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AMERICA'S RACIAL STAIN
The Taint Argument and the Limits of Constitutional Law and Rhetoric

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Nothing lasts, and yet nothing passes, either.
And nothing passes just because nothing lasts.[1]

I. INTRODUCTION

How should reformers respond to America's racial stain? The problem is more complex than many imagine. Political activists usually attempt to promote change by taking advantage of a gap between current reality and a touchstone they use to measure the normative desirability of that reality. But what if the touchstone itself is infected by the reality that activists want to change?

Consider first the Constitution. For much of our history, social movements have resorted to constitutional law and rhetoric as a foundation grounding campaigns for reform.[2] That history creates a problem: if critique of the status quo is deep enough to erode the moral standing of the Constitution itself, then reformers destroy the substrate on which the critique rests. There is no simple way for a document born in original sin to cleanse itself of its own impurity.

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1 PHILIP ROTH, THE HUMAN STAIN: A NOVEL 52 (2000).

2 *See*, *e.g.*, DAVID D. COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW (2016); Jack M. Balkin & Riva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

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The problem runs deeper. The Constitution serves as a symbol of the broader American experience. At the beginning, our country was stained white. On one telling of our national story, the stain has colored all our history. If the telling is accurate, then purging the stain requires destroying the American ethos. Before we can achieve real political progress, we must explode the self-glorifying myth of American exceptionalism. Yet the very effort to come to terms with our real history undermines the normative basis for our rebirth.

Questions raised by these problems do not lend themselves to definitive answers, and this essay does not offer them. Instead, I suggest a variety of responses that attempt to grapple with the difficulty. I also offer tentative assessments of whether they can do so successfully. Least promising, I argue, are responses grounded in constitutional law understood as judicial parsing of constitutional text and precedent. This social practice is too deeply mired in a pernicious history, set of conventions, and restraints to pull itself out of its own muck.

Political redemption offers more promise. Tactics used outside the courthouse that invoke the vaguer, higher ideals supposedly implicit in constitutional text and that reimagine and reconstruct our history in a more favorable light might provide a foundation for renewal. But the effective use of these tactics requires extraordinary political and rhetorical skill that no one on the current scene has yet demonstrated. Perhaps more importantly, it also requires a willingness of Americans, also yet to be demonstrated, to follow such a leader toward racial reconciliation.

II. THE CULTURAL AND HISTORICAL PROBLEM

As an entry point into the problem, imagine that Washington, D.C., somehow realizes its long-time ambition to become a state. What should the new state be called? Clearly not "Washington, District of Columbia." The only acceptable part of that name is the word "of." Early versions of DC statehood bills labeled it "New Columbia,"[3] as did a draft of the new state's constitution.[4] But that name is also unacceptable. Christopher Columbus was

3 *See* Arin Greenwood, D.C. *Statehood Senate Bill by Joe Lieberman Would Make 'New Columbia' 51st State*, HuffPost (Dec. 20, 2012), https://www.huffpost.com/entry/dc-statehood-senate-lieberman-new-columbia-_n_2334077.

4 *See* New Columbia Statehood Comm'n, The Constitution of the State of New Columbia, https://statehood.dc.gov/sites/default/files/dc/sites/statehood/publication/attachments/DRAFT%20CONSTITUTION%20PACKAGE%20FINAL.pdf.

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at a minimum a brutal enslaver, and he may have been a genocidal maniac.[5] Making "Columbia" "New" doesn't extirpate the crimes of the old Columbus any more than a "New Hitleria" would cleanse Hitler's crimes.

House Resolution 51, the first bill providing for D.C. statehood to pass either house of Congress, names the new state "Washington, Douglass Commonwealth."[6] This gets rid of Columbus and cleverly preserves the "Washington, D.C." label by changing the words that D and C abbreviate. Unfortunately, though, it accomplishes these goals at the cost of considerable awkwardness. The name would inevitably be shortened to "Washington," but we already have a state so named. The more serious problem is that the bill asks D.C.'s Black residents to accept a name honoring a man who enslaved their ancestors.

The bill's authors apparently thought the unacceptable implications of the naming could be avoided by balancing George Washington with Frederick Douglass, an authentic hero who was a D.C. resident and once was the D.C. recorder of deeds.[7] But balancing a white slaveholder with a Black abolitionist and calling it a day is morally repulsive. It suggests that a compromise equally honoring our nation's racist and liberatory past is acceptable. It isn't.[8]

Controversy about monuments, statues, and patriotic songs presents another version of the same difficulty. Consider first our national anthem. The poem that provided its lyrics was written by Francis Scott Key, a slave owner[9] who used his legal acumen to prosecute abolitionists for libel.[10] The third verse proclaimed that

> No refuge could save the hireling and slave
> From the terror of flight or the gloom of the grave.[11]

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5 The extent of Columbus's depravity is disputed and, unsurprisingly, has become deeply politicized. *Compare, e.g.*, George E. Tinker & Mark Freeland, *Thief, Trader, Murderer: Christopher Columbus and Caribbean Population Decline,* 23 WACAZO SA. REV. 25, 26 (2008) (arguing that Columbus was . . . a murderer, culpable for those crimes against humanity as the head of an authoritarian regime just as readily as Adolph Hitler"), *with* Mary Ann Castronova Fusco, *In Person; In Defense of Columbus*, N.Y. TIMES (Oct 8, 2000), https://www.nytimes.com/2000/10/08/nyregion/in-person-in-defense-of-columbus.html (quoting historian William J. Connell as conceding that Columbus enslaved indigenous peoples but arguing that "we have to be very careful about applying 20th-century understandings of morality to morality of the 15th century").

6 *See* Washington, D.C. Admission Act, H.R. 51, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/51.

7 *See* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM (2018).

8 Of course, the vast majority of Americans who honor Washington do so in spite of, rather than because of, his status as a slaveholder. But do Washington's many other accomplishments really earn him forgiveness for asserting the power to own other human beings? And even if we do forgive him, it hardly follows that we should honor him.

9 *See* MARC LEEPSON, WHAT SO PROUDLY WE HAIL: FRANCIS SCOTT KEY, A LIFE (2014).

10 *See* JEFFERSON MORLEY, SNOW STORM IN AUGUST: WASHINGTON CITY, FRANCIS SCOTT KEY, AND THE FORGOTTEN RACE RIOT OF 1835 (2012).

11 *Id.*

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The apparent reference is to the dire fate that Key envisioned for enslaved African Americans who rushed to British battle lines in search of freedom. Without apparent irony, Key concludes the stanza by proclaiming that

> And the star-spangled banner in triumph doth wave
> O'er the land of the free and the home of the brave.[12]

The context makes apparent whose freedom Key cared about and whose home he was describing. Is it any wonder, then, that some defenders of racial justice refuse to stand when the song is sung? Still, we can understand and applaud their actions while also wondering whether our fragile politics can withstand a campaign to dethrone this supposed symbol of national unity.

