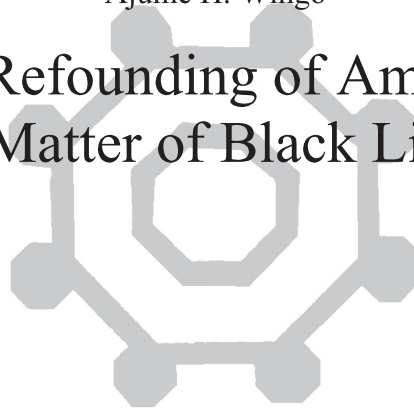


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The Refounding of America: A Matter of Black Lives



Having a sense of belonging is critical to a citizen's security and well-being. For that reason, the founder of the state of Nso, in the North West Region of Cameroon, Ngonso, formulated her constitution with an eye toward developing and sustaining this sense of belonging to a home, the nation. As she put it, "for us [wirnsso, or Nso citizens] to have a sense of belonging the state ought to be like a home."

For Ngonso, this sense of belonging transcended mere residence in a state's boundaries or even citizenship. It requires a *sense* of belonging to that home, that one is valued and recognized as part and parcel of a larger community. Home is a sphere where members are interlocked by empathy, sympathy, concern and caring for one another.

The problem of establishing this sense of belonging in a multiracial state with a legacy of slavery like the United States is particularly challenging. This challenge is exacerbated in the United States because the foundation of the state – the federal Constitution, which might be presumed to provide the resources needed for a stable, multiracial state – focuses on *formal* protections for citizens of different races, but speaks only in the most general and aspirational terms concerning the question of the *sense* of belonging that citizens – and in particular, African American citizens – enjoy.

This is no accident, of course, for formal protections – rights and legal privileges of citizenship – are easy to articulate, even if they may be difficult to enforce or realize. Establishing a sense of belonging, however, is not just, or even principally, a matter of articulating formal protections, but requires

statesmen and stateswomen of the highest order adept at building a genuine community. Yet as difficult as it might be, a just and stable democratic state requires its citizens to be bound together with some such sense of community, which transcends any set of formal rights or protections, and provides its members that sense of belonging.

The task of creating a state in which blacks and whites equally enjoy this sense of belonging is incomplete. This lack of a sense of belonging has been the most formidable problem of African Americans. Despite having played integral roles in America's growth and development for more than 400 years, African Americans are in an important sense still outsiders in their homeland. That they have made so many contributions over so long, yet even now find it necessary to insist that "Black Lives Matter," makes evident that the United States is not the "home of homes" that a state should be for its citizens, and that it faces a problem that calls for an unusual and dramatic solution.

My aim here is to sketch the outlines of such a solution – a kind of "Refounding of the United States" – that I believe may help make space for all in a state that was founded by whites for whites. As I note below, such a project is risky, for it is surely a mistake to conclude that America is in need of some wholesale reconstruction. Yet the existence and magnitude of the problems faced by African Americans call for broad changes in the state's focus and direction.

Those problems were encapsulated in the killing of George Floyd and the upheavals that followed his death on May 25, 2020. At the time, the country was already in the midst of the COVID-19 pandemic that seemed to be killing Americans with no end in sight. The death of George Floyd at the hands of a white Minneapolis police officer, Derek Chauvin, in daylight and in plain view of other officers and members of the public, was just the latest in a series of black citizens dying at the hands of white police officers. Two months before Floyd's death, on March 13, 2020, Breonna Taylor, a 26-year-old African-American woman, was fatally shot in her Louisville, Kentucky, apartment by white plainclothes officers Jonathan Mattingly, Brett Hankison, and Myles Cosgrove of the Louisville Metro Police Department as part of an investigation into drug dealing operations.

The deaths of Taylor and Floyd triggered a series of protests under the banner of "Black Lives Matter," a movement that had started in 2013 following the killing of Trayvon Martin, a 17-year old African American boy, by George Zimmerman, a private security officer. That the protests took place during a pandemic was a measure of the concern – even fear – African Americans felt toward the police, suggesting that the protesters

perceived the forces presumably devoted to upholding the law and protecting citizens as more dangerous than the deadly virus.

