth-Century Brazil,* SCIELO, http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1413-77042016000300467, (last visited Mar. 11, 2021).
[74] *Wrights*, 11 Va. at 134.
[75] *Id.*
[76] *Id.*
[77] *Id.*

party claiming to make the other his slave."[78] Only people appearing to be African would be presumed to be slaves.

Although Wright was granted her freedom, the case, by default, establish by implication that only people of African descent, black people, could and would from then be presumed to be slaves under the jurisprudence of the United States. The presumption would carry forward until the proclamation of emancipation and has had a lasting and lingering effect on American political, civil, social, and economic interrelations.

The subjugation of people persists, and although slavery was abolished except as punishment, by the Thirteenth Amendment to the Constitution of the United States, its impact has lingered.[79] Old tactics were maintained, refined and redeployed to dispossess various cultural, ethnical, and racial groupings of people. New discriminatory tactics have also been conjured up. The courts and the legal system, as a whole, have been used to justify different reclassifications of people entitled the benefits of citizenship and due process of law.

In *Strauder v. West Virginia,* the Supreme Court held that "white race, 'is property,' in the same sense that a right of action or of inheritance is property." [80] Thus race became property and property entailed privilege. The notion of race as property and its consequential ramifications was addressed in *Plessy v. Ferguson*, a suit in which the plaintiff, progeny of interracial relation, filed an action to claim "privilege, and immunity secured to citizens of the United States of the white race."[81] Plessy was a passenger aboard a train and was assigned by a coachman to sit in the section of the train (different coach) ascribed to passengers deemed non-white. Plessy insisted on being seated in the section reserved for whites, he was ejected therefrom and commenced an action to claim equal protection of the law and equal right to entitlement to what other citizens, white citizens, were entitled to.[82]

Notwithstanding evidence of inferior conditions, the Court in *Plessy* held that separation of people based on racial categories, even after the emancipation proclamation, was constitutional, therefore, impliedly justified in societal functioning. The Court stated:

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[78] *Id.*
[79] U.S. CONST. Amend. XIII.
[80] 101 U.S. 303 (1880).
[81] 163 U.S. 537 (1896).
[82] *Id.*

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that consideration upon it.[83]

The court's opinion reflects the prevalent attitudes of the time, many justices of the Court embodied the notions of inferiority that had been inculcated on the American continent since colonial times. The court's opinion also implied that negros (blacks) had a lower mental capability by suggesting that the reality of the sub-par conditions of the separate train coaches did not exist and were conjured up through black imagination.

Judicial decisions such as *Plessy* enabled and encouraged discrimination based on perception of race and suggestions of inferiority. Ordinary white citizens relied on the discriminatory legislations and judicial rulings to further engage in rampant acts of racial terrorism.[84] Vigilante and militia groups arose to continue and expand the dispossession, suppression, and oppression colored people. Nightriders and groups such as the Ku Klux Klan emerged to terrorize non-whites, dispossess them of property, and often force them into, or, back into conditions akin to slavery and servitude. Killing, lynching, burnings, beatings, rapes, extortion, harassments were prevalent. White citizens were empowered to mete out justice as they saw fit, and seldom suffered any consequence for injustices perpetrated against non-whites.[85]

Discrimination, otherization, and racism also enabled the United States government to inter many of its citizens in detention camps. Interment of U.S citizens of Japanese descent was justified by the Supreme Court's opinion in *Korematsu v. United States*.[86] Fred Korematsu was an American citizen of Japanese descent. Fred was gainfully and lawfully employed. Fred believed himself to be American. Following the attack by the Japanese Empire on the American Naval base at Pearl Harbor, Executive Order No. 34 was enacted. The Order

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[83] *Id.*
[84] *Ku Klux Klan; A History of Racism and Violence*, THE SOUTHERN POVERTY LAW CENTER (2011), https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf.
[85] *Id.*
[86] 323 U.S. 214 (1944).

imposed a curfew on and excluded Americans of Japanese descent from certain areas and localities. Fred, rather than relocate to a detention camp; underwent surgery to attempt to disguise his ancestry, he also changed his name. Fred was eventually discovered and prosecuted for violating the Order. The court, in fashioning its opinion acknowledged, "it is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry."[87] In upholding the discriminatory order, the court reasoned that Fred and others so impacted were "excluded because we are at war with the Japanese empire."[88] Such judicially exclusionary rationale was not applied in times of conflict against the English crown and had not been applied since the colonial and territorial expansionary era.