Monuments and statues that glorify traitors and racists pose a similar problem. It should be obvious that these structures deserve no place in our public iconography, but opponents of the iconoclasts ask, "Where is the stopping point?" It is not as easy as it might seem to dismiss their concern.

Consider, for example, the people memorialized by the most important monuments in Washington, D.C. When George Washington went to Philadelphia, where he presided over the Constitutional Convention, he was accompanied by the enslaved William (Billy) Lee, whom Washington had purchased for 61 pounds, 15 shillings.[13] Lee waited on Washington hand and foot. For years, Thomas Jefferson ran what amounted to a slave labor camp at Monticello. He repeatedly impregnated the enslaved Sally Hemings, the half-sister of his wife.[14] Abraham Lincoln stated that he had no objection to a constitutional amendment that would have permanently protected slavery.[15] Until nearly the end of his life, he believed that African Americans could never coexist with whites and favored

12 *Id.*

13 *See* Jessie MacLeod, *William Lee (fl. 1768–1810)*, in Encyclopedia Va. (Dec. 22, 2022), https://encyclopediavirginia.org/entries/lee-william-fl-1768-1810/.

14 *See* Annette Gordon-Reed, The Hemingses of Monticello: An American Family (2008).

15 Shortly before Lincoln's inauguration, Congress enacted the Corwin Amendment, which provided, "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." In his inaugural address, Lincoln stated that he had "no objection" to the amendment. *Abraham Lincoln: First Inaugural Address*, Bartleby (Mar. 4, 1861), https://www.bartleby.com/124/pres31.html.

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various crackpot schemes to rid the country of them.[16] Should we destroy the Washington Monument and Lincoln and Jefferson memorials?

The controversy over names and statues might be thought to create no more than a trivial embarrassment. Perhaps it is an example of our unfortunate preoccupation with symbolism at the expense of substance. But confining the problem to statues, songs, and monuments seriously understates the sweep of the claims made by iconoclasts. On their account, the nation's entire history is tainted by racism and oppression. Instead of an aberration, Trumpism is only the latest manifestation of our founding and permanent commitment to white supremacy. The Revolutionary War, the drafting of the Constitution, the settling of the West, the Jacksonian Revolution, the Progressive movement, the New Deal, the Nixon presidency, and the Reagan renewal are all colored by America's racial stain. Arguably, it infects even modern American attitudes toward the war in Ukraine—we have been much more responsive to the suffering of white Christians there than we were to the suffering of, for example, victims of genocide and mass slaughter in Rwanda, Yemen, Myanmar, and South Sudan.

Of course, there are other ways to characterize our history. I discuss these possibilities below. But suppose at least provisionally that the account is right, or even partially right. If America's racial stain has always been white, then the iconoclastic projects risk the effacement of our history as well as all the statues, monuments, literature, and songs that glorify it. The projects suggest that we must disown both our Constitution (the document) and our constitution (our ontological status). Is that an undertaking that we could or should pursue in the name of the very Constitution and constitution we are attempting to displace?

In the sections below, I explore this question first with regard to judicially enforceable constitutional law and then with regard to constitutionally tinged rhetoric as it operates in the political sphere.

III. THE PROBLEM FOR COURTS

America's racial stain inevitably produces disruptions, tensions, and contradictions in standard constitutional doctrine that, in theory, social activists might exploit. A generation

16 Even after signing the preliminary Emancipation Proclamation, Lincoln told African American leaders that

> [y]ou and we are different races. We have between us a broader difference than exists between almost any other two races. . . . [T]his physical difference is a great disadvantage to us both, as I think your race suffers very greatly . . . by living among us, while ours suffer from your presence. . . . [O]n this broad continent, not a single man of your race is made equal of a single man of ours. . . . It is better for us both, therefore to be separated.

V The Collected Works of Abraham Lincoln 371–72 (Roy P. Basler ed. 1953). On Lincoln's change of heart toward the end of his life, see Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 259–63 (2010).

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of critical legal scholars tried to act on this theory. Many of them believed as an article of faith that the deconstructive project would open space for a politics that was more humane, equal, decent, and just.

With the benefit of years of difficult experience, we now have solid reason to doubt that deconstruction can achieve this objective. There are two versions of the theory. On the first account, the contradictions could encourage timid judges to see that they have a choice about how to formulate legal doctrine. Judges would then use that freedom to support progressive change. On the second version, pointing out contradiction and incoherence could lay the groundwork for discrediting the very enterprise of liberal constitutionalism so it can be replaced with a more just legal structure.

Perhaps the jury is still out on the second claim (more on this below), but in retrospect, the first claim seems impossibly naïve. It rests on a radical misunderstanding of the kinds of people who become judges and a radical underestimation of the resilience and flexibility of legal doctrine. The very indeterminacy that Critical Legal Studies emphasized means that judges have a limitless capacity to squirm out of embarrassing corners by recharacterizing or overruling precedent, reframing factual and temporal assumptions, exploiting the ambiguity of relevant text, or simply and willfully ignoring or obfuscating contradiction.

The discussion that follows provides a brief case study of this phenomenon in the context of America's racial stain. It documents both the discontinuities produced by the taint argument and the tactics that have been and will be employed to soften or obscure those discontinuities.

A. Using the Racial Stain Argument to Force Change in Doctrine

1. The problem.—The doctrinal problem begins with *Washington v. Davis*,[17] in which the Court held that a facially neutral government policy need not be strictly scrutinized even if it has a disproportionate racial effect. The Court's opinion surprisingly and candidly acknowledged the racial stain problem exemplified above by the difficulties posed when we contemplate a new name for D.C., abandoning the national anthem, or removing public art. The *Davis* Court thought that the results of an effects test "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."[18]

For proponents of the racial taint theory, that is just the point: the tendrils of American racism are pervasive, and getting rid of racial hierarchy and white privilege "root and branch"[19] requires revolutionary change. For the *Davis* majority, though, the very fact that

17 Washington v. Davis, 426 U.S. 229 (1976).

18 *Id.* at 248.

19 Green v. Cnty. Sch. Bd., 391 U.S. 430, 438 (1968).

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an effects test would require such change meant that the Court had to reject the test. The Justices seem to have thought that constitutional law necessarily operated at the margins, smoothing the rough edges of our practices and traditions but not requiring their transformation. That view entails living with a contradiction. On the one hand, we have the official story that insists that racial hierarchy is unconstitutional and unacceptable. But on the other, when the effort to eliminate racial hierarchy is "far reaching" and would raise "serious questions" about established institutions and practices, hierarchy is both constitutional and acceptable.

But although *Davis* attempted to cabin the taint argument, it did not completely reject it. The Court reaffirmed long-standing doctrine applying strict scrutiny to statutes that facially discriminate on a racial basis, apparently even if they do not have a current, racially disproportionate effect. More significantly, it made clear that even a facially neutral statute or policy would trigger strict scrutiny if it was enacted for a racist purpose.