The Black Lives Matter (BLM) movement awakened many in America and throughout the world to the effects of what many refer to as systemic racism, a phenomenon that had largely been invisible to even white liberals who acknowledged individual bigots but resisted any suggestion that the entire system was biased against blacks.¹

A similar recognition was recorded nearly 200 years ago by Alexis de Tocqueville who, after his sojourn in the United States, said that “the most formidable of all ills that threaten the future of the Union arises from the presence of a black population upon its territory.”² Tocqueville sensed in 1831 what many whites first felt in 2020, i.e., that in spite of the Constitution of the United States, blacks were treated as outsiders in their own country. That is, while the written Constitution provides equal protections for blacks and whites alike, there is an informal and often equally powerful, unwritten constitution that shapes the way the written Constitution is applied and enforced that undermines equality.

For those who were wary of the end of slavery, Thomas Jefferson warned his fellow Americans of the dilemma underlying their country’s founding principles, stating that “Nothing is more certainly written in the book of fate than that these people [i.e., blacks] are to be free; nor is it less certain that the two races, equally free, cannot live in the same government.”³ Jefferson here sensed an entrenched gap between the black and the white population of the land. Yes, according to him, the Constitution may abolish slavery (as in fact it did), but it cannot establish that more fundamental union – that sense of community that is needed for a stable and thriving state. African American felt the same pessimism about the possibility of such a union, sometimes joining with white abolitionists who believed the only solution to Jefferson’s dilemma was for the races to separate.⁴

Thomas Jefferson and the Constitution of the Heart and Soul

In principle, there are at least five ways to resolve Jefferson’s dilemma posed by the presumed incompatibility of the races. The first two require embracing some form of racial supremacy where one race is allowed to belong and the other is not:

1. White re-subjugate blacks.
2. Blacks subjugate whites.

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Another set of options are what I refer to as the “separatist option,” that avoids subjugation by separating the races:

3. Blacks found a new colony, say in Neptune, and deport all the whites there.

4. Whites found a new faraway colony, say in Uranus, and deport all the blacks there.

Finally, there is the possibility of altering the relationship between whites and blacks so as to resolve Jefferson’s dilemma:

5. Establish an unwritten constitution of the heart and soul, to complement the written one, for blacks and whites.

To an average African American, it is sometimes difficult to see the United States as anything but a hostile force. From police violence against blacks, the disproportionate percentage of African Americans in prison, the pernicious effects of the 1994 Violent Crime Control and Law Enforcement Act drafted by now-President Biden,⁵ and the sorry history of redlining,⁶ African Americans rightly sense that they do not belong to the only state that they know and call their own. The fact that the state would even defend some of these practices, even if in good faith, adds up to give some sober onlookers a sense of apathy of the state towards African Americans.

The Refounders of the United States are in favor of option 5, the founding of the constitution of the heart and soul in which the two races (the other races notwithstanding) can live together in one state. Before looking at that, consider two critical views of the Refounding project.

Progressivism and the Refounding of the United States

Tiffany Jones Miller in a piece aptly entitled “The Refounding of America”⁷ critiqued the conception of refounding America championed by progressives. One of the intellectual fathers of Progressivism, John Dewey, was quite sensitive to the problems of blacks, and was active in the formation of the National Association for the Advancement of Colored People, the American Civil Liberties Union, and the American Federation of Teachers. He saw the refounding of America as an incremental, progressive enterprise, in which judges and academics would chip off, little by little, the injustices of the original Founders of America to form a more just world for all.

The progressives generally regarded poverty as among the greatest constraints on the spiritual development of the people. According to Miller, they championed a host of rights purported to enhance the material security

of poorer Americans like the right to a job, a minimum wage, a maximum work day and week, a decent home (public housing), and insurance against accident (workers' compensation), illness (public healthcare), and old age (social security). Most of these rights were enshrined in federal law during the New Deal. Because access to education at all levels and to fine art is no less essential to spiritual fulfillment, Dewey also advocated generous public provision of these resources – and indeed the provision of both was a hallmark of Lyndon B. Johnson's Great Society.

According to Miller, the progressive ideal called for a radical overhaul of the traditional view of the federal government being a limited government. She argues that it also required a dramatic shift in our understanding of the content of the Constitution, since progressive reforms, she claims, "stretched the original text [of the Constitution] to uses undreamed of." Miller's concern, shared with many conservatives, is that the changes to the public's understanding of the role of government and the content of the Constitution required to assert citizens' positive rights to material conditions would also erode important freedoms.