Even in the twenty-first century, discrimination, otherization, and racism persists in the United States' judicial, political, civic, and economic journey. People deemed non-white are excluded from communities and neighborhoods, at times even from public places, such as Starbucks coffee shops.[89] Non-whites are predatorily preyed upon by financial institutions such as banks and credit agencies.[90] Non-whites are often blamed for societal woes and difficulties such as the crime rate, and budgetary allocation of resources.[91] Non-whites are evaluated under more stringent criteria than their white fellow human beings.[92] Non-whites have fewer opportunities than their white counterparts.[93] Non-whites face harsher discipline and suffer harsher consequences than their white counterparts.[94] Poor people of all races, whites included toil and survive on meager allocations of resources.[95]

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[87] *Id*.
[88] *Id*.
[89]Terrence Cullen, *Starbucks manager called the cops on black men two minutes after they arrived for business meeting*, DAILY NEWS (Apr. 20, 2018), https://www.nydailynews.com/news/national/starbucks-manager-called-cops-minutes-black-men-arrive-article-1.3942931.
[90] *Mortgage 101*, LENDINGTREE, https://www.mortgage101.com/article/5-examples-predatory-lending/, (last visited Mar. 11, 2021).
[91] Amber Phillips, *'They're rapists.' President Trump's campaign launch speech two years later, annotated,* THE WASHINGTON POST (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/.
[92] Radley Balko, *Opinion: 21 more studies showing racial disparities in the criminal justice system*, THE WASHINGTON POST (Apr. 9, 2019), https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/.
[93] Jeanna Smialek, *Even as Americans Grew Richer, Inequality Persisted*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/28/business/economy/coronavirus-pandemic-income-inequality.html.
[94] Balko, *supra* note 92.
[95] Smialek, *supra* note 93.

The United States also continues to subscribe to discriminatory pronouncements of supposed religious superiority.

Donald Trump, the former U.S. President has gone so far as to implement a blanket ban on migration and travel from certain Muslims countries, for no apparent reason other than the fact of religion.[96] The current American president has also revived, and fueled discrimination based on perception of race. He has called Mexicans "rapists" and "criminals."[97]

The United States, an agglomeration of colonial territory established through otherization, dispossession, subjugation, forced migration, compensated migration, and usurpation has reverted to some of those old tropes. The United States stubbornly embraces and adheres to its foundational mythology.

Candid acknowledgment of the United States' colonial past, and its journey since its inception as a federal republic, rather than punditry professions of recognition of migration as affixed to the statue of liberty, may entail more harmonious and just relations amongst inhabitants of this vast country.

Relinquishment of adherence to proven fallacies and erroneous assumptions may lead to the materialization of the liberation and equitable congregation of man, woman, and child; the purported rationale of the pioneering settlers turned colonists. Otherwise, more scenes like the one witnessed in the summer of 2018, in Charlottesville, Virginia, where white supremacists marched through the streets chanting "Jews will not replace us" will become prevalent once again, as had been the case in the early twentieth century.[98] More calls for barriers and walls of separation will be hailed and harkened to.[99] More arbitrary seclusions and exclusions will be tolerated. More dubious detentions will be justified. More unarmed people of color will be perceived as threats to the tranquility of blissful white Americans. Inequity and inequality will continue to be structurally integral to U.S. jurisprudence, and the United States will

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[96] *Understanding Trump's Muslim Bans*, NATIONAL IMMIGRATION LAW CENTER (Mar. 8, 2019), https://www.nilc.org/issues/immigration-enforcement/understanding-the-muslim-bans/.
[97] Amber Phillips, *'They're rapists.' President Trump's campaign launch speech two years later, annotated*, THE WASHINGTON POST (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/.
[98] *Two Years Ago, They Marched in Charlottesville. Where Are They Now?*, ADL (Aug. 8, 2019), https://www.adl.org/blog/two-years-ago-they-marched-in-charlottesville-where-are-they-now.
[99] *When xenophobia spreads like a virus*, UNIVERSITY OF MINNESOTA (May 4, 2020), https://twin-cities.umn.edu/news-events/when-xenophobia-spreads-virus.

continue to be an embodiment of contradiction and conflict, prejudice and progressive stagnation, a colonial constitution.