The Rise of the New Racism

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On December 7, 1995 two white soldiers from Fort Bragg went into nearby Fayetteville, North Carolina with semi-automatic weapons, "hunting for blacks."1 The two soldiers succeeded in their intended goal. They shot Michael James, age 36, and Jackie Burden, age 27, in the head at close range, killing them. In the soldiers’ rooms the police found a Nazi flag, racist literature, a bombmaking book, and white supremacist paraphernalia.2

News of this event appeared in papers and on television as I was reading Dinesh D'Souza's The End of Racism.3 The brutal murders in North Carolina, and other incidents,4 underscore the fundamental problem with D'Souza’s book. To put it bluntly, D'Souza does not take seriously anti-black racism in the United States. Furthermore, while acknowledging that a few bad things may once have happened, here and there, he rejects history in favor of polemical and inaccurate statements about the past. He concludes that while “racism undoubtedly exists,”5 it “no longer has the power to thwart blacks or any other group in achieving their economic, political, and social aspirations.”6 Rather, D'Souza trivializes racism in the United States, asserting: “African Americans suffer slights in terms of taxidrivers who pass them by, pedestrians who treat them as a security risk, banks that are reluctant to invest in black neighborhoods, and other forms of continued discrimination.”7 Such a view is only possible if we ignore the soldiers who murdered Michael James and Jackie Burden, the resurrection of the Ku Klux Klan, the torching of black churches throughout the South, the attitudes of urban police officers such as the

4. For what is just the most recent example as this goes to press, see Jack E. White, Texaco’s White Collar Bigos: Top Executives, Confronting a Discrimination Suit, Talk About Shredding Documents, TIME, Nov. 18, 1996, at 104 (discussing taped conversation among Texaco executives using racial epithets and considering shredding documents needed in discrimination suit).
5. D’SOUZA, supra note 3, at 525.
6. Id.
7. Id. Even these forms of discrimination are hardly as trivial as D’Souza believes. Without bank loans minorities are unable to buy homes or start or expand businesses. It is indeed odd that D’Souza, who wrote this book while a fellow at the American Enterprise Institute, would be so cavalier about such an important aspect of the American economy as access to capital.
Los Angeles Police Department's Stacy Koons and Mark Fuhrman, the recently exposed attitude and behavior of some Texaco executives, and many other less publicized but equally disturbing incidents of racism.

D'Souza begins in a promising way, suggesting that "Americans must step back from the sound and fury long enough to ask some fundamental questions about race and racism." Instead of stepping back or offering a reasoned analysis of our nation's racial problems, D'Souza inveighs against most public policies regarding race. In laying the groundwork for this attack, he distorts history beyond recognition, or ignores it altogether. Similarly, he distorts the present through a selective narrative and a clever presentation of stories and anecdotes.

Like any good polemic, *The End of Racism* contains much that appears to be true. Unfortunately, the book includes much more that is not true or is only partially true. Sorting through all of this is not an easy task, especially with a book that runs 700 pages. Who has the time or energy, and what journal would allow the space, to respond to every inaccuracy and half truth, every slanted presentation of an event, every display of misinformation, every bit of partial information that hides some significant nuance or fact? In some ways, this book is the publishing equivalent of the "big lie": it is impossible to respond to the entire enterprise.

In this Review, I will discuss in some detail just a few of D'Souza's assertions and arguments. My goal is to examine the underpinnings of D'Souza's arguments, particularly those regarding the origin and history of race relations in America. D'Souza predicates much of his argument on historical assertions which cannot stand up to careful analysis. If his historical foundation falls, then so must many of his conclusions about race and American society.

D'Souza purports to offer new insights into American history and the history of racism. Along with the Free Press, which published this book, he offers it as a piece of competent scholarship, claiming that, "it's a serious book—700 pages, 2,000 footnotes." But all the footnotes in the world are meaningless if the sources are flawed or the analysis skewed. Rather than a serious intellectual work, this is more like a parody of scholarship, where selected "facts" are pulled out of any recognizable context, and used to support a particular viewpoint.

I. THE NEW RACISM

*The End of Racism* embodies the elements of what I characterize as the

8. Id. at 1.
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"new racism," a way of thinking that has become fashionable and acceptable in some quarters. The "new racism": (1) denies the history of racial oppression in America; (2) rejects biological racism in favor of an attack on black culture; and (3) supports formal, de jure equality in order to attack civil rights laws that prohibit private discrimination and in order to undermine any public policies that might monitor equality and give it substantive meaning.