Progressives think in terms of the *fullness of time*. But a retort to progress was provided by no other than Martin Luther King, Jr. in *The Letter from Birmingham Jail* (1963). He said:

We have waited for more than 340 years for our constitutional and God-given rights. ... Perhaps it is easy for those who have never felt the stinging darts of segregation to say wait. But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize, and even kill your black brothers and sisters with impunity ... when you are forever fighting a degenerating sense of "nobodiness"— then you will understand why we find it difficult to wait.

The question to ask the progressives is whether progressivism addresses the problem described by Jefferson et al. The problems that Jefferson et al. speak of gravely are not problems that are amenable to an intellectual solution but are spiritual problems that require spiritual solutions – solutions that the rationalized bureaucratic modern state is simply not equipped to handle. It is not the formal provisions of the law and the written Constitutions that are the problem. Rather it is something larger and deeper than that: the empathetic existential gap between whites and blacks entrenched in the original founding of America is the problem. It is this divide that needs to be closed so that black and white, equally free, can live in the same state with a sense of belonging.

The Democrats' Refounding of America

Another critical analysis of attempts to “Refound” the United States was recently offered by another conservative writer, Christopher Caldwell in the *Wall Street Journal*.⁸ Caldwell’s piece was prompted by former President Obama’s eulogy for the late Congressman, John Lewis, in which he described the civil rights leader as a “... founding father of that fuller, fairer, better America.”⁹ Caldwell described Obama’s selection of this phrase as “an epochal turn of phrase,” stating that although Obama spoke these words in the context of Mr. Lewis’s funeral, he was actually reacting to the ongoing Black Lives Matter protests.

Why in the context of the ongoing protests against perceived police racism did Obama forcefully stretch himself to praise the late Congressman Lewis, a protégé of Rev. Martin Luther King, Jr., as a founding father of America? It was not as much from what he did as a Congressman as what he did before becoming a Congressman that earned him Obama’s praise. Lewis desegregated lunch counters in Nashville in 1960, spoke at the 1963 March on Washington, contributed immensely to the Civil Rights Act of 1964, and was savagely beaten leading a march in Selma in 1965.

By referring to Mr. Lewis as a founding father, Obama was probably and specifically reaching out to the Civil Rights Act of 1964 that the late Congressman had helped to bring about. According to Caldwell, the Civil Rights Act was represented as a refounding of the country because it shifted the power of the Constitution to courts, making them not merely the interpreters of the Constitution but the *authors* of the Constitution. According to Caldwell, the significance of Obama’s “anoint[ing] of John Lewis as a ‘Founding Father’” and the understanding of the Civil Rights Act as a refounding of America have been fully embraced by establishment Democratic politicians.¹⁰

Central to Caldwell’s analysis is the assumption that the 1964 Civil Rights Act was a watershed in American history that in some fundamental sense “reformed” the nation. While that may be true with respect to the formal structure of rights for citizens and to the procedures through which the state protected those rights, it seems to have done little to give African Americans a sense of belonging. The Civil Rights Act came about specifically to address the Southern racial segregation with its separate facilities, its inferior schools for blacks, its exclusion of blacks from voting. The targets of the Jim Crow Laws¹¹ were African Americans but the Civil Rights Act that ensued did not *specifically* target the victims, the African Americans.

As Caldwell observes, while the Act's principal objective was directed toward African Americans, its effect was far broader:

Although ending segregation was the Act's main selling point, its language was open-ended. Women could use it to sue for more access to executive positions. Immigrants could use it to sue for ballots in Spanish. Over time, the groups who could demand redress were expanded – this summer's *Bostock v. Clayton* case brought gay and transgender people under its protection.

The long-term benefits of the Act, then, were distributed over a much broader group of people than blacks. The effect of that may generally be seen as positive, to the extent that a wide swath of individuals benefited. The effect on blacks of that diffusion of the Act's benefits, however, may not have been entirely positive. Let me ask you this: Did the Civil Rights Act address the grave problem that Jefferson, Lincoln, the early abolitionists, and Tocqueville saw so clearly? That problem had to do with the sense of belonging for African Americans and more specifically, the deep chasm between blacks and whites that Jefferson despaired of bridging. If the Act did anything, it helped highlight that chasm. It helped shed light on the fact that the *only* way to have the Act passed was to widen its scope to include all future immigrants. The state had limited sympathy for African Americans otherwise the language would have been directed at them specifically. It highlights what Hannah Arendt referred to as a continuation of the nation's tacit *consensus universalis*,¹² which she argued simply did not recognize African Americans as full and equal members.

