

## ARTICLES

### Or Does It Explode? White Supremacy, Dominion, and the West Coast on Fire

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*The many catastrophes of the year of (y)our Lord 2020 included protests for racial equality and a particularly vicious fire season on the West Coast. This brief Article argues that the two are, in fact, closely connected. In the 1800’s, California outlawed indigenous practices the settlers deemed primitive and inferior—including prescribed burns. In doing so, they undid centuries of intentional forest management and created a literal tinderbox of white supremacy that has begun to explode at the same time as other parts of the United States’s racist foundations.*

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What` happens to a dream deferred?

Does it dry up  
like a raisin in the sun?  
Or fester like a sore—  
And then run?  
Does it stink like rotten meat?  
Or crust and sugar over—  
like a syrupy sweet?

Maybe it just sags  
like a heavy load.

*Or does it explode?*<sup>1</sup>

#### INTRODUCTION

Since the passage of the Civil War Amendments, reformists of all stripes have attempted to create an equitable society by inserting marginalized peoples into systems created to oppress them.<sup>2</sup> But 2020 screamed the answer to Langston Hughes’s famous leading question. We have been watching, in real time, as a dream deferred explodes. The revolution is not only televised, it is livestreamed, live-tweeted—the revolution is nearly impossible to turn off. Whether it be prison abolition catapulting from radical to mainstream,<sup>3</sup> the use of the phrase “qualified immunity” outside of Constitutional Law classes,<sup>4</sup> professional athlete walk-offs,<sup>5</sup> or the

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<sup>1</sup> LANGSTON HUGHES, *Harlem (2)*, in LANGSTON HUGHES: POEMS 238, 238 (David Roessel, ed. 1999) (emphasis added).

<sup>2</sup> See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 40–59 (2003) (explaining failure of reform in context of prison abolition).

<sup>3</sup> E.g., Rachele Hernandez, *Columbia University Receives \$5 Million to Develop ‘Racial Justice and Abolition Democracy’ Curriculum*, COLLEGE FIX (Feb. 26, 2021), <https://www.thecollegefix.com/columbia-university-receives-5-million-to-develop-racial-justice-and-abolition-democracy-curriculum/>.

<sup>4</sup> E.g., Chauncey Alcorn, *Ben & Jerry’s Co-Founders Want to Make It Easier to Sue Cops Who Abuse Their Authority*, CNN BUS. (Jan. 21, 2021, 3:15 PM), <https://www.cnn.com/2021/01/27/business/ben-and-jerrys-qualified-immunity/index.html>.

energy of the people in the street despite a deadly pandemic,<sup>6</sup> the United States is being forced to deal with the contemporary implications of its racist foundation on an unprecedented level.

As with all civil rights movements,<sup>7</sup> the backlash to this most recent movement from those wishing to maintain the status quo has been fierce. Months of unapologetic falsehoods about election fraud reached their logical conclusion on January 6, 2021.<sup>8</sup> A riotous mob staged an insurrection at the U.S. Capitol in order to prevent the counting of electoral votes.<sup>9</sup> Bad faith arguments over process aside,<sup>10</sup> there is no question that the traitors were motivated by the man for whom they carried a banner.<sup>11</sup> Likewise, there is no question that the then-president of the United States had no qualms about tossing aside perfectly valid votes from places where people of color live.<sup>12</sup> White supremacy is not a bug, it is a feature

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<sup>5</sup> Bryan Armen Graham, *WNBA Players Walk Off Court During National Anthem Before Season Opener*, GUARDIAN (July 25, 2020, 3:20 PM), <https://www.theguardian.com/sport/2020/jul/25/liberty-storm-anthem-protest-breonna-taylor>.

<sup>6</sup> Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

<sup>7</sup> Lawrence B. Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/>.