A. History Denied

Throughout his book D'Souza denies the significance of past discrimination. In what are possibly the most astounding conclusions of the book, D'Souza denies that "[s]egregation was a system established by white racists for the purpose of oppressing blacks" or that "[s]lavery was a racist institution." I will return to these two issues, D'Souza's new history of segregation and his new history of slavery, in Parts III and IV of this Review, respectively.

B. Beyond Biology

For now, I would like to comment briefly on D'Souza's move beyond biology and his advocacy of de jure equality. Unlike generations of Americans beginning with Thomas Jefferson, the new racists eschew biological explanations for different success rates between blacks and whites. D'Souza ultimately rejects notions of biological inferiority, but it is a tepid, backhanded rejection. Commenting on The Bell Curve, he writes:

Whatever the book's shortcomings, it remains an undisputed fact that the fifteen-point IQ difference between blacks and whites has remained roughly constant for more than three quarters of a century, even though the environmental conditions for African Americans have vastly improved during that period. It is possible to reject the fatalism of genetic theories of IQ differences, as I do.

This partial rejection of notions of biological racism comes at the end of a forty-five page chapter, provocatively titled "The Content of Our Chromosomes," in which D'Souza repeats at great length, but does not directly challenge, most of the arguments of those who offer biological defenses of racial superiority.

In stepping away from scientific racism, the "new racism" offers a cultural
argument, lumping together all African Americans in a way that looks suspiciously like a repackaged version of the old racism. Thus, D'Souza talks about "the behavior of the African American underclass, which flagrantly violates and scandalizes basic codes of responsibility, decency, and civility." He fails to define this "underclass" but asserts that, for many whites, it "represents a revival of barbarism in the midst of Western civilization." He then easily moves from discussing the "African American underclass" to "the performance and conduct of African Americans," presumably extending his analysis beyond the underclass. He argues that "[i]f blacks can close the civilization gap, the race problem in this country is likely to become insignificant." The "new racism" substitutes culture, or "civilization," for biology. Blacks are inferior, not because they are born that way, but because they lack civilization. This leads D'Souza to a disarmingly simple conclusion. He contends that "there are three possible explanations" for why "differences" between blacks and whites "persist at all socio-economic levels": "genes, culture, and racial discrimination (or some combination of these factors)."

He then argues that because "liberals"—an undefined group he excoriates throughout his book—"are committed to the precept that all cultures are or should be equal, it follows that observable group differences are the product of either discrimination or genes." Most of D'Souza's work is aimed at proving his theory that racial discrimination has never been much of a problem in the United States and is not now. Having proved the theory to his own satisfaction, he argues that, "[i]f discrimination cannot fully explain why blacks do not perform as well as whites on various measures of performance, then the conclusion cannot be escaped: according to the liberal paradigm, blacks must be genetically inferior. Arthur Jensen and Charles Murray wait in the wings." The way out, of course, is to accept D'Souza's view that black culture, not black genetic make-up, is defective.

C. Formal Equality

Proponents of the "new racism," unlike their more benighted predecessors, do not oppose formal racial equality. On the contrary, they often embrace it,

15. Id. at 527.
16. Id.
17. Id.
18. Id. at 529. Other causes come to mind, including the disproportionate number of poor blacks, the lack of job opportunities in inner cities, a criminal justice system that punishes black youths for minor crimes more harshly than whites who commit identical crimes, the failure of many urban police forces to provide meaningful protection for black neighborhoods, the easy access to firearms fostered by conservative elements in society, a lack of commitment to quality urban education, housing policies, and the economic decline of both central cities and the rural South since the 1960s.
19. Id.
20. Id.
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arguing that any policies which deviate from formal equality are themselves racist. Thus they reject any form of affirmative action or other public policies designed to reach out to minorities traditionally excluded from the American mainstream. They even reject race-conscious monitoring of equality or equal opportunity. Because the "new racism" denies the existence of discrimination in American society, proponents argue there is no need to consider race at any level of social policy. The result of the "new racism," if implemented, would be to give lip service to formal equality while allowing individuals, corporations, and governmental entities to discriminate freely, as long as the discrimination was undertaken without any formal policy.

Such a social policy is more open and more clever than the de jure segregation of the pre-Brown era. It would allow some blacks to enter elite jobs, thereby satisfying proponents of the claim that equality exists. Indeed, the very existence of a few such people—D'Souza touts Justice Clarence Thomas, General Colin Powell, and Virginia's former Governor Douglas Wilder—proves to the proponents of the "new racism" that racial discrimination does not exist.21 At the same time, the policies of the "new racism" would allow for informal discrimination because there could be no monitoring of the failure of minorities to be integrated into the American mainstream.