The Highlight of the Founding Problem that calls for the Refounding of the United States

Thomas was a middle age “Back-to-Africa” African American man. Thomas introduced himself to me as “brother Thomas,” saying that when he heard me speaking, he immediately could tell from my accent that I was a “brother” from Africa. He told me that his ultimate aim in life was to return to Africa, his motherland. After meeting him several times at the same café I first met him, he offered to show me around Berkeley. I had arrived at Berkeley as an undergraduate a week before we met. I was delighted to have a new friend upon arrival. He offered to drive me in his new car to a Berkeley flea market where, as he put it, I would find many “brothers and sisters,” i.e., African Americans. We set out for the market on Saturday morning. He told

me about his healthy family, gainful employment, the house he owned in Oakland, and his new car he just bought in which we were riding. A few blocks away from where we started, he suddenly tensed up, stopped talking and was literally sweating and taking quick looks at his rear mirror. Surprised by his sudden changed of mood, I asked what was wrong? “White Police! Police,” he said. I looked at a police patrol car behind the following car manned by a white police officer. Thomas slowed down, changed lanes, and the police car drove past us without paying even the slightest attention to us. He took a deep breath and told me that the white police officers were the “enemy number one” of young successful black men like himself. He said that most of his male classmates from primary and high school were in prison for possessing or selling cocaine, marijuana or for reasons that only the police could tell. He said some of his family members lost their lives in the hands of the police officers. He then went on to advise me to be careful in case I ended up at the hands of the white police officers because “you will surely go to jail whether you are guilty or not.”

We arrived at the flea market and a cheerful Thomas showed me around it introducing me to some Africans who were there shopping and then drove me back to the University campus. On the way he told me that the only way that he could live free was for him to move with his family back to Africa, his homeland. I asked if he had visited Africa before. He replied that he had not, but that he’d been planning on it for a very long time.

I lost track of Thomas the moment I left Berkeley but that drive to the flea market has haunted me for years. The impression I got from spending time with Thomas was of a law-abiding citizen, hardworking African American man living in the most powerful country in the world. But when I looked closer at him and listened attentively to his stories, I got the impression of someone living in a place as if a sojourner whose life belonged somewhere else. Obviously, the police officer was not after him and did not seem to have noticed him on our drive to the flea market. He confessed that he had no problem with the law, yet the impression he gave me was of someone who did not *feel* at home. Thomas could not help but see the situation as that of whites against blacks and whites represented by police officers acting in the name of the state. Talking with Thomas seemed to confirm Jefferson’s sober warning that “the two races, equally free, cannot live together.”

This is the problem! When that sacred sense of belonging is lacking (as in the case of Thomas) the written constitution becomes for him something for whites – as he put it once, “a source of jobs for lawyers, judges, prison guards, police officers.” I thought of Thomas and his frustration when I heard

Black Lives Matter protesters calling for defunding the police and for dismantling the entire judicial system.

That frustration is understandable. However, I argue that focusing on the police and even the entire legal institution as those who have called for “defunding the police” is misdirected. The focus should instead be on the perception that the constitution and legal protections are not applied to blacks and whites in the same way, and those differences in application deny blacks that sacred existential sense of belonging. Ultimately, the focus should be on solving the problem posed when one group feels that they belong and another feels excluded. African Americans and their perceived nemeses are not to be blame. The unwritten constitution is.

Guideposts to Refounding the United States of America: The Path not Taken by Contemporary Founders

To see how we might refound the state, let us start by considering what a constitution should look like. A constitution founds a state, not the other way around. Founders of states wittingly or not are authors of constitutions. According to Princess Ngonso, the lawgiver of the state of Nso: “The Constitution generates and pumps blood to the arteries of all wirnso [citizens of Nso].” The metaphor Ngonso uses to describe the Constitution is a grave one of life and death. When the people of Nso talk of defending their state with their blood, that is what they are referring to because they know that without their hearts (Constitution), they are all (civically) dead.