If the Court thought this compromise effectively eliminated the revolutionary potential of the taint argument, it was sadly mistaken. The mistake becomes apparent when one examines the implications of *Hunter v. Underwood*[20]—a case that applied the "intent" test to invalidate a statute. *Hunter*, decided in 1985, concerned a provision of the Alabama Constitution adopted eighty-four years earlier. The provision disfranchised all persons convicted of "crimes of moral turpitude," and the legislative history left no doubt that it was enacted for the purpose of restricting the voting rights of African Americans. Writing for a unanimous Court, Justice Rehnquist treated as irrelevant questions about whether the law currently served a legitimate purpose or remained on the books for nonracial reasons. Even if those facts were true, the Court held, the provision must be invalidated because of the motivation of the people who had enacted it years ago.[21]

If the claims some people make about our racial stain are accurate, the potential implications of *Hunter* are breathtaking. There can be no doubt that slavery helped shape the Constitution itself. As historian Donald Robinson has written, "[t]he South's enthusiastic participation in the nationalizing thrust of 1787 carried one portentous qualification: the national government could be as powerful as the vision of a great national empire demanded, *provided that it keep its hands off slavery*."[22] The compromises the Framers made with the motive of satisfying slaveholders are well known and affect virtually every aspect of American government.[23] Later amendments reversed some of the most egregious coddling of slavery, including the three-fifths compromise[24] and the requirement that free

20 Hunter v. Underwood, 471 U.S. 222 (1985).

21 *Id.* at 232–33.

22 Donald Robinson, Slavery and the Structure of American Politics 1765–1820, at 209–10 (1971).

23 For an account of how slavery influenced the drafting of the provisions detailed below, see Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 257–304 (2016).

24 U.S. Const. art. I, § 2, cl. 2 (counting three-fifths of "all other Persons" in apportioning representation).

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states return escaped enslaved people.[25] The ban on the importation of slaves until 1808[26] expired according to its own terms. But other vital provisions remain. They include protections for states' rights contained in the Tenth Amendment,[27] the shape of the federal taxation power,[28] the grant of federal power to mobilize the militia to put down insurrections,[29] the protection of property rights,[30] the ban on congressional export taxes,[31] the electoral college system,[32] and the allocation of treaty-making and appointment powers partly to the president rather than entirely to the Senate.[33] Judicial enforcement of any of these provisions implicates modern generations in our nation's racist past.

I will have more to say below about the status of the Constitution, but even if disowning it is off the table, many sub-constitutional statutes and policies are vulnerable if we take *Hunter* seriously. Some examples:

1. Some claim that police forces have their origins in the slave patrols tasked with capturing escaped enslaved persons and returning them to their former condition.[34] The claim may be exaggerated or overly simple, but there can be no denying that a major motivation for having and expanding police forces was the felt need to control African Americans.

2. Many of our drug laws were enacted because of racist fears of supposedly drug-crazed Asian and African Americans.[35]

3. Conservative scholars have demonstrated that early progressive measures like minimum wage and maximum hours laws were enacted to suppress competition from African American workers.[36] The Davis-Bacon Act, which requires contractors to pay the local prevailing wage to workers at federally funded construction projects, was passed for racist reasons.[37] Federal home mortgage

25 Id. art. IV, § 2, cl. 3 (requiring states to "deliver[] up" any person held "to Service or Labour" who escaped).

26 *Id.* art. I, § 9, cl. 1.

27 *Id.* amend. X.

28 *Id.* art. I, § 2, cl. 3.

29 *Id.* art. I, § 8, cl. 15; *id.* art. II, § 2, cl. 2.

30 *Id.* amend. V.

31 *Id.* art. I, § 9, cl. 5.

32 *Id.* art. II, § 1, cl. 2–4; *id.* amend. XII.

33 *Id.* art. II, § 2, cl. 2.

34 *See*, *e.g.*, *The Origins of Modern Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing (last visited Apr. 13, 2022).

35 *See*, *e.g.*, Desmond Manderson, *Symbolism and Racism in Drug History and Policy,* 18 Drug & Alcohol Rev. 179 (1999).

36 *See* David Bernstein, Only One Place of Redress: African Americans, Labor Regulation, and the Courts from Reconstruction to the New Deal (2001).

37 *See* David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow,* 13 Natl. Black L.J. 276 (1994).

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policy deliberately promoted residential segregation.[38] More broadly, much of the New Deal was racially gerrymandered to help white, but not Black, workers.[39]

4. The location of highways, public housing, public schools, and other public works projects was strongly influenced by the racial composition of neighborhoods in which they were located.[40]

5. Our immigration laws were enacted with the express purpose of controlling the ethnic composition of the country. The very criteria for membership in our political community—who counts as Americans—is therefore racially stained in both senses of the word. The 1965 immigration act ended some of the most egregious aspects of this policy, but not all of them, and the effort to control the flow of immigrants remains motivated at least in part by racist assumptions that go back to the beginning of restrictionist legislation.[41]

6. Early gun-control measures were apparently motivated by fears of what would happen if African Americans were armed.[42]

7. Many argue that the death penalty, which has been abolished in most of the world, survives only because of its disproportionate effect on African Americans.[43]

Unfortunately, these specific examples are just the beginning of the problem. For example, they leave out the pervasive effects that sexist assumptions and outright misogyny have had on our legal architecture. Discrimination against and exploitation of Hispanics and Asians are well documented and have had a profound effect on our history. And what are we to make of the treatment of American Indians? The country's entire history is premised on their displacement, subjugation, and elimination.

38 *See* Richard Rothstein, The Color of Law: The Forgotten History of How Our Government Segregated America (2017).

39 *See* Ira Katznelson, Fear Itself: The New Deal and the Origins of Our Times (2013).

40 *See* Rothstein, *supra* note 38.

41 *See*, *e.g.*, Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 Nw. U. L. Rev. Online 1 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1308&context=nulr_online&preview_mode=1&z=1620939228.

42 *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991).

43 *See*, *e.g.*, Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment 8–115 (2016).

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More generally, specific examples fail to capture the true radicalism of the *Hunter* approach. To fully vindicate *Hunter*'s promise, we must imagine what our society would look like if we had never had laws enforcing slavery, if Reconstruction had succeeded, if there had never been a Jim Crow regime, if different people had immigrated to the United States, and if Indians had not been slaughtered and displaced. That means ceding to judges the authority to imagine and put into place a wholly different country. Could it be that the Constitution requires this outcome?

2. Off-ramps.—There was a moment in American history when the eradication of America's racial stain might have been possible. After the Civil War, Union troops occupied the South, and radical Republicans controlled Congress. At least some radical Republicans wanted to remake America's racial order.