<sup>8</sup> Toluse Olorunnipa & Michelle Ye Hee Lee, *Trump's Lie That the Election Was Stolen Has Cost \$501 Million (And Counting) as Taxpayers Fund Enhanced Security, Legal Fees, Property Repairs and More*, WASH. POST (Feb. 6, 2021), <https://www.washingtonpost.com/politics/interactive/2021/cost-trump-election-fraud/>.

<sup>9</sup> Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html>.

<sup>10</sup> See Eileen Sullivan, *5 Takeaways from Day One of Trump's Second Impeachment Trial*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/09/us/politics/trump-impeachment-takeaways.html>.

<sup>11</sup> Aaron Rugar, *How Trump's Speech Led to the Capitol Riot*, VOX (Jan. 8, 2021, 2:10 PM), <https://www.vox.com/22220746/trump-speech-incite-capitol-riot>.

<sup>12</sup> Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020), <https://www.npr.org/2020/>

in U.S. political life. And yet to this day, the country brags to the world about the legacy of imperfect men who fought a revolution to create a society for themselves.<sup>13</sup> When “all men are created equal” was written, “men” had a narrow definition and Jefferson was never compelled to write a sequel, one that included women—or people of color.<sup>14</sup> Over two centuries later, the systems they and their successors created continue to work as intended, and we are left with three fundamental truths: The country was founded on white male supremacy, the country continues to exist to protect white male supremacy, and white male supremacy is not sustainable.<sup>15</sup>

There are a staggering number of systems that work to marginalize anyone who does not look like Benjamin Franklin,<sup>16</sup> and this would not be a respectable Article if it did not nod to all the issues outside of its scope. Contemporary policing has its origins in slave catching.<sup>17</sup> Congress’s plenary authority over immigration is root-

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11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group.

<sup>13</sup> MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 24–25 (2020).

<sup>14</sup> *Id.* at 26–34.

<sup>15</sup> *Id.* at 8–9.

<sup>16</sup> Benjamin Franklin, *Observations Concerning the Increase of Mankind, Peopling of Countries, &c.*, in *OBSERVATIONS ON THE LATE AND PRESENT CONDUCT OF THE FRENCH, WITH REGARD TO THEIR ENCROACHMENTS UPON THE BRITISH COLONIES IN NORTH AMERICA. TOGETHER WITH REMARKS ON THE IMPORTANCE OF THESE COLONIES TO GREAT-BRITAIN. BY WILLIAM CLARKE, M. D. OF BOSTON IN NEW-ENGLAND. TO WHICH IS ADDED, WROTE BY ANOTHER HAND, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, &c.*, 53–54 (1755) (“[T]he Number of purely white People in the World is proportionably very small . . . I could wish their Numbers were increased. And while we are, as I may call it, Scouring our Planet, by clearing America of Woods, and so making this Side of our Globe reflect a brighter Light to the Eyes of Inhabitants in Mars or Venus, why should we in the Sight of Superior Beings, darken its People? why increase the Sons of Africa, by Planting them in America, where we have so fair an Opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red? But perhaps I am partial to the Complexion of my Country, for such Kind of Partiality is natural to Mankind.”).

<sup>17</sup> Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 *UCLA L. REV. DISCOURSE* 1108, 1113–21 (2020), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1631&context=wlufac>.

ed in a need to keep the United States white *so obvious* it did not even need to be written down.<sup>18</sup> The list is as long as it is depressing, and this Article does not purport to be exhaustive.

Instead, this Article looks to the congruence of factors that led the West Coast to literally, rather than figuratively, explode during the fire season of 2020. Climate change is an important part of the narrative that was rightly front and center in most coverage of the devastating fires.<sup>19</sup> But, while this is a necessary part of the story, it is not sufficient to explain why there are unaltered photographs of San Francisco looking like Mars.<sup>20</sup> At their core, the laws that undergird U.S. ownership of land are rooted in the Judeo-Christian idea that those who make productive use of land have a superior claim to it.<sup>21</sup> In this culture, productivity is defined by how many resources can be exploited. And as the colonizers saw it, the “merciless Indian savages”<sup>22</sup> could not hold title to land because said savages did not know how to properly exploit it. By their telling, God gave man dominion over the land and the sea, and it remained man’s proper place to exercise that dominion.<sup>23</sup>