If one takes this blood metaphor seriously, one realizes that a life-generating constitution transcends the words that comprise it. A justly ordered constitution also encompasses *dynamic* traditions, rituals, symbols, ceremonies, and august norms and cultural practices.

A justly ordered constitution is like a frame around a picture. The picture to which the constitutional frame should direct the attention of the viewers is (to put it simply) a *sense* of belonging to a home. What kind of constitution would give its citizens that sense of belonging both to the home of each and the home of all? A *wonderful* constitution that mesmerizes and entrances citizens with a *sense* of belonging should itself be imbibed in the senses of the citizens. As such, it is not only the words as who is speaking them, on what occasion, the look on the face of the speaker, the uniform, the place where the words are spoken and the character of those speaking the words that matter for the purposes of the injecting into the hearts and souls of citizens that existential *senses*. This conception of an unwritten

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constitution should open the doors for august symbols, rituals, ceremonies, traditions, cultures, mores and narratives that, along with a more formal written one, are essential to a justly ordered state capable of rooting itself deep into the soul of citizens.¹³

Abraham Lincoln as the Refounder of the United States

As noted above, Thomas Jefferson saw and described in vivid words the gravest problem with the country's founding. Abraham Lincoln showed us how to refound the country as a first step toward addressing Jefferson's terrible dilemma. Lincoln's example provides valuable lessons on how to continue this project of refounding the United States so as to give everyone a sense of belonging or, to put it in Ngonnso's words, to form a constitution that functions as a "heart" that generates and pumps blood to the arteries and veins of all the citizens giving each life and a sense of home. A just-ordered constitution should have a steely razor edge capable of cutting through the heart of each citizen into the soul and getting lodged there and warming the entire being. The present constitution is like a kiss that dries at the lips of the lover without warming the heart,¹⁴ not to make mention of the soul.

The founding of a state is a process that is hard to control, much like a powerful storm that uproots trees, tears down houses, sweeping away the old to make room for the new. The founding of the United States was no exception to that. It involved the sweeping away not just of the prejudices the various European people brought with them, but of many of their erstwhile entrenched identities – ethnic, religious, and tribalistic – in favor of a new identity as *white* – free and equal – as distinguished from *black* – inferior, infantile, and fit only for subjection.

In time, of course, blacks began to resist, disrupting not only the whites' sense of superiority but their personal security. Whites – particularly white slaveowners – took to heart Jefferson's dilemma and, concluding that "the two races, equally free, cannot live in the same government," resolved to deny blacks their freedom. This is the extent to which the Civil War can be said to have been caused by slavery with one side, the Confederate, fighting to ensure that "the two races are not equally free," specifically that blacks remain in bondage, and the other side, the Union, ensuring that they are freed and live in the same state.

The Civil War and the post-war amendments represented a different approach to Jefferson's dilemma and forced the nation to try to find a way for the two races, now both at least on paper free, to live under the same

government. Thus, Lincoln sought to defeat the Confederacy in battle, to free the slaves through the Emancipation Proclamation, and ultimately to amend the Constitution to bar slavery altogether.

But Lincoln also recognized that outcomes on the battlefield and on paper were not enough to achieve the “more perfect union” promised in the preamble to the Constitution. Thus, following the battle of Gettysburg, in which more than 50,000 Union and Confederate soldiers were killed, Lincoln attempted nothing less than a refounding of America. He stood at a small monument erected at the focal point of the cemetery, asserting that “... we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth.”

Lincoln succeeded. He did it not by appealing to the text of the extant Constitution as a document (that is sitting here on my desk) but by appealing to the Founding Fathers of the land that came before him as well as alluring to the words of Thomas Jefferson penned in the Declaration of Independence, a document that is not legally binding in the United States but that is nevertheless an important part of the constitution of the United States writ large. According to Lincoln, when the founding fathers said that “all men are created equal” they meant “all men” including blacks on behalf of whom the war was fought to constitutionalize that sacred equality in order to make the nation whole. Lincoln saw this equality as what I am referring to as the “sacred existential sense of belonging” and the constitution as a frame around that picture. What is important here is that the symbolic speech, the rituals and the ceremonies, along with the traditions and the tropes like God invoked in his address, were not the affairs of the mind but, in a larger and more fitting sense, these were the affairs of the heart and soul. The smell of corpses, the view of the battle ground, the vocalization of the words, the feet on the cemetery ground – all touch the senses, and the trope of God and the occasion itself made sure the words penetrated the soul of Americans. When Lincoln referred to “democracy” he was not referring to democracies in Hong Kong, Iraq, Kenya or Myanmar. He was talking about Americans in black and white – a fact made explicit in his Second Inaugural Address which, along with his Gettysburg Address and his eventual martyrdom, has (if not should) become part of the larger constitution of the United States.