II. D'SOUZA'S NON-RACIST AMERICA

D'Souza argues that the process of overcoming racism in American society "must first involve revising our most basic assumptions about race."22 He notes: "I question and reject the following widely shared premises that shape the conventional wisdom about racism, as well as America's civil rights laws."23 Among other things, he rejects the following propositions: "[s]egregation was a system established by white racists for the purpose of oppressing blacks;" "[t]he civil rights movement represented a triumph of justice and enlightenment over the forces of Southern racism and hate;" and "[s]lavery was a racist institution, and the Constitution's compromise with slavery discredits the American Founding as racist and morally corrupt."24

D'Souza concludes that there is no white racism, and except for some distant period between the end of the Civil War and the modern era, there never really was any racism, only scattered examples of intolerance. Even the early twentieth century, when segregation was in full force and lynchings were rampant, was not truly an era of racism because, D'Souza contends, segregation was a paternalistic system promulgated by the better class of whites

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21. See id. at 526.
22. D'SOUZA, supra note 3, at 2.
23. Id.
24. Id.
to protect blacks from the real “racists” in the South. He even claims that protests to segregation in the late nineteenth century came not from blacks offended by discrimination, but from white owners of street cars and other facilities, who resisted separate accommodations for blacks because it was economically inefficient to provide them. Thus, D'Souza argues, the United States has never been and is not now a fundamentally racist society. He rejects the civil rights movement, the movement toward integration, and the value or need for civil rights law. D'Souza's only black hero is Booker T. Washington, whom he describes in glowing terms for having “sought reconciliation and common ground even with Southern segregationists.”

From such claims D'Souza concludes that racism is not the root of black unemployment, ghettoization, and what he refers to as “black failure” in America. He rejects the assumptions he ascribes to “liberals,” that differences in black and white success in education and finding jobs are tied to either racism or social conditions, and concludes “that it is an illusion to believe that racial difference between blacks and whites is largely a phenomenon of socioeconomic class.” Rather, D'Souza's explanation for “black failure,” including lower IQ scores, “is the functional inadequacy of African American culture.” He believes that this situation is compounded by racists in the black community, the misguided goals of the civil rights movement, affirmative action, and of course, his true bête noire (if one can use that term in an essay on this subject), white liberals. Emphatically he argues that “[r]acism cannot explain most of the contemporary hardships faced by African Americans, even if some of them had their historical roots in oppression.”

This acknowledgment of oppression is as much of a concession to history as he seems willing to make.

Although D'Souza denies that historical forces created our modern racial dilemmas, he nevertheless focuses a great deal of attention on history, or at least on past events interpreted through his rather peculiar lens. It is important for D'Souza to do this because, in order to maintain that black failure rests at the doorstep of black America, he must slay the dragons of history that suggest more complicated, widespread, and deeply rooted causes.

In the rest of this Review I will focus on D'Souza's analysis of early segregation and his peculiar, indeed bizarre, ideas about slavery and racism.

25. Id. at 179-81.
26. See infra Part III. D'Souza writes, "Who fought segregation? Not the liberals: there were few outspoken liberals in South and the opinions were irrelevant. Rather, it was the private companies such as streetcar owners who mounted the only significant, albeit unsuccessful opposition." D'SOUSA, supra note 3, at 180.
27. Id., supra note 3, at 185.
28. Id. at 431.
29. Id. at 457.
30. Id. at 461.
31. Id. at 526.
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The analysis he presents of these two subjects lays the groundwork for the rest of his book. If he is right that slavery was not racist and that segregation was not harmful to blacks, then perhaps racism is not at the root of our social problems. But, if he is wrong on these issues—as I argue he is—then much of the rest of his book must collapse as well.

III. D’SOUZA’S NEW HISTORY OF SEGREGATION

D’Souza explains segregation as a system created by white conservatives who wanted to protect blacks from the meaner elements of Southern society. There is some element of truth to this but, like much in this book, D’Souza avoids complexity and historical evidence that might undermine his ultra-conservative views. Moreover, his praise for the Southern white elite is overblown and often unjustified.

D’Souza claims that white conservatives established segregation to “assure that blacks, like the handicapped, would be insulated from the radical racists and—in the paternalist view—permitted to perform to the capacity of their arrested development.”32 Conversely, white “radicals had no qualms about tormenting and killing blacks” while “conservatives were appalled by such vulgar displays of bloodthirstiness.”33 Segregation, therefore, came out of “the code of the Christian and the gentleman.” The Southern elite, by denying blacks equal rights, were actually trying to protect them.34

But the process of creating segregation was too complicated to easily divide Southern whites into “conservatives” and “radicals.” Moreover, Southern conservatives, even “Christian gentlemen” were willing to use violence to suppress blacks. After the Civil War, a former Confederate general and wealthy landowner, Nathan Bedford Forest, became the first grand wizard of the Ku Klux Klan, a terrorist organization which used violence to prevent blacks from voting, achieving economic independence, or attaining education.35 Throughout the South, community leaders joined the Klan in the 1860s and 1870s.

