

TAINTED PRECEDENT

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We have a common law system of constitutional adjudication, at least in the sense that constitutional practice in the United States relies on prior rulings rather than reasoning from first principles in each case. If there's controlling precedent on point, it's binding. Neither "inferior courts" in the federal system, nor state courts adjudicating federal law, are permitted to start anew with the "original public meaning" of the First Amendment or pronounce a fresh Dworkinian "moral reading" of the Fourth. Even the highest court in the land, the Supreme Court of the United States, for reasons of reputation, stability, and rule of law, does not treat every case it hears as one of first impression—its justices work through forests of precedent (of variable density) in reaching its decisions.

And this presents a problem that Professor Killenbeck has identified in his article¹—what happens when a reasonable, even valuable, proposition of law is found buried deep within problematic or even odious opinions? Unlike some civil law countries, or even some states,² there's no convention in federal constitutional law that permits someone to simply cite a legal proposition—"racial classifications are subject to strict scrutiny"³—completely disentangled from the factual

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1. See generally Mark R. Killenbeck, *Sober Second Thought? Korematsu Reconsidered*, 74 ARK. L. REV. 151 (2021).

2. The Supreme Court of Ohio, for instance, stipulates that its syllabus is binding. *Smith v. Klem*, 450 N.E.2d 1171, 1173 (Ohio 1983) ("[I]t is well-established that the syllabus of an opinion issued by this court states the law of the case."). The reasoning of the opinion may be helpful for understanding the holding, but it's the syllabus that's law, not the decision that generates it. Cf. *Koonce v. Doolittle*, 37 S.E. 644, 645 (W. Va. 1900) ("[T]his court only makes the more important points of law a part of the syllabus for the general information of the legal profession and public[.]"').

3. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring in part,

circumstances—or persons—that give voice to the decision. And therein lies the problem. Sometimes the legal proposition from an opinion—strict scrutiny—is besmirched with some fairly obnoxious facts. Indeed, sometimes the authors, facts, reasoning, or results are so reviled, that the opinion—whatever kernels of wisdom it may contain—is considered anti-canonical.⁴ What to do with this tainted precedent?⁵ This short reflection on Professor Killenbeck’s article offers some thoughts on the topic.

CATEGORIES OF TAINTED PRECEDENT

Tainted precedent comes in a number of forms, of various degrees of seriousness. Some precedent is tainted because of the noxiousness of its author. Justice James Clark McReynolds was widely known as a racial bigot and anti-Semite.⁶ And yet he’s the author of two of the most significant substantive due process cases of the mid twentieth century:⁷ *Meyer v. Nebraska*,⁸ which struck down a state law forbidding German foreign language instruction to children, and *Pierce v. Society of Sisters*,⁹ which struck down an Oregon law requiring all children to attend public school. These cases are often regarded as essential building blocks in modern substantive due process jurisprudence having to do with individual rights, like abortion, same-sex marriage, and privacy, despite the fact they flowed from the pen of such a

concurring in judgment)) (“[R]acial classifications of any sort must be subjected to ‘strict scrutiny[.]’”).

4. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386-87 (2011).

5. The description comes from Professors Fallon and Meltzer. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2077 (2007) (“*Korematsu* is a tainted precedent, more reviled than respected.”).

6. Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 370; David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 641 (2004).

7. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1002 (1992) (“James Clark McReynolds, the reactionary Associate Justice, [was] a legendary bigot who hated Germans, Catholics, and Jews, and yet authored the famous icons of liberal toleration.”).

8. *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923).

9. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”).

personally poisonous jurist. Even the reviled Chief Justice Robert Taney, author of the paradigmatic anti-canonical opinion, *Dred Scott v. Sandford*, authored opinions now understood to be anti-monopolist and designed to limit the outsized power of corporations in favor of regulation.¹⁰ His decision in *Bank of Augusta v. Earle*¹¹ is frequently cited for the proposition that corporations have no citizenship claims under the Privileges and Immunities Clause of Article IV (later extended to the Privileges or Immunities Clause of the Fourteenth Amendment).¹²

Some precedent is tainted because the justifications upon which it relies are discredited, or even rejected, even though the outcome remains supported on other grounds. *Buchanan v. Warley*¹³ fits this model. Today, *Buchanan* is cited for the laudable proposition that the Fourteenth Amendment Equal Protection Clause prohibits a racial zoning scheme.¹⁴ But a close read of *Buchanan* reveals that it is not really a full-throated endorsement of racial equity. *Buchanan* actually rests on suspect notions that economic due process rights to freely dispose of property trump government-imposed restrictions on alienability.¹⁵

Some precedent is tainted because, even though it expresses a useful proposition, that proposition is not applied in the precedential case to the ends of justice or is mired in problematic or offensive reasoning on other issues. The *Civil Rights Cases*¹⁶ fit this model. The opinion is routinely cited for the state action doctrine—a proposition that there must be a sphere of private life

10. See ADAM WINKLER, *WE THE CORPORATIONS* 95-97 (2018).

11. *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839) (corporations cannot claim “the rights which belong to its members as citizens of a state”).