Following on the heels of Lincoln was Martin Luther King, Jr. He too fought for the establishment of a new understanding of the Constitution. The highlight of the fight for which he gave his life was the “I have a

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Dream Speech” at the step of Lincoln’s memorial. His use of hearty American tropes in his speech, the spot where he stood, the occasion and the people present were meant to speak to the heart because, when it comes down to the sense of belonging, it is the heart not the mind that is the problem. Both Lincoln and Martin Luther King, Jr. targeted exactly that.

A Matter of Black Lives and the Nonrationality of the Constitution

On the 6th of January I was glued to my television watching the events live as they were unfolding at the United States Capitol as the almost exclusively white crowd stormed the Capitol. What interested me was not the desecration of the Capitol, but the *feelings* of the mob as they marched to the Capitol (not just while, but *because* Congress was engaged there in one of the gravest civic rituals of a democratic nation, the transfer of political office), chanting “USA! USA! USA!” I could not help but feel that those whites had, perhaps for the first time, tasted what African Americans have been feeling since the inception of this nation, the sense – justified or not – that they do not belong to the only place they refer to as their home.

Understandably, most onlookers were horrified at the scene, and many – including the majority of the lawmakers, then-Senate Majority Leader Mitch McConnell, the media, and many business leaders – denounced the mob as white supremacists, traitors, criminals, treasonists, and domestic terrorists. Social media giants blocked them from applications such as Twitter, Instagram, Facebook, and Youtube, and people talked of placing known perpetrators on no-fly lists.

While the outrage at the members of the mob is reasonable, I think it should also be tempered by the possibility that simply dismissing their conduct as that of insurrectionists, criminals, domestic terrorists, and racial supremacists will be counterproductive. To the extent that their rage reflects their *sense* that their country is not their own, they may share – far more than the affluent, well-educated commentators from their privileged positions in the media and government – the kind of frustration that African Americans have been in since the inception of this nation. In their hearts and souls they cannot recognize the place they call home as theirs anymore.

Recognizing this possibility does not amount to excusing or condoning the behavior of the mob, or to equating the conditions and experiences of the members of the Capitol mob with those of African Americans. But I think it does call on us to see that there are perhaps divisions other than those of race that separate us from one another, and that pose dilemmas

similar to that posed by Jefferson with respect to race. When I see videos of the members of the mob assaulting the Capitol police and breaking windows and doors, I simply do not feel I can imagine life from their point of view. Of course, I am under no obligation to be able to put myself in their shoes or to empathize with them. But should that lead to their isolation from participation in civil life, they will surely experience social death or what the people of Nso, the people who sired me, refer to as “death in life” – a result that, if it affects a significant population, is liable to have negative consequences for all of us.

As Abraham Lincoln demonstrated to us, refounding the United States will take more than looking into the written charter that has gained the reputation of the Constitution. That great charter was written in 1787, ratified in 1788 and went into operation in 1789. If the “two races, equally free” are to live equitably in the same government, then the new founders will need to avail themselves of the larger and more operational part of the constitution. That larger part speaks to our heart, souls and senses. We are surrounded by that constitution on our quotidian life. I am referring here to the ubiquitous symbols, rituals, ceremonies, traditions, norms and narratives that are responsible for our sense of belonging to a home. That metaphoric home is built off of a sense of cohesion, empathy, sympathy, aesthetics and the sublime.