This Article argues that is it the culture of the colonizer—rather than some sort of universal human nature—that drives climate change, generally, and the fires in the West, specifically. It uses this example to show that a system of government that was built upon the belief that one of its cultures is superior cannot simply bring other cultures under its umbrella without addressing the rot at the core. This Article is brief, and it will proceed in three Parts. Part I gives a short overview of how white supremacy and the biblical understanding of dominion form the foundation of U.S. prop-

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<sup>18</sup> Hannah Gordon, Note, *Cowboys and Indians: Settler Colonialism and the Dog Whistle in U.S. Immigration Policy*, 74 U. MIA. L. REV. 520, 538–41 (2020).

<sup>19</sup> Rebecca Miller et al., *Climate Change is Central to California’s Wildfires*, SCI. AM. (Oct. 29, 2020), [scientificamerican.com/article/climate-change-is-central-to-californias-wildfires/](https://www.scientificamerican.com/article/climate-change-is-central-to-californias-wildfires/).

<sup>20</sup> See *US Wildfires: San Francisco Residents React to Orange Skies*, BBC NEWS (Sept. 10, 2020), <https://www.bbc.com/news/av/world-us-canada-54109381>.

<sup>21</sup> See *infra* Part I.

<sup>22</sup> THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

<sup>23</sup> See *infra* Part I.

erty law. Part II explains what the colonizers missed: how indigenous peoples developed intricate systems of non-exploitative land cultivation. This Part places special emphasis on the millennia-old practice in what is now California, Oregon, and Washington of prescribed burns to prevent widespread wildfires. Part III argues that it is unsustainable to maintain a system that bases its sovereignty on white supremacy by simply alleging that the system now includes those it was designed to oppress. Rather, we need a full-throated reconciliation with what was done, by whom, to whom, and why. Critically, we need an honest conversation about what systems can be reformed to be inclusive and what systems are rotten to their core and must be reimagined entirely. The consequences of delaying this dream are, as we have seen, explosive.

#### I. GOD’S PLAN: *JOHNSON V. M’INTOSH*

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.<sup>24</sup>

In one of the earliest and most consequential cases property cases not involving a fox, Chief Justice John Marshall placed white supremacy front and center in U.S. land rights. The facts of the case read like the most dreaded of bar exam hypotheticals: Two men claim to own the same piece of land based on two different chains of title.<sup>25</sup> One chain of title began with the British crown, and the other began with an Indian.<sup>26</sup> Marshall rooted his reasoning in one of the most basic principles of property law: A person cannot sell that which he does not own.

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

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<sup>24</sup> *Genesis* 1:28 (King James).

<sup>25</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 571–73 (1823).

<sup>26</sup> *Id.*

and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.<sup>27</sup>

Thus, while the Indians (for the time being) had the right to occupy the land, they did not possess the right to convey title, as they were *too primitive* for such sophisticated European principles. Marshall went so far as to recognize that conquest typically resulted in the integration of the conquered into the conquering society but lamented that the conquered at hand were “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”<sup>28</sup> Leaving the land to the savages was simply not an option because “[t]o leave them in possession of their country, was to leave the country a wilderness.”<sup>29</sup> In short, the United States legitimized its conquest because of its superior understanding of how to tame and use property, and this justification remains in effect to this day.

## II. CULTIVATION WITHOUT EXPLOITATION: INDIGENOUS FOREST MANAGEMENT

Stripping American Indians of the power to shape their environment with fire is tantamount to dismissing their humanity. Our capacity to manipulate fire is a species monopoly, unique to humans but also universal to all humans. Deny someone the right to fire and you deny them of that status.<sup>30</sup>

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<sup>27</sup> *Id.* at 574.

<sup>28</sup> *Id.* at 590.