After Reconstruction, conservative Southern “gentlemen” used violence to suppress black and white political cooperation. In 1892, for example, white Populists courted the black vote in much of the South. D’Souza’s “gentlemen” supported the Democratic Party.36 In Georgia whites supporting the Democrats murdered at least fifteen black Populists; in Virginia and North Carolina

32. Id. at 179.
33. Id.
34. Id.
the white elite resorted to riots to suppress the black vote. In the 1890s much of the movement to disenfranchise blacks came from the white elite who controlled the Democratic party. Such opposition was fueled by the fear of a growing alliance between poor whites and blacks. In Arkansas, when white Populists denounced lynching, "a Democratic newspaper offered the reassurance that practical Arkansas farmers had not 'suddenly become . . . defenders of Negro rapists and criminals.'" Thus the white elite was willing to support lynching and crude race baiting to maintain its political power. Surely it is difficult to see how blacks were "insulated" from white violence, or how D'Souza can characterize the white elite as protective.

Starting with the end of the Civil War and continuing well into the 1960s, white conservatives tolerated lynching, race riots, and racial murders in order to suppress blacks. Between 1889 and 1918, Southern whites lynched about 2900 blacks. Some were hanged, others were burned alive. White conservatives often took part in these gory affairs, and rarely if ever condemned them. The only Southern opposition to lynching came from a few dedicated Southern white liberals, Southern white women progressives, and of course, the black community. The white elite throughout the South rarely discouraged, and often encouraged, urban riots against black communities. The Atlanta Constitution, a voice of the elite new South, constantly belittled blacks, inflated passions through hysterical reporting of alleged "[n]egro crime waves," and encouraged attacks against blacks that led to the bloody Atlanta race riot of 1906. Similarly, in Tulsa the white elite supported the use of extreme force, including an aerial bombing of a black neighborhood in the race riot of 1921. After the riot, the Mayor and City Commission attempted to use eminent domain and newly adopted city zoning ordinances to claim land owned by blacks. Their goal was to force all blacks out of the city and use the land they had owned to build a new railroad terminal. Only tenacious
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resistance, led by the black attorney Buck Colbert Franklin, defeated this attempt to drive blacks from Tulsa.\textsuperscript{45}

These few examples of widespread racism and violence sanctioned by the white Southern elite suggest a striking deficiency in D'Souza's history of American segregation. In reality, all classes of whites endorsed and supported segregation and violence. Irrational race hatred, class warfare, greed, and economic exploitation went into the matrix of creating a segregated America.

A. Opposition to Segregation

Just as D'Souza does not understand the underpinnings of segregation or its historical development, neither does he understand the persistence of black resistance to it. D'Souza writes: "Who fought segregation? Not the liberals: there were few outspoken liberals in the South and their opinions were irrelevant. Rather, it was the private companies such as streetcar owners who mounted the only significant, albeit unsuccessful opposition."\textsuperscript{46} Even if this analysis is correct—which, as will be clear in a moment, it is not—the argument that businesses opposed segregation does not explain why white professional associations, such as county and state bars and medical societies, refused to accept black members.\textsuperscript{47} Segregation of professional associations, which preceded most statutorily required segregation, had no economic basis; it was purely a racist response by the white elite to the emergence of the African American professional.

D'Souza bases his analysis on one economic history article which looked only at streetcar segregation.\textsuperscript{48} Yet, D'Souza generalizes from this narrow analysis to assert that "private companies . . . mounted the only significant" opposition to segregation.\textsuperscript{49} Oddly, D'Souza seems unaware of many black boycotts of streetcars, even though the very article he cites discusses them.\textsuperscript{50} But boycotts were just one way in which blacks fought segregation.