Randall Robinson entitled his book *The Debt* in which he argues in fiscal terms what the government of the United States owes African Americans.¹⁵ But when he shifted his focus to the heart of the government of the United States, he positioned himself at the Capitol of the United States and then expressed his feelings from deep inside him saying this:

I looked straight up and immediately saw the callous irony, wondering if the slaves who had helped to erect the structure might have bristled at it as quickly as I. . . . Symbolizing the carapace of American liberty, sixty-odd robed figures are arranged in heroic attitudes around the majestic Washington, before whom a white banner is unfurled bearing the Latin phrase E Pluribus Unum, or one out of many. But all of the many in the fresco are white.¹⁶

Black Lives Matter protesters, working to bring down the statues such as the one of the Confederate General Robert E. Lee in Charleville, Virginia, recognize their importance as part of the unwritten constitution of the United States that has denied them that sense of belonging. The white supremacists defending those statues similarly recognize, perhaps only tacitly, the significance of those statues, albeit as representing something they fear to lose. Indeed, the problem posed by those monuments is not just

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that they are symbols of the Confederacy, but that they and so many other of our civic symbols and memorials are white – a reminder that our polity is in so many ways one made for whites.

Think for a moment about these aspects of the unwritten constitution. Think not only of this or that but of the totality of them and then you can begin to feel the weight on your soul. Like Robinson, you experience the Capitol as a powerful symbol. Yet if you are an African American, you may wonder if you actually belong in such a place in which so many of the individuals represented and honored are white. The Supreme Court and the White House, too, are powerful symbols, with a similar alienating effect for many African Americans. While in the environs, step into a garden variety of memorials, starting with the towering Washington Memorial that is larger than life, and then visit the Franklin Delano Roosevelt and then the Lincoln Memorials and at the Lincoln Memorial spend a little more time. There you will notice, inscribed on the south wall of the monument, the text of the Gettysburg Address, above which is a mural depicting the angel of truth freeing a slave; engraved on the north wall you will find the text of the Lincoln's Second Inaugural Speech and in the middle of the pavilion is the figure of Abraham Lincoln himself, his grave countenance casting a palpable aura over visitors to his shrine. The White House itself is a symbol of the power of the United States representing the residence of the highest executive of the land. Washington, the political capital of the United States is named after George Washington, the first President of the United States. Then go into museums and what you find there are overwhelmingly representative of what Jefferson refers to as the "white race." The statues of Martin Luther King, Jr., alone are the exceptions that proves the weight of nonrational imagery of the white race. The same is true across much of the country, where those who are recognized and celebrated in the names of cities, streets, parks, and schools are, with few exceptions, white.

Decisions regarding who to recognize in such public ways and who to celebrate as our most important civic heroes cannot help but have an effect on how citizens think of each other and of themselves. This, in turn, form part of the unwritten constitutions that guides citizens' expectations as to how they and others should be treated by the state.

Hannah Arendt refers to the aspect of the tacit constitution or the constitution writ large that I have been defending as "*consensus universalis*" and argues that it is this particular aspect, this existential sacred sense of belonging that makes all other aspects of the constitution possible and palpable. Arendt criticizes the ability of the Amendments to the

Constitution to right the wrongs of the past, or what she refers to as the “original crime.” The original crime refers to the exclusion of blacks from the tacit (hearty) original constitution of the United States. She puts this so succinctly in a passage that deserves to be quoted at length:

We know that this original crime could not be remedied by the Fourteenth and Fifteenth Amendments; on the contrary, the tacit exclusion from the tacit consensus was made more conspicuous by the inability or the unwillingness of the federal government to enforce its own laws, and as time went by and wave after wave of immigrants came to the country, it was even more obvious that blacks, now free, and born and bred in the country, were the only ones for whom it was not true that, in Bancroft’s words, ‘the welcome of the commonwealth was as wide as sorrow.’ We know the result, and we need not be surprised that the present belated attempts to welcome the Negro population explicitly into the otherwise tacit consensus universalis of the nation are not trusted. (An explicit constitutional amendment, addressed specifically to the Negro people of America, might have underlined the great change more dramatically for these people who had never been welcome, assuring them of its finality. Supreme Court decisions are constitutional interpretations, of which the Dred Scott decision, which held in 1857, that ‘Negroes are not and cannot be citizens in the meaning of the federal Constitution,’ is one. The Failure of the Congress to propose such an amendment is striking in light of the overwhelming vote for a constitutional amendment to cure infinitely milder discriminatory practices against women.) At any rate, attempts of integration often are met by rebuffs from black organizations ... because they are in open rebellion ...¹⁷

The founding of the United States was a radical event sweeping clean the old identities of the various discrete white immigrants and replacing those with a new identity based on race. The refounding of the United States would call for even a more radical change to free Americans of that deep-rooted racial prejudice of white against blacks.