But as we all know, that effort failed. As Eric McKittrick has pointed out,[44] the South, unlike post–World War II Germany and Japan, was never made to accept defeat. The South never became a subjugated enemy subject to the will of the prevailing power. Instead, from the beginning, powerful forces in the North were all too ready for reconciliation and "redemption." Far from mandating radical reconstruction, federal courts used constitutional law as an instrument to frustrate it.[45] The upshot, historian Heather Cox Richardson claims, is that the South eventually won the Civil War.[46]

The victors in 1865 behaved differently from the victors in 1945 for many reasons. Perhaps the principal one is that Allied forces in World War II came from the outside. Germany and Japan had not been part of the United States or the United Kingdom. They did not share a common history or culture. For that reason, the problem of shared responsibility did not arise. In contrast, America's racial stain was not limited to the South. It was and is built into our common history. Extirpating it meant dealing with problems in the North as well as the South.

In any event, whether or not radical reconstruction was possible in 1865, it pretty clearly is impossible now, especially if one imagines it emanating from judicially enforced constitutional doctrine. The progress that was made after the Civil War came about largely because there were troops on the ground and, as noted above, despite rather than because of the efforts of judges to enforce constitutional law. Today, there are no troops on the ground and no prostrate and defeated enemy begging for mercy.

44 *See* Eric L. McKittrick, Andrew Johnson and Reconstruction 31–35 (1960).

45 *See* The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875).

46 Heather Cox Richardson, How the South Won the Civil War: Oligarchy, Democracy, and the Continuing Fight for the Soul of America (2020).

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The notion of the modern Supreme Court leading a campaign of radical reconstruction is fanciful to say the least. But worse than that, and more surprisingly, judicially led reconstruction is probably also undesirable. The last thing racial progressives should want is a conservative Court trying to imagine and put in place a reconstructed society conforming to its conception of what we would have been if we had had a different history. And even if the Court were somehow transformed, prior experience strongly suggests that judicially enforced constitutional law is not up to the task of radical reconstruction. The most liberal Supreme Court in our history—the Warren Court—mostly failed.[47] Certainly, the modern Court is not about to lead us to a promised land. For these reasons, the courts need to find, have found, and will find off-ramps to escape *Hunter*'s implications.

To understand these off-ramps, we must begin by making some analytic distinctions. It turns out that there are two different taint arguments.[48] On some occasions, "taint" refers to a but-for causal connection between previous acts of unconstitutional discrimination and a current state of affairs. Perhaps, for example, a city exhibits a pattern of housing segregation, and this segregation can be traced to discriminatory government decisions made years earlier concerning the availability of government-backed mortgages.[49] On other occasions, "taint" refers to the genealogy of a statute or policy. Perhaps a statute was enacted decades ago for a discriminatory purpose. If the statute remains on the books years later, or if it has been replaced by a subsequent statute that closely tracks its predecessor, the earlier statute or policy might be thought to "taint" the later one.[50]

Matters are further complicated by different understandings of the previous "discriminatory purpose" that putatively infects current policy. Sometimes, the illicit purpose is a desire to harm or denigrate a disfavored group simply for the purpose of making things worse for members of the group.[51] The possibility of this sort of discriminatory purpose lies behind the strict scrutiny afforded statutes or policies that facially discriminate against

47 The Warren Court's most famous racial project was school desegregation, but nine years after *Brown*, it had achieved virtually no integration in the Deep South. When integration finally came, the efficient cause was forceful action by the Johnson administration rather than by the courts. And even then, the abolition of de jure segregation failed to dismantle the country's racial hierarchy. *See*, *e.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2d ed. 2008).

48 *See* W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1203–04 (2022) (distinguishing between different "taint" arguments).

49 *See* Rothstein, *supra* note 38; *cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 499, 530 (1989) (Marshall, J., dissenting) (tying inability of minority-owned Richmond construction firms to win government contracts to pattern of nationwide discrimination).

50 *See*, *e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985).

51 *See*, *e.g.*, U.S. Dep't of Agric. v. Moreno, 417 U.S. 528, 534 (1973) (stating that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); Romer v. Evans, 517 U.S. 620, 635 (1996) ("We conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

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protected classes, but it might also play a role in finding that facially neutral policies are tainted by an unconstitutional purpose.

The second kind of purpose often also involves a desire to harm a disfavored group, but that desire is not a necessary component of the prohibited purpose. Instead, the purpose is defined by the desire to produce the same result that facial discrimination would produce but to do so by facially neutral means. Put differently, the purpose is to use a facially neutral statute or policy with the aim of producing a disproportionate racial effect.[52]

The Supreme Court has pretty much shut down the possibility of making the first sort of taint argument. It has repeatedly held that what it calls general "societal discrimination" resulting from previous unconstitutional acts is insufficient to require remedy. Indeed, a remedy for "societal discrimination" is not permitted even when it takes the form of race-based preferences.[53] Instead, remedies are available only when there is a direct causal link between a discrete discriminatory act and an identifiable, personal injury.[54] The fact that our country has been stained white throughout its history will therefore be unavailing for plaintiffs complaining about modern racial hierarchy.

The second kind of taint argument, involving the genealogy of various statutes and government policies, poses a more difficult problem. At least in theory, *Hunter* requires invalidation of previous statutes that taint currently applicable statutes and policies. As the examples discussed above illustrate, there is no shortage of current statutes and policies that might be vulnerable if this command were taken literally.

How might courts avoid taking *Hunter*'s command literally? The cleanest solution would be to overrule *Hunter*. Disowning the case is not without attraction. Why, after all, should the motives and purposes of people long dead matter today? If a statute currently has a neutral or salutary impact and if it is no longer supported for racist reasons, why should its pedigree matter? Why should identical statutes be constitutional or unconstitutional because of the reasons people supported them?

Moreover, the effort to sort out the motives or purposes of actors is famously fraught and, perhaps, altogether incoherent. Different people have different motives that they might not fully understand themselves. They usually don't tell us what these motives are, and many legislators and voters act without clear understandings of what they are

52 *See*, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down facially neutral redistricting where aim was to deny African Americans the right to vote).

53 *See*, *e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 262, 274 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

54 *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (rejecting race-based measures to remedy general societal discrimination because "such measures would risk placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered'").

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voting for or how what they are voting for will intersect with unanticipated social conditions years later.

More broadly, a repudiation of *Hunter* might mark a first step toward shifting the conversation from the past to the future and from imposing blame to finding solutions. On this view, preoccupation with the worst aspects of our history is a poor strategy for achieving social justice. People inevitably react defensively when asked to disown their national identity or when blamed for misdeeds committed by past generations. A more fruitful strategy for removing our racial stain is to reconstruct our history in a more positive way or, alternatively, to disregard it and start afresh.

But as attractive as overruling *Hunter* might seem, an overlapping consensus between the left and the right stands in the way of that outcome.