The battle against segregation was also fought in the courts. D'Souza makes only a passing reference in the text to the fact that, in 1896, "the Supreme Court upheld the 'separate but equal' doctrine."\textsuperscript{51} Having failed even to mention the name of this case, \textit{Plessy v. Ferguson},\textsuperscript{52} in the text, D'Souza does not bother to examine its roots. \textit{Plessy} was a test case, brought and paid for by

\textsuperscript{45} Id.
\textsuperscript{46} D'SOUZA, supra note 3, at 180.
\textsuperscript{47} On the problems of early black lawyers, see generally J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944 (1994) and Finkelman, supra note 43.
\textsuperscript{49} D'SOUZA, supra note 3, at 180.
\textsuperscript{50} See Roback, supra note 48, at 907, 911, 912; see also August Meier & Elliott Rudwick, The Boycott Movement Against Jim Crow Streetcars, 1900-1930, at 55 J. AM. HIST. 55 (1969).
\textsuperscript{51} D'SOUZA, supra note 3, at 178.
\textsuperscript{52} 163 U.S. 537 (1896).
African Americans in New Orleans, not by the railroads, to challenge the validity of the laws requiring separate railroad cars.\textsuperscript{53}

\textit{Plessy} was only the most famous of a number of cases brought by blacks to challenge segregation. In \textit{Hall v. DeCuir},\textsuperscript{54} a black woman challenged the action of a steamboat that refused to allow her to eat in the stateroom, which the steamboat operators, in violation of state law, closed to blacks. In 1881, Mrs. Silena Gray, the wife of a minister from Lexington, Kentucky, successfully sued the Cincinnati Southern Railroad when the railroad would not let her sit in the first class car.\textsuperscript{55} Similarly, Mrs. Belle Smoot sued the Kentucky Central Railroad for barring her from the ladies coach because of her race.\textsuperscript{56} Mrs. Smoot lost her case, perhaps because the Kentucky jury was less sympathetic to her claim than the one from Ohio had been for Mrs. Gray. But regional sympathies were not always decisive. In Tennessee, Jane Brown successfully sued for $3000 when the railroad discriminated against her.\textsuperscript{57} The railroad had refused to seat Brown in the "ladies car"\textsuperscript{58} and a Tennessee jury found that this violated common law standards of reasonableness. However, the Tennessee legislature thought otherwise and, in 1881, passed a law requiring segregation in first-class accommodations on railroads.\textsuperscript{59}

The push to keep middle-class black men and women from the first-class and ladies cars on trains came directly from the white elite—D'Souza's "Christian gentlemen." They wanted to force middle-class black women and men to ride in the second-class and smoking cars with the rougher, lower-class white men. Indeed, throughout the twenty to thirty years before southern states required segregated transportation, railroads and steamboats routinely segregated blacks by preventing them from sitting in first-class accommodations even if they paid for them. Instead, the companies forced blacks into second-class cars, baggage cars, and smoking cars. These were always inferior facilities. As Booker T. Washington noted: "The seats in the coach given to colored people are always greatly inferior to those given the whites. The car is usually very filthy. There is no carpet as in the first class coach."\textsuperscript{60} Washington also complained that these Jim Crow cars were not even...
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exclusively for blacks because, "[w]henever a poorly dressed, slovenly white
man boards the train he is shown into the colored half coach. When a white
man gets drunk or wants to lounge around in an indecent position, he finds his
way into the colored department."61 This evidence shows that, far from
attempting to protect blacks from the hostility of the white lower classes, the
white elite tried to force blacks and lower-class whites to mingle, often under
deplobrable conditions.

Along the same lines, the steamboat operators in Hall, in violation of state
law, chose to segregate blacks from the staterooms of the elite.62 Paternalism
cannot explain the actions of the steamboat operators. Nor does it explain the
desire of the Southern elite—before statutory segregation was widespread—to
segregate themselves from educated, refined, middle-class, black professionals
and entrepreneurs. During Reconstruction, railroads and steamboats even
forced black officeholders, including members of Congress, to sit in segregated
facilities or in the integrated "smoking" and second-class cars.63 D'Souza
would like to blame segregation on working-class and lower-class whites. He
wants to interpret segregation as something elite whites created to separate the
violence-prone lower classes from each other in order to prevent the lower
class whites from lynching blacks. But, in fact, segregation was initially used
only to separate professional and middle-class whites from their black
counterparts. The early segregation of blacks on railroads and steamships
involved forcing middle class blacks, who could afford first-class tickets, to sit
with the poorer class of whites who could not afford first-class passage.

History also shows that businesses, rather than opposing segregation,
actually initiated it. In the Tennessee case discussed above, a jury found that
the railroad was acting in an unreasonable manner by segregating the ladies
car.64 This demonstrates that, long before the law required segregation,
Southern businesses practiced it by refusing to sell blacks first-class tickets for
public transportation. This was certainly not in their economic self-interest; it
was, however, in the cultural and class interests of the leaders of the South
who controlled these enterprises.

Now that it is clear that it was not D'Souza's "private companies such as
streetcar owners who mounted the only significant, albeit unsuccessful
opposition"65 to segregation, we return to his question: "Who fought
segregation?"66 In reality, as is hinted above, the most significant opposition
came from blacks.