It is perhaps understandable that Jefferson should be pessimistic about the prospects of such a refounding. But the history of the United States suggests that change is possible, if only the new founders of the constitution of the land engage their imagination and focus not on the written charter that is popularly referred to as the Constitution of the United States, but on the richer *de facto* constitution to counteract harmful entrenched prejudices.

The measure of a union of hearts of the Americans would come when, at the time of ubiquitous murdering of young black men and women at the

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hands of police officers, the entire nation pauses to ask itself this soul searching question: “where are we as a nation going wrong such that our law enforcement officers, charged with the duty of securing lives, take the lives of some of us?” The parallel to this question is one that we would expect from a house divided along entrenched racial bias lines of us versus them: “what manner of people are those (referring to African American victims of police brutality) who are so intellectually and morally deficient not to realize that if they could just do what the police tell them to do all will be fine?” This comes down to who we are as humans. Our truest social selves are not our thoughts but something that our thoughts reveal and hide. Great founders of states like Ngonso have headed this notion of the selves seriously, making sure to incorporate human feelings and much more into their constitution to make it a constitution for people like us on this earth and on this patch of land with a narrative real or imagined.

In this respect, gestures such as putting Harriet Tubman on the twenty-dollar bill are not trivial, empty acts, but important means of assuring African Americans that they are welcome in their own country, that they belong. It is when the landscape is equally full of images of both races that the heart of the constitution shall pump blood to all citizens of the United States giving them life, ownership and thriving.

Let me conclude with an exchange between Princess Ngonso, the lawgiver of Nso, and Simaa’, an intellectual.

The exchange:

Simaa’: feeling is stupid, and stupidity is bad!

Ngonso: Feeling is wonderful, and wonder is the wheel on which our world runs. That’s all!

NOTES

¹ A high-profile example is that of Prince Harry who, only after marrying and having a child with an African American woman--Meghan, Duchess of Sussex--and living on the American soil, appeared to become aware of the extent of everyday racism in the United States, saying recently that “the world that we know has been created by white people for white people.” <https://www.cnn.com/2020/10/02/uk/prince-harry-meghan-racism-bhm-gbr-intl-scli/index.html>.

² Cited in Hannah Arendt, *Crisis of the Republic* (New York: Harcourt Brace Jovanovick, inc, 1969), 89.

³ *Ibid*, 90.

⁴ Famously, early abolitionists advocated for the creation of a new country, Liberia, to which freed slaves from America could emigrate. During the Civil War, “a deputation of Blacks approached Abraham Lincoln and asked him to found a colony for them in South America, (ibid)” so they can establish their own state.

⁵ Among other things, this statute, the largest federal crime bill in the history of the United States, created new federal crimes relating to gang activity and expanded the federal death penalty.

⁶ Redlining refers to the practice of denying services (often loans and other financial services) to residents of particular neighborhoods on the basis of ethnicity or race.

⁷ National Review, Dec. 27, 2011, available at <https://www.nationalreview.com/2011/12/refounding-america-tiffany-jones-miller/>.

⁸ <https://www.wsj.com/articles/the-democrats-refounding-of-america-11597342320>

⁹ For the full transcript of Obama’s eulogy, see <https://www.nytimes.com/2020/07/30/us/obama-eulogy-john-lewis-full-transcript.html>

¹⁰ <https://www.wsj.com/articles/the-democrats-refounding-of-america-11597342320>.

¹¹ “Jim Crow” laws were racially discriminatory statutes passed at the state and local level throughout the South in the United States following the post-Civil War.

¹² Hannah Arendt, *Crisis of the Republic* (New York: Harcourt Brace Jovanovich, Inc, 1969).

¹³ For more on political symbols, rituals, traditions, and ceremonies, see Ajume H. Wingo, *Veil Politics in Liberal Democratic States* (Cambridge: Cambridge University Press, 2003).

¹⁴ Maurizio Viroli, *Niccolò’s Smile* (New York: Hill and Wang, 1998).

¹⁵ Randall Robinson, *The Debt: What America owes to Blacks* (New York: Penguin Group, 2000).

¹⁶ *Ibid*, 1.

¹⁷ Arendt, *Crisis of the Republic*, 90 – 92.