The first problem is that an outright overruling would permit the continued enforcement of racist laws, thereby undermining the prevailing ideology of racial neutrality. If the Court upheld statutes deliberately gerrymandered to disadvantage racial minorities, it would be publicly declaring that racial discrimination is constitutionally permissible. It is one thing to leave our racial hierarchy in place; it is another to overtly endorse it.

Moreover, *Hunter* remains helpful to both progressives and conservatives when used judiciously and instrumentally to mount attacks on the outer defensive perimeters of our racialized politics. Writing for conservatives and progressives alike, Justice Gorsuch recently used the racial taint argument to discredit Louisiana's statute permitting non-unanimous jury verdicts in criminal cases[55]—a point reinforced by Justice Sotomayor's separate concurrence.[56] Conservatives have used the taint argument to discredit gun control legislation[57] and a variety of progressive reforms, most prominently the Davis-Bacon Act, which mandates payment of the locally prevailing wage on federally funded construction projects.[58] Overruling *Hunter* might also complicate conservative reliance on illicit purposes to invalidate laws supposedly impinging upon the free-exercise rights of religious conservatives.[59] For their part, progressives continue to use the taint argument to attack voting restrictions,[60] segregated educational institutions,[61] and a variety of police practices.[62]

55 Ramos v. Louisiana, 140 S. Ct. 1390, 1393–94 (2020).

56 *Id.* at 1410 (Sotomayor, J., concurring).

57 *See*, *e.g.*, McDonald v. City of Chi., 561 U.S. 742, 843–49 (2010) (Thomas, J., concurring in part and concurring in the judgment).

58 *See* Bernstein, *supra* note 37, at 276.

59 *See*, *e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020) (using taint argument to attack state prohibition on aid to religiously affiliated schools).

60 *See*, *e.g.*, Johnson v. Governor of the St. of Fla., 405 F.3d 1214, 1243–47 (11th Cir. 2005) (Barkett, J., dissenting).

61 *See*, *e.g.*, United States v. Fordice, 505 U.S. 717, 728–32 (1992).

62 *See*, *e.g.*, United States v. Strieff, 579 U.S. 232, 253–54 (2016) (Sotomayor, J., dissenting).

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But perhaps the strongest reason for preserving *Hunter* is that there is no need to overrule it. Why incur the disruption and ideological cost of disowning the case when the justices can easily avoid its implications whenever it threatens to extend beyond the perimeters and into the heart of the racial status quo?

Judges can use and have used a variety of off-ramps to avoid *Hunter*'s implications. As W. Kerrel Murray wrote, the Supreme Court has often greeted *Hunter*-type arguments with an answer that "resembles a shrug."[63] For example, in *Trump v. Hawaii*,[64] where the Court upheld the third iteration of President Trump's travel ban, it treated as essentially irrelevant the earlier iterations, which lower courts had found were infected with a discriminatory purpose. Similarly, in *McCleskey v. Kemp*,[65] where the Court upheld Georgia's death penalty against charges of racial discrimination, the justices summarily dismissed arguments that capital punishment was originally instituted in Georgia for overtly discriminatory reasons.[66]

For courts unsatisfied with a mere "shrug," numerous analytic tools are available to avoid *Hunter*'s force. The simplest is to deny that there was a racial motivation in the first place. On a few occasions, discriminatory motivation might be inferred from discriminatory impact, but in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[67] the Court declared that "such cases are rare."[68] In the more usual case, "impact alone is not determinative, and the Court must look to other evidence."[69]

The *Hunter* Court itself acknowledged that examining this evidence is a "problematic undertaking"[70] and quoted a passage from *United States v. O'Brien* acknowledging that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[71] *Hunter* was unusual because the candor and shamelessness exhibited by proponents of the law meant that no guesswork was required. More often, the law's proponents will be more discreet. For understandable reasons, even justices sympathetic to the underlying claim are reluctant to accuse public officials of racism and bad faith.

The Court's recent treatment of illicit purpose in the related context of anti-abortion legislation illustrates the point. In *Whole Woman's Health v. Hellersted*,[72] the Court

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63 Murray, *supra* note 48, at 1193.

64 Trump v. Hawaii, 138 S. Ct. 2392 (2018).

65 McCleskey v. Kemp, 481 U.S. 279 (1987).

66 *See id.* at 298 n.20.

67 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 555 (1976).

68 *Id.* at 564.

69 *Id.*

70 Hunter v. Underwood, 471 U.S. 222, 228 (1985).

71 *Id.*, quoting United States v. O'Brien, 391 U.S. 367, 383–84 (1968).

72 Whole Woman's Health v. Hellersted, 579 U.S. 582 (2016).

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confronted a Texas statute imposing a variety of restrictions on abortion clinics, including a requirement that doctors working at the clinics have admitting privileges at nearby hospitals and that the facilities meet the exacting standards for surgical centers.

Writing for the majority, Justice Breyer recited in detail evidence indicating that the restrictions had no relationship to protecting the health of pregnant women. One might have supposed that this fact, taken together with facts about Texas politics known to any informed observer, would have led to the conclusion that the statutory scheme had the "purpose . . . of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"[73] thereby violating the "undue burden" standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[74] But, perhaps out of concern for the implicit rules of etiquette in constitutional litigation, even the Court's liberals were unprepared to accuse Texas legislators of deliberate subterfuge. This reluctance was not without cost. It forced the Court's majority into a tortured, contingent, and time-bound inquiry into the effects of the statutory scheme.

At least abortion law has an effects prong that allowed the Court to invalidate the Texas statute without resort to a purpose inquiry. But *Washington v. Davis* forecloses resort to constitutional arguments based on mere discriminatory effect in the racial context. The result is that opponents of laws with discriminatory impact have no constitutional recourse when courts are unwilling to find discriminatory purpose.

Consider, for example, *Johnson v. Governor of the State of Florida*,[75] where the United States Court of Appeals for the Eleventh Circuit declined to find a discriminatory purpose behind a felon disfranchisement law enacted by a Florida constitutional convention in 1868. The Florida constitution resulted from the victory of "moderate" Republicans, who insisted on the disfranchisement provision, over "radical Republicans," who opposed it.[76] The Eleventh Circuit acknowledged that the convention as a whole was permeated by "an unfortunate and indefensible racial animus,"[77] that "racial discrimination may have motivated certain other provisions in Florida's 1868 Constitution,"[78] and that "a few isolated remarks"[79] by delegates suggested that a discriminatory purpose motivated the disfranchisement provision. But the court nonetheless concluded that "[t]he existence of racial discrimination behind some provisions of Florida's 1868 Constitution does not . . . establish that racial animus motivated the criminal disenfranchisement provision."[80]

73 Planned Parenthood v. Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

74 *Id.*

75 Johnson v. Governor of the St. of Fla., 405 F.3d 1214 (2005).

76 *Id.* at 1218.