61. Id.
63. For examples of this kind of treatment, see LOFGREN, supra note 38, at 15-16.
65. D'SOUZA, supra note 3, at 180.
66. Id.
In the antebellum period, Northern blacks challenged segregation through lawsuits, political action, and cooperative protest with whites. *Roberts v. Boston*[^67^] is only the best known struggle against antebellum Northern segregation. In that case a young black attorney, Robert Morris, represented black parents seeking to send their children to integrated schools.[^68^] When the case got to the Massachusetts Supreme Judicial Court, Charles Sumner, a white liberal, argued on behalf of integration. In his brief, Sumner made constitutional, policy, and psychological arguments similar to those used later in *Brown v. Board of Education*.[^69^] Unlike the attorneys in *Brown*, however, he was unsuccessful. In the first use of the “separate but equal doctrine,” Chief Justice Lemuel Shaw upheld Boston’s system of segregating black children.[^70^] But neither Boston’s black community nor Sumner gave up after *Roberts*. Rather, blacks in Boston redoubled their efforts to eliminate segregated schools. A boycott “reduced black [school] attendance dramatically.”[^71^] Some blacks relocated, “taking advantage of integrated schools in several towns outside Boston.”[^72^] Meanwhile blacks petitioned the legislature, which in 1855 prohibited segregated schools in Massachusetts.[^73^]

As the cases illustrate, in the period immediately before and continuing after the Civil War, blacks were persistent in their opposition to segregation. In yet another example of blacks using the courts to attempt to vindicate their claims of equality, one of *The Civil Rights Cases*[^74^] was a civil law suit brought by Sallie Robinson after the Memphis and Charleston Railroad refused to let her sit in the “ladies car.”[^75^] In *The Civil Rights Cases*, the Court struck down most of the Civil Rights Act of 1875.[^76^] Blacks throughout the nation responded to the Court’s decision with “shock and profound dismay,” holding protest meetings throughout the country.[^77^] In 1889, black men and women in Baltimore organized the United Brotherhood of Liberty, which was dedicated to fighting segregation. This organization arranged for the 1889 publication of *Justice and Jurisprudence: An Inquiry Concerning the Constitutional Limitations of the Thirteenth, Fourteenth, and Fifteenth Amendments*, a “philosophic account of the jurisprudence of race-prejudice, and of the history of its

[^71^]: HORTON, *supra* note 70, at 74.
[^72^]: *Id.* at 74-75.
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lineal descent from the ancestral jurisprudence of slavery."78 The forty-six
chapter tome dealt with all aspects of civil rights law in the United States, and
it was for years the best and only treatise on civil rights law in the United
States.

Blacks in New Orleans took up the struggle in the 1890s, setting the stage
for Plessy. In September 1891, elite "persons of color" in New Orleans formed
the "Citizens Committee to Test the Constitutionality of the Separate Car
Law."79 They raised $3,000 for the costs of a test case. Albion Tourgee, the
nation's leading white advocate of black rights—a white "liberal" in D'Souza's
terminology—agreed to take the case without fee.80 Tourgee, a former judge,
was a nationally prominent writer most noted for his novel about Reconstruc-
tion, A Fool's Errand.81 In June 1892, Homer A. Plessy intentionally sat in
the white car of a railroad train, in what may have been the nation's first
example of a civil rights activist purposely seeking to be arrested to challenge
segregation.

Who fought segregation? At the cutting edge of opposition were blacks,
mostly in the South, and a few whites who joined them. This continued to be
true throughout the first five decades of the twentieth century, as the National
Association for the Advancement of Colored People (NAACP) took the lead
in the black struggle against segregation. D'Souza either does not understand
this history, or has chosen to ignore it because it undercuts his overall attack
on the civil rights movement.

Preoccupied with praising segregation, because it provided "economic
opportunity" for blacks,82 D'Souza fails to see what most African Americans
saw: The minimal economic opportunity segregation provided for some blacks
was not worth the humiliation, the lack of true opportunity, or the oppression
of so many more blacks.83 Clearly segregation provided some business for
some black professionals, but the system also meant that the vast majority of
African Americans were denied higher paying jobs in industry and government
and all but a tiny handful of blacks were denied educational opportunities on
par with whites.84

78. JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS
OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS 42 (Negro University Press 1969)
(1889), quoted in J. Clay Smith, Justice and Jurisprudence and the Black Lawyer, 69 NOTRE DAME L.
REV. 1077, 1086-87 (1994); see also Lado, supra note 77.
79. See LOFGREN, supra note 38, at 29-31.
80. See Michael Kent Curtis, Albion Tourgee: Remembering Plessy's Lawyer on the 100th
81. See id. at 192.
82. D'SOUZA, supra note 3, at 181.
84. See Gil Kujovich, Equal Opportunity in Higher Education and the Black Public College: The
D'Souza describes the age of segregation (roughly 1880-1954) as a kind of nirvana for blacks, when “[b]lack masons, repairmen, jewelers, tailors and teachers made a modest living in the Jim Crow world” while “[o]n a larger scale, building on the self-help and fraternal organizations that free blacks set up during the antebellum era, blacks developed a flourishing banking, real estate, and insurance industry.” This pollyanna version of America's past ignores the fact that black lawyers, physicians, and other professionals were denied access to their white colleagues, as organizations like the American Bar Association remained segregated until the 1940s. It also ignores the problem that most blacks had no access to college and professional education because Southern states refused to provide schools for them. For example, not until the late 1940s did the Supreme Court begin to force states like Texas and Oklahoma to provide legal education for blacks.

D'Souza's history of segregation ignores the grinding poverty of most Southern blacks (who made up more than 90% of all African Americans), the police brutality, thousands of lynchings, lack of due process in the courts, denial of the ballot, and persistent violence that public officials, private individuals, and terrorist organizations like the Ku Klux Klan constantly imposed on all Southern and some Northern blacks. Black teachers may have had jobs in segregated schools, but they were paid less than whites and had to teach under horrible conditions. Southern school districts uniformly spent far less on the education of black children than on white children. Many Southern school districts refused to provide high schools for blacks, because the elite conservatives—D'Souza's “Christian gentlemen”—who ran the school boards saw no reason to provide such “higher” education for people they hoped to keep in a perpetual state of economic and social peonage.

Most important of all, D'Souza ignores the persistent opposition to segregation that blacks mustered whenever they could, even when the chances of winning were slim and the cost of opposition high. At great expense, and

85. Id. at 181-82.
86. See Smith, supra note 47, at 541-45.
88. See, e.g., Alston v. Board of Educ. of Norfolk, 112 F.2d 992 (4th Cir. 1940) (ordering school board to pay black teachers same salaries as white teachers).
89. In 1949-50, for example, the School District in Clarendon County, South Carolina spent $179 for each white student in the public schools and $43 for each black student. The total value of the 61 schools for blacks was $194,575 while the 12 schools for whites were valued at $673,850. See Richard Kluger, Simple Justice 8 (1975).
90. See, e.g., Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (denying relief to blacks in Augusta, Georgia who sought to enjoin the construction of new high school for white students after School board had abolished county’s only high school for blacks); Gebhart v. Belton, 91 A.2d 137 (Del. 1952) (noting that in Delaware there were no high schools for blacks outside of two major cities), aff'd on other grounds, Brown v. Board of Educ., 349 U.S. 294 (1954).
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often at greater personal risk, blacks challenged segregation whenever they could. This short history illustrates the fundamental inaccuracy of D'Souza's assertions that segregation was an attempt by the elite to protect blacks from the lower classes; that business interests opposed segregation on economic grounds; and that white businesses, not blacks, were the main opponents of segregation. More importantly, it demonstrates that segregation was never benign, but was almost always damaging to the economic, social, and educational aspirations of blacks. It is the heritage of this pernicious system, and not the uncivilized nature of black culture, that most immediately created the racial and social problems that America faces as it enters the twenty-first century. Lurking in the background of segregation is the legacy of American slavery and the racism it created.

IV. D'SOUZA'S NEW HISTORY OF SLAVERY

D'Souza's mischaracterization of the age of segregation is predicated on his bizarre description of slavery. He argues that slavery was not a racist institution. Much of his book rests on this claim. If slavery was not racist, then D'Souza can claim that American society is not either. But D'Souza's arguments unravel if our experience with slavery so poisoned us that our culture might still suffer from the racism it created. Therefore, it is important to examine seriously his assertions about slavery and race.

D'Souza boldly rejects what he asserts to be the conventional wisdom that "[s]lavery was a racist institution, and the Constitution's compromise with slavery discredits the American founding as racist and morally corrupt."91 In a series of rhetorical questions, he attempts to create doubt that "American slavery was a racist institution," that "whites were the oppressors and blacks were the victims," and that the Constitution was proslavery.92

His response to these and other issues takes the form of a forty-seven page chapter with the provocative title, "An American Dilemma: Was Slavery a Racist Institution?"93 The chapter contains 249 footnotes that cover another seventeen pages at the back of the book. Surely such apparently prodigious scholarship must impress the serious reader and the nonspecialist alike.