<sup>29</sup> *Id.*

<sup>30</sup> Stephen J. Pyne, *Vestal Fires and Virgin Lands: A Reburn*, in PROCEEDINGS: SYMPOSIUM ON FIRE IN WILDERNESS AND PARK MANAGEMENT, 15, 17 (1996).

One of our many founding myths is that the colonizers found the wildness untouched.<sup>31</sup> In reality, they had stumbled into a complex agricultural system developed over millennia to blend seamlessly into its surroundings.<sup>32</sup> Chief Justice Marshall's assumption that the only way to properly utilize land was to plow it into large farms<sup>33</sup> was not only racist, but it was unscientific. Throughout what now constitutes this country, indigenous peoples had intentionally shaped their environment to be productive.<sup>34</sup> One of the most notable ways they accomplished this was through prescribed burns.<sup>35</sup>

Indigenous peoples throughout the continent used fire for a multitude of reasons. *Inter alia*, they cleared the underbrush to make the land easier to travel, killed poisonous snakes, increased production of berry shrubs, and herded wildlife during hunts.<sup>36</sup> Critically, the practice of high-frequency, low-intensity burns reshaped the ecosystem so that lightning-generated fires did not have enough fodder to get too out of control.<sup>37</sup>

In 1850, the same year California became a state and only twenty-seven years after *Johnson v. M'Intosh*, its new legislature passed the Act for the Government and Protection of Indians.<sup>38</sup> In addition to criminalizing vagrancy<sup>39</sup> and creating a legal avenue

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<sup>31</sup> *Id.* at 15–16; see also Nick Estes, *Only Racist Ignorance Lets Rick Santorum Think America Was 'Birthed from Nothing'*, GUARDIAN (Apr. 27, 2021, 8:56 PM), <https://www.theguardian.com/commentisfree/2021/apr/27/only-racist-ignorance-lets-rick-santorum-think-america-was-birthed-from-nothing>.

<sup>32</sup> Pyne, *supra* note 30, at 16–18.

<sup>33</sup> See *supra* Part I.

<sup>34</sup> Pyne, *supra* note 30, at 16–18.

<sup>35</sup> *Id.*

<sup>36</sup> GERALD W. WILLIAMS, REFERENCES ON THE AMERICAN INDIAN USE OF FIRE IN ECOSYSTEMS 3–4 (2003).

<sup>37</sup> Susie Cagle, *'Fire Is Medicine': The Tribes Burning California Forests to Save Them*, GUARDIAN (Nov. 21, 2019, 6:00 PM), <https://www.theguardian.com/us-news/2019/nov/21/wildfire-prescribed-burns-california-native-americans>.

<sup>38</sup> An Act for the Government and Protection of Indians April 22, 1850, ch. 133, Statutes of California, April 22, 1850.

<sup>39</sup> *Id.* ¶ 20 (authorizing officials to “make out a warrant under his hand and seal, authorizing and requiring the officer having [a “vagrant” indigenous person] in charge or custody, to hire out such vagrant within twenty-four hours to



for kidnapping,<sup>40</sup> the Act for the Government and *Protection*<sup>41</sup> of Indians outlawed both intentionally setting fires and allowing existing fires to burn.<sup>42</sup> For about a century, the prevailing wisdom was that fire was uncivilized, and the forest would thrive if allowed to grow untouched.<sup>43</sup> Integral to this logic was the commoditization of timber.<sup>44</sup> Therefore, according to the colonizers, the proper use of the wilderness was to grow as much timber as possible, and anything that disrupted that process was not a productive use of the land.

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the highest bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months.”).

<sup>40</sup> *Id.* ¶ 3 (“Any [white] person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian Minor, and wishing to keep it . . .”).