77 *Id.* at 1219–20.

78 *Id.* at 1219.

79 *Id.*

80 *Id.*

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Accordingly, it refused to invalidate the provision. A court that was unable to detect a racial purpose shared by delegates obsessed with racism and bigotry is not likely to find it in the more usual case where legislators are more subtle and discreet.

Suppose that evidence of a discriminatory purpose is so strong that it cannot be ignored or denied. Even in these circumstances, other off-ramps remain open. In *Hunter*, Justice Rehnquist cited to his own opinion in *Mount Healthy City Board of Education v. Doyle*,[81] which held that even if an illicit purpose is a "substantial" factor motivating government action, defenders of the action could nonetheless prevail if they proved that it had not been the "but-for" cause of the action. In the context of legislative redistricting, the Court has held that even but-for causation is insufficient. Instead, facially neutral redistricting is unconstitutional only if it "is so bizarre on its face that it is unexplainable on grounds other than race."[82]

Finding an unconstitutional racial purpose is made still more difficult by the distinction between two types of purposes discussed above.[83] Standing alone, *Hunter* suggests that the deliberate use of facial neutrality to produce the same result that would have resulted from a facially discriminatory policy is sufficiently discriminatory. But the Court's earlier decision in *Personnel Administration of Massachusetts v. Feeney*,[84] which upheld a facially neutral veteran's preference in state hiring that had a radically disproportionate gender effect, throws some doubt on this understanding. The Court held that discriminatory purpose meant "more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects on an identifiable group."[85]

While this language is hardly free from ambiguity, it at least suggests that something like the second sort of intent—a deliberate desire to harm the disfavored group for the sake of harming it—is required. After all, Massachusetts intended to produce the disproportionate impact of the veteran's preference in the sense that it instituted the policy with full knowledge that it would have this impact. But because Massachusetts was not motivated by a desire to harm women for the sake of harming them, the program survived constitutional scrutiny.

Even when this narrow version of discriminatory purpose plainly caused a government action and even when the action is "unexplainable on grounds other than race," opponents of the action are still not home free. In *Coleman v. Miller*,[86] the United States Court of

81 Hunter v. Underwood, 471 U.S. 222, 225 (1985), citing Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

82 Shaw v. Reno, 509 U.S. 630, 644 (1993).

83 *See supra* notes 51–53 and accompanying text.

84 Pers. Admin. of Mass. v. Feeney, 442 U.S. 256 (1977).

85 *Id.* at 279.

86 Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997).

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Appeals for the Eleventh Circuit rejected a constitutional challenge to the Georgia state flag, which was modeled after the Confederate battle flag. The court did not deny that the flag design was adopted for discriminatory reasons. It hardly could. The flag bill was enacted as part of a package that also declared that the Supreme Court's ruling in *Brown v. Board of Education* was null and void.[87] The Eleventh Circuit conceded that the flag design was "adopted during a regrettable period in Georgia's history when its public leaders were implementing a campaign of massive resistance to the Supreme Court's desegregation rulings."[88] Yet it refused to outlaw the flag because, it held, plaintiffs had not demonstrated that its display had a racially discriminatory effect.[89]

Finally, suppose that discriminatory purpose and effect are clearly established. Courts have held that later reenactment of an identical provision can purge the primary taint, thereby shielding the statute from challenge.[90] But if that is true, suppose that there has been no reenactment because current legislators are satisfied with the status quo for non-racial reasons? It is only a short step from holding that a new statute purges the primary taint to holding that an old statute is constitutional if a modern legislature *would have* reenacted it for racially neutral reasons if called upon to do so.

The short of it, then, is that when *Hunter* threatens to produce change that is "far reaching," it is easy for courts to avoid its implications. While I have suggested doctrinal strategies that courts have used or could use for avoidance, the particular strategy hardly matters. The bottom line is that courts will not and cannot be trapped by legal argument into reaching results that produce radical change.

It does not follow that the taint argument is completely ineffectual. As I have suggested above, judges retain the capacity to use the argument selectively and instrumentally to justify decisions at the margin. Perhaps more significantly, the argument retains some disruptive potential. As psychoanalysts teach, denial is hard work and is never fully successful. For all the modern Court's frantic attempts to paper over our history, the stain inevitably bleeds through. When it does, the resulting guilt and pain destabilize the myths that protect our self-respect.

But over many years, courts have shown a capacity to live with and control these destabilizing forces. They produce embarrassment and discomfort but not the sort of collapse that might clear the ground for fundamental change. People who think that legal arguments alone have the capacity to produce such change have not paid adequate attention to the lessons of history.

87 *Id.* at 528–29.

88 *Id.* at 528.

89 *Id.* at 530.

90 *See*, *e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); Johnson v. Governor of the St. of Fla., 405 F.3d 214, 1224 (11th Cir. 2005).

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B. Using the Racial Taint Argument to Destabilize the Practice of Constitutional Adjudication

Suppose that we widen our lens and attempt to use the taint argument on the level of the overall practice of constitutional adjudication rather than on the level of doctrine that the practice produces. Paradoxically, this more ambitious effort may hold out more hope of ultimate victory. To be clear, discrediting American constitutionalism is a long-term project with, at best, uncertain chances of success. For reasons that are outlined below, change is very unlikely to come from within. Still, this broader project is less vulnerable to doctrinal manipulation and more likely to produce meaningful change, even if only in the very long run.

To see how the destabilization might work, consider two of the most reviled cases in the history of the United States Supreme Court: *Dred Scott v. Sandford*[91] and *Johnson v. M'Intosh*.[92] Whereas *Dred Scott* demonstrates the taint theory's subversive potential, *Johnson* provides reasons why the potential can be realized only outside the practice that the taint theory undermines.

1. Dred Scott.—In *Dred Scott*, Chief Justice Taney wrote that even free African Americans could not be citizens and were not included in the phrase "the people of the United States." In perhaps the most infamous passage ever written by a Supreme Court justice, he said that African Americans were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[93]

Remarkably, this explosive language is almost always quoted out of context. When the context is removed, readers can be forgiven for concluding that these were Chief Justice Taney's own views. And perhaps they were. Taney himself had been a slaveholder, although he had emancipated his slaves. There can be no doubt that he was a racist. Still, the context makes clear that Taney was not presenting the views as his own. In the paragraph immediately preceding the language quoted above, he wrote, "It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted."[94] Taney wanted the reader to understand that he was not articulating his

91 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

92 Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823).

93 *Dred Scott*, 60 U.S. (19 How.), at 407.