At the outset, it is necessary to separate two points that D'Souza claims are inaccurate conventional wisdom. The racism of slavery is an entirely separate issue from the compromises over slavery that were written into the Constitution. Conventional wisdom surely accepts that slavery was racist. But the claim that conventional wisdom agrees that the American Founding was "morally corrupt" is purely a straw man D'Souza creates to knock down. By tying the

91. D'SOUZA, supra note 3, at 2; see also id. at 22.
92. Id. at 70-71.
93. Id. at 67.
two points together, D'Souza wants to force his readers to accept both or neither. Since many Americans will not accept the latter point, that the Founding was morally corrupt, they might very well also reject the former point, that slavery was racist.

The following Section will first examine the fundamental racism of slavery. It seems almost perverse to have to make the point, but since D'Souza has gone to great lengths to deny it, a discussion of race and slavery is in order. On the second point, this Article will argue that there is indeed great moral taint associated with slavery and the American Founding. This does not, however, wholly "discredit" the Founding, although it does force us to see the ways in which slavery and racism were important components of it.

A. D'Souza's Peculiar History of Race and Slavery

D'Souza begins by asserting that "[a]lthough U.S. Senator Bill Bradley articulates the conventional view that 'slavery was our original sin,' there was nothing original about Americans practicing slavery." This retort, which seems clever at first glance, is not particularly responsive. Slavery was certainly not "original" to the English colonies on the mainland of North America. Nevertheless, simply noting that slavery did not originate in the American colonies fails to address Senator Bradley's point.

D'Souza believes that because slavery was not unique to the American colonies, it is not the source of the deplorable state of American race relations. In a largely accurate, though somewhat polemical discussion of slavery in various cultures, D'Souza demonstrates, as if anyone doubted it, that slavery could be found in many places and that in Africa human bondage was universally common. Indeed, he seems to take special delight in reminding his readers about slavery in Africa, and among Native Americans and Arabs. He notes that slavery was "practiced in the ancient world" and also that "in the modern era slavery was prevalent in Africa, the slave trade was actively promoted by the Arabs, American Indians owned slaves, and there were even thousands of black slaveowners in America. In this sense, American slavery was hardly a peculiar institution." D'Souza shows that North African Arabs and sub-Saharan black Africans enslaved black Africans and sold them to each other and to European traders. These historically accurate observations may offend some extremist Afro-centric scholars, who would like to blame Christians or Jews for the African trade and will undoubtedly educate many non-specialists, but they offer no new knowledge and will not surprise any serious student of African history or

94. Id.
95. Id.
96. Id.
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American slavery.

So far, this is nothing spectacular or new. But, in a clever, though not terribly sophisticated move, D'Souza next tries to argue that slavery was not racist because (1) Africans had held each other in slavery and sold each other to Euro-Americans, and (2) in the United States some African Americans owned slaves who were also African Americans. On both logical and historical grounds, this argument fails. Neither the fact that Africans sold black slaves, nor that a handful of blacks in the United States owned slaves, negates the facts that American slavery was racially-based, that American slaveowners developed elaborate racist arguments to justify slavery, and that no one but a person of African ancestry could be a slave in the United States.

B. African Participation in Slavery

That Africans sold other Africans into slavery merely shows that all Africans did not see each other as being of the same race or ethnic group, or that when they did, it did not prevent them from enslaving each other. Indeed, we might argue that it is racist even to presume that all Africans saw themselves as members of the same race or group. We certainly do not apply such standards to Europe, where ethnic and religious differences have allowed people of the same “race” to enslave and slaughter each other. The very word “slave” originates from the word “slav.” The Italians and other Southern Europeans enslaved so many Slavic peoples that the people and the term became synonymous.97 In the 1940s, Germans enslaved their fellow countrymen (as well as Russians, Poles, and other Europeans). Those sent to German industries as slaves or sent to German slave labor camps (as opposed to death camps like Auschwitz) were often physically indistinguishable from those who commanded their labor. Blond, blue-eyed German-speaking natives of Berlin or Frankfurt were enslaved by the German government if they were also Jews or of partial Jewish ancestry. Under German theories of race, those enslaved were designated as members of different races or as politically corrupted.98

Thus, it should hardly surprise us that in Africa Egbos sold Yorubas into slavery, and vice versa. Although he does not say it, D'Souza subtly tries to imply that Africans caused their own misfortune and that Africa itself was an uncivilized place, because Africans sold each other into slavery. Curiously, this begs the important question of the level of civilization of the Europeans who bought slaves. Indeed, the willingness of Europeans to enslave strangers who had done no harm to them surely raises moral issues and leads one to question

97. “[T]he Slavonic population in