<sup>41</sup> The long history of claiming to protect vulnerable people while actually oppressing them continues to this day. In 2019, the Trump administration instituted the Migrant Protection Protocols, which forced non-Mexican migrants to wait in Mexico while their immigration claims are processed. *Migrant Protection Protocols*, U.S. DEP’T HOMELAND SEC. (Jan 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>. This has resulted in giant refugee camps some 300 feet from the entrance to the United States. See Dave Graham et al., *As Mexico's Largest Migrant Camp Empties, New Tents Spring Up Along Border*, REUTERS (Feb. 21, 2021, 12:57 PM), <https://www.reuters.com/article/us-usa-immigration-mexico/as-mexicos-largest-migrant-camp-empties-new-tents-spring-up-along-border-idUSKCN2AR0K0>. These camps are often controlled by the drug cartels, which are sometimes the same cartels the migrants fled in their home countries. See Julian Resendiz, *Border Patrol: Mexican Cartels “Charging Every Person that Comes Across”*, BORDERREPORT (Mar. 26, 2021, 11:15 AM GMT-0600), <https://www.borderreport.com/hot-topics/immigration/border-patrol-mexican-cartels-charging-every-person-that-comes-across/>. The Author worked with a Central American minor who attempted to seek asylum with her mother, only for the family to be sent to Mexico. Immediately upon arrival, the mother was thrown into a truck by a drug cartel. The minor managed to escape and was let into the United States as an unaccompanied “alien” [*sic*] child. She has not heard from her mother since, and she is presumed dead. For a further explanation of the anti-indigenous racism in U.S. immigration law, see generally Gordon, *supra* note 18.

<sup>42</sup> An Act for the Government and Protection of Indians April 22, 1850 at ¶ 10.

<sup>43</sup> Cagle, *supra* note 37.

<sup>44</sup> *Id.*

By 1968, however, the National Forest Service realized that no new giant sequoias were growing.<sup>45</sup> A century without fire had, indeed, allowed the forest to grow untouched.<sup>46</sup> Consequently, millennia of work to cultivate habitable land was wiped out.<sup>47</sup> The National Park Service began to reintroduce prescribed burns, and the Forest Service did the same a decade later.<sup>48</sup> California is now increasing the use of indigenous prescribed burns,<sup>49</sup> but as the 2020 fire season showed,<sup>50</sup> undoing the damage will not be simple.

### III. AMERICA, YOU GREAT UNFINISHED SYMPHONY: TELLING THE TRUTH ABOUT THE PAST TO CHART A NEW FUTURE

To be clear: this Article is in no way claiming that the outlawing of prescribed burns is the *only* reason that the West is on fire. The effects of climate change are open and notorious. But the white supremacist drive to dominate the land belongs in the conversation about climate change broadly, with condescension and disdain for pre-European forest management as one poignant example. This Article argues that it is impossible to create a just society without an honest conversation about the origins of its injustice. A real reckoning will involve more than the sentiment that yes, the United States did bad things, but *now*, we are inclusive of everyone. What we are seeing now is the failed attempt to bring marginalized people into systems created with the explicit goal of their subordination. It may be an inconvenient truth, but these systems are not sustainable.

This Article does not pretend to have a plan for a new form of government. To do so would entirely defeat the point, as the main argument is that a government that is truly accountable to its peo-

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Lauren Sommer, *To Manage Wildfire, California Looks to What Tribes Have Known All Along*, N.P.R. (Aug. 24, 2020, 9:00 AM), <https://www.npr.org/2020/08/24/899422710/to-manage-wildfire-california-looks-to-what-tribes-have-known-all-along>.

<sup>50</sup> *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, BBC (Sept. 18, 2020), <https://www.bbc.com/news/world-us-canada-54180049>.

ple must take into account the experiences of all of its people. Instead, this Article offers the following starting point: We must ensure that present and future generations learn the true history of what this country is and how it came to be. Rather than protecting the founder's Constitution with religious-like zeal, we need honest conversations about what we expect from our government and what we are willing to sacrifice for its protection.

The white supremacist origin myth is an integral part to maintaining the current power structure. But this country cannot afford to continue deferring the dream of an equitable society. It will only explode.