94 *Id.*

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own views but rather faithfully uncovering what would today be called the Constitution's "original public meaning." He insisted that it

> is not the province of the court to decide upon the justice or injustice, the polity or impolity of these laws. The decision on that question belonged to . . . those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject and to administer it as we find it, according to its true intent and meaning when it was adopted.[95]

Why is Taney almost always quoted out of context? If the view that African Americans have "no rights which the white man was bound to respect" can be attributed to Taney alone, then we are left with the disquieting fact that a vicious racist was once Chief Justice of the United States. That is bad enough, but Taney's personal faults do not necessarily impeach the institution that he was part of. If the view must, instead, be attributed to the Framers, and if judges are duty bound to enforce the view when they decide constitutional cases, then the legitimacy of American constitutionalism is drawn into question.

As soon as Taney's language is put into context, ironies abound. First, it turns out that Taney and modern taint theorists are allies. Who would have thought? Both insist that from the beginning, America was stained white, and the stain pollutes our founding documents. Second, if Taney and taint theorists are right, and if one accepts originalist methodology, then *Dred Scott* was rightly decided. If it is in fact the duty of judges to give effect to the Constitution's original public meaning without regard to contemporary moral or political views, and if the American Constitution is in fact stained white, then Taney was duty bound to enforce the Constitution's racist requirements. But no one today is ready to admit that *Dred Scott* was rightly decided. If *Dred Scott* is right, then standard constitutionalism must be wrong.

For just this reason, defenders of standard constitutionalism must either obfuscate Taney's position (which they do by quoting him out of context) or attack the evidence supporting it. Many of the Constitution's defenders have opted for the second tactic. It is, of course, possible that Taney and taint theorists alike are wrong about the Constitution's original meaning. Modern scholars are divided about the extent to which Taney got the history right[96]; almost certainly he exaggerated and oversimplified. The debate is complicated by divisions among originalists about whether original public meaning, original expected application, or original intent is the relevant touchstone. But even if we

95 *Id.* at 405.

96 *Compare* Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (2006) *with* Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978).

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acknowledge these complications, it is nonetheless true that many of Taney's critics have also exaggerated and oversimplified. History almost never speaks to us in an unambiguous voice, and there is almost certainly some truth on both sides. Without attempting here to finally resolve the historical dispute, we can note four points of interest.

First, in a backhanded way, the frantic and sometimes tendentious efforts by defenders of standard constitutionalism to prove Taney wrong themselves demonstrate the strength of the taint theory's subversive potential. They would hardly go to the trouble of quoting him in a misleading fashion or trying to discredit the evidence on which he relied if they did not believe that his position put their project at risk.

Second, even if Taney's historical reconstruction is *partially* wrong, it still impeaches standard constitutionalism to the extent that it is right. Perhaps the Framers meant to include African Americans within the phrase "we the people." Perhaps this was how the words were publicly understood at the time of the framing. Still, it is relatively uncontroversial that many other provisions of the Constitution were added to protect the status of slavery.[97] More broadly, it is beyond dispute that no people of color attended the Constitutional Convention or participated in ratification of the document. The fact that their views simply did not count goes a long way toward impeaching the Constitution's legitimacy.

Third, suppose—improbably—that Taney was entirely wrong. Even then, his point demonstrates the fragility of modern constitutionalism. That is so because constitutional obligation then becomes hostage to the claim that he was wrong. Resting on Taney's mistake makes constitutional legitimacy contingent on a historical demonstration that the Framers entertained the "right" views about political morality. But many constitutionalists claim that constitutionalism is important precisely because it provides a way to abstract from contentious and unresolvable issues about political morality. If constitutionalists concede that we are obligated to obey the Constitution only when we agree with the view of the Framers, they effectively give the game away.

Finally, it might be thought that the *Dred Scott* problem impeaches only originalism and leaves untouched advocates of more complex, pluralist theories such as living constitutionalism. To the extent that these theories inject contemporary policy and moral considerations into constitutional analysis, it is true that they escape the problems outlined above. But virtually all these theories also acknowledge that constitutional text matters and that it is often decisive. When the text is ambiguous or open textured, perhaps it can be interpreted according to contemporary norms. But much of the Constitution is neither ambiguous nor open textured, and, when this is so, living constitutionalists too must come to grips with the taint problem.

97 *See supra* notes 22–33 and accompanying text.

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2. Johnson.—If *Dred Scott* demonstrates the subversive power of the taint argument, *Johnson v. M'Intosh* demonstrates why the power must be applied from the outside.

Johnson involved a land dispute between a plaintiff whose title depended on the sale of the land in question by the Piankeshaw Indian Nation and a defendant who claimed title through a grant by the United States. Writing for the Court, Chief Justice Marshall held that Indian tribes lacked the power to convey land to private individuals. The defendant's claim therefore prevailed.[98]

In so holding, the Court discussed at length rights based on discovery and conquest that, in a modern context, provide ample support for the taint argument.[99] Like Taney, Marshall turns out to be an unlikely ally supporting claims made by taint theorists. He expressly acknowledged that rights based on discovery allocated land among European nations and that European law left those nations free to dispose of Indian occupants as they chose.[100] He made plain that the very foundations of American government rest on the exercise of this power.

Also like Taney, Marshall attempted to separate himself from these conclusions. At the beginning of his analysis, he wrote that

> it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.[101]

Like Taney's disclaimers, Marshall's attempts to avoid responsibility for his own decision are not completely convincing. He failed to obscure completely his own racist assumptions, which lay behind his legal conclusion. For example, he characterized American Indians as "fierce savages" who, if allowed to remain in control, would "leave the country a wilderness."[102]

Perhaps, then, what Marshall really lacked was not legal grounding for doing the right thing but the perception and courage to free himself from the racist context in which he worked. Like Taney, and like even abolitionist judges who refused to confront slavery during the antebellum period, Marshall ignored the possibility of throwing off the self-imposed shackles that restrained him.

98 *Johnson*, 21 U.S. (8 Wheat.), at 604.

99 *Id.* at 572–85.

100 *Id.* at 573–74.

101 *Id.* at 572.

102 *Id.* at 590.

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Yet, for all the racist assumptions behind the opinion, Marshall made a point that is hard to deny. He wrote:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. However [restrictions on Indian sale of land] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, [it] certainly cannot be rejected by Courts of justice.[103]

With remarkable prescience, this passage captured the dilemma faced by modern taint theorists: if our racial stain seeps into the core of who we are and where we came from, then all actions by our government are tainted. Judges cannot at once claim legitimacy for their decisions and disown the sordid history that provides them with that legitimacy. It follows that a judge who accepts the taint argument must thereby disclaim the very power he would have to exercise to remove our racial stain.

Because judges cannot be expected to at once assert power and undermine the basis on which the power is asserted, the taint argument, if it works at all, will have to apply pressure from the outside. People who are not judges and who do not claim power grounded in our sordid past will have to force judges to relinquish control. The next part explores whether the taint argument can contribute to this task.