12. JAMES D. COX & THOMAS LEE HAZEN, *1 TREATISE ON THE LAW OF CORPORATIONS* § 1:4 n.4 (3d) (citing *Earle*, 38 U.S. at 586-89). See also *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 126 (1912) (“[I]t is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State.”).

13. *Buchanan v. Warley*, 245 U.S. 60 (1917).

14. *Shelley v. Kraemer*, 334 U.S. 1, 11-12 (1948). See David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 *GEO. L.J.* 1253, 1274 (2005) (noting that the court in *Shelley* “favorably cited *Buchanan v. Warley*, but obscured the fact that *Buchanan* was a due process and not an equal protection case.”).

15. See *Buchanan*, 245 U.S. at 82.

16. *Civil Rights Cases*, 109 U.S. 3 (1883).

separate from public life, essential for human flourishing and as a legal bulwark against the authoritarian ambitions of government actors.¹⁷ And yet, the same opinion struck down the first federal public accommodation law in the United States as exceeding Congress's Fourteenth Amendment (and Thirteenth Amendment) power.¹⁸ Even more directly in the service of racial justice, the *Civil Rights Cases* contain dicta that the Thirteenth Amendment targets not only the narrow issue of chattel slavery but also has a "reflex character" that empowers—at minimum—Congress to pass legislation aimed at the "badges and incidents" of slavery as well.¹⁹ That dicta has been the predicate for some of the most direct civil rights decisions of the Warren and Burger Courts, including *Jones v. Alfred H. Mayer Co.*²⁰ and *Runyon v. McCrary*.²¹

Then there are the anticanonical cases, like *Dred Scott*²² and *Korematsu*²³—cases so tainted that their citation for any proposition other than condemnation is typically considered intolerable. This is where Professor Killenbeck's appeal comes in. Is there anything in *Korematsu* that's redeemable? Is the fact that it is one of the first cases to articulate strict scrutiny for racial classifications sufficient to rescue it—at least in that small measure—from thoroughgoing ignominy?

17. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.") (citing the *Civil Rights Cases*, 109 U.S. 3); see also *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009); *Raithatha v. Univ. of Pikeville*, No. 7:16-CV-251-EBA, 2017 WL 4583245, at *7 (E.D. Ky. Oct. 13, 2017); cf. Adam Liptak, *Can Twitter Legally Bar Trump? The First Amendment Says Yes*, N.Y. TIMES (Jan. 9, 2021), [<https://perma.cc/E5QU-FHUX>] (citing First Amendment scholars who say that Twitter is not a state actor bound by the First Amendment).

18. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). The law guaranteed that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

19. *Civil Rights Cases*, 109 U.S. at 20.

20. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968).

21. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

22. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

23. *Korematsu v. United States*, 323 U.S. 214 (1944).

RECKONING WITH TAINTED PRECEDENT

In some respects, dealing with tainted precedent raises similar questions to what we do with monuments with troublesome pasts.²⁴ Do we ignore their faults and just make use of them? Do we contextualize them? Do we create counter-monuments? Do we tear them down?

For the practitioner or the judge, it feels like the question is rather straightforward. If the legal proposition is sound, and if it is necessary to cite the precedent for the proposition, its problematic origins or parentage should not matter. As a scholar of gun rights and regulation, I frequently encounter arguments, typically from gun-rights advocates, that because gun regulation was unquestionably used to racist ends in the past, that means all contemporary gun regulation is racist and should be abandoned. My response to those arguments is to say that the history of all law in America is tainted with white supremacy. I am not about to say that laws punishing robbery, rape, and murder should be excised from the penal code because their history is sullied by two centuries of express and implicit racial bias.

We should be circumspect about how the law is written. We should be vigilant in monitoring how it is applied and enforced, but the mere fact that it comes out of a racist past is not sufficient to sap it of its utility. A rule that requires we abandon useful precedent on the grounds that it is contaminated with racism would leave us with precious little of the public good left.²⁵ Of course, such an answer assumes that something valuable can be separated from the dross. Sometimes that may not be possible. One can find something useful about a prohibition against “badges and incidents” of slavery in the *Civil Rights Cases*.²⁶ It’s difficult to see any redeeming precedential material coming from *Dred Scott*.²⁷

24. For a slightly different take on a similar issue, see generally Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020).

25. *See id.* at 120 (“If we look carefully enough, we could find something objectionable about nearly every [nineteenth century] judge or opinion In a legal system built on precedent, disregarding the decisions of all these judges is impractical.”)

26. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

27. Although, scholars and some judges cite *Scott* for gun rights positions. *See, e.g.*, *Parker v. District of Columbia*, 478 F.3d 370, 391 (D.C. Cir. 2007) (citing *Dred Scott v.*

That does not mean that as teachers of the law we should not provide due acknowledgement to the problematic history of these cases.²⁸ And in that sense, I see Professor Killenbeck as providing a valuable service in that regard. By exposing the lurid history of a rightly reviled opinion, he shows that even some of the most benighted of decisions can occasionally contain seeds of a more just and equitable constitutional order.

Sandford, 60 U.S. 393 (1857)), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008).

28. See Simard, *supra* note 24, at 121-22.