IV. THE PROBLEM FOR CONSTITUTIONAL POLITICS

As Marshall's *M'Intosh* opinion acknowledged, judicial power is deeply and inevitably tainted by America's racial past. At first, it may seem that political actors who are not judges are not similarly constrained. Advocates who write scholarly books and articles, who contribute op-ed essays to newspapers, who organize political campaigns, or who demonstrate in the streets do not make claims to power and legitimacy rooted in former racism and oppression. Perhaps they can escape America's racial taint and lead us to authentic reconstruction.

But if our racial stain is as pervasive as taint theorists claim, can political activists really escape it? Recall that the problem is not just about law. It is about the very essence of the American experience—about our culture; our baseline, automatic and unthinking assumptions about ourselves; our history; and, perhaps, our destiny. Can anyone alive

103 *Id.* at 591.

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and functioning in the United States escape all of that? The black separatist H. Rap Brown (now Jamil Abudullah Al-amin) once said that "violence is as American as cherry pie."[104] As much as he might want to deny it, it is also true that H. Rap Brown is as American as George Washington.

This dilemma is hardly new. It first emerged more than a century and a half ago. Radical abolitionist William Lloyd Garrison embraced a nineteenth-century version of the taint argument and used it to insist that there had to be a clean break from the past. Garrison famously burned a copy of the Constitution on Independence Day and proclaimed that it was "a covenant with death and an agreement with hell."[105] Other abolitionists argued that the North should secede from the South.[106]

At first, Frederick Douglass sided with Garrisonians, but he ultimately changed his mind. He came to believe—or at least he came to believe that it was instrumentally useful to believe—that American history and ideals, understood in the right way, provided adequate tools to fashion reconstruction. Douglass realized that he could not succeed by separating himself from America. He had to make his story part of America.[107]

The same ancient debate divides taint theorists and their opponents today. Often the debate takes the form of argument between historians about the motivations of historical actors and the causes of historical events. No doubt that argument forms part of the dispute, but it is not all of it and not the most important part. All sophisticated historians understand that historical narratives are plastic and open to contrasting modern interpretation. Of course, history is not completely malleable; some historical narratives are simply false. But our national experience with race is sufficiently complicated and ambiguous to open questions about the political usefulness of various potential narratives.

When the problem is posed in this more candid fashion, the horns of the dilemma become clearer. On the one hand, there can be no doubt that "wokeness" has become a powerful organizing tool. The very label suggests the potential for the taint argument to make us see things that were previously invisible. It makes sense of forces and outcomes that might otherwise seem mysterious and disconnected. It provides an organizing principle that motivates rage and action.

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104 *See Comm; CBS Library of Contemporary Quotations; H. Rap Brown*, Am. Archive of Pub. Broad., https://americanarchive.org/catalog/cpb-aacip_80-74qjqrq1 (last visited Apr. 13, 2022).

105 *See* Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery 445 (1998).

106 For example, Wendell Philips argued that "dissolution of the Union, sure to result speedily in the abolition of slavery, would be a lesser evil than the slow faltering disease." Edward Payson Powell, Nullification and Secession in the United States: A History of Six Attempts During the First Century of the Republic 238 (2002).

107 For an account of his original beliefs and his reasons for changing them, see Frederick Douglass, My Bondage and My Freedom 396 (1855). During the secession crisis of 1861, Douglass at least conditionally reembraced disunionism. *See* Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 146 (2010) ("If the Union can only be maintained by new concessions to the slaveholders, let the Union perish.").

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But a lingering worry remains. For all their discontent, and as much as they may not want to admit it, taint theorists are also part of America's past and present. Can a political movement that calls for the repudiation of the very culture from which it emerges possibly succeed?

"Wokeness"—uncompromising emphasis on how past injustice determines present distributions of well-being—galvanizes some but alienates many others. To be sure, recent polling about what has come to be inaccurately called "critical race theory" demonstrates there is more public support for a candid acknowledgment of our racist past than one might imagine.[108] But the majority of those polled are still unfamiliar with the controversy. When confronted with the actual prospect of disowning all of America's past, many Americans react negatively. The unseating of San Francisco school board members who favored changing the names of some of the city's schools and the results of the Virginia gubernatorial race where the Republican candidate successfully ran on a platform of resisting "critical race theory" are troubling signs of things to come.

Taint theory demands that we repudiate the myths, symbols, and stories central to our national identity. Because many Americans will find it impossible or undesirable to do so, the theory erects an obstacle to the creation of a long hoped for but rarely achieved cross-racial coalition of the dispossessed. Such a coalition must emphasize inclusiveness rather than particular histories and grievances. It must focus on class injustice, rather than race or ethnicity. It would require transcending rather than dwelling on our past.

And yet one cannot help wondering whether these criticisms of taint theory reflect the very unconscious white supremacy that taint theorists see everywhere. After all, different people in the United States have different histories. For many people of color, American history is marked by betrayal, brutality, injustice, suffering, terror, and violent death. Why are we so concerned about asking white Americans to give up on their history and not concerned at all about asking Americans of color to give up on theirs?

None of this is to say that a cross-racial coalition dedicated to reform is impossible. Such a coalition may offer the best hope for a truly (re)constructive politics. But how can it be achieved? Doing so requires somehow fashioning a common history. But is there really a common history on offer? Optimists imagine that such a history could be forged from a reimagined version of white history that emphasizes the best of the American experience. One might, for example, celebrate the stirring rhetoric contained in the preamble to the Constitution, the Declaration of Independence, the Gettysburg Address, or the speeches of Martin Luther King, Jr., while downplaying or ignoring the context in which the words were spoken or the actual beliefs and actions of many of the speakers.

108 *See* Jamelle Bouie, *What Americans Really Think About 'Critical Race Theory,'* N.Y. Times (Feb. 26, 2022), https://www.nytimes.com/2022/02/26/opinion/critical-race-theory-survey.html.

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Perhaps this project offers the best hope for racial progress, but no one should suppose that undertaking the task is without risks. We are too far down the path of division and anger for the job to be easy. What seems like positive reconstruction to some will seem like a cleaned-up version of white history—whitewash (in more than one sense)—to others.

Can the words "all men are created equal" really inspire when we know that their author thought that people of color were inherently inferior? How can one celebrate George Washington's renunciation of power when his second term ended without noting that he returned home to a slave plantation? Is it really irrelevant that at the very moment he signed the Emancipation Proclamation, Abraham Lincoln favored removal of all people of color from the country?

If a truly common history eludes us, then putting in place an interracial coalition means somehow building a wall of acoustic separation that allows those motivated by racial taint to hear the argument while silencing it for others who will be alienated by it. It means using our national symbols and myths as a foundation for the future even as we discredit the role they have played in our past. It means simultaneously forgetting and remembering.

Bridging those contradictions requires extraordinary political and rhetorical skills—the skills that, at least in nascent form, Frederick Douglass exhibited in the nineteenth century. Perhaps there is another Frederick Douglass just over the horizon, and perhaps there are people of good will ready to follow her. But for now, we are left with no more than hope for a salvation that has not yet appeared and may never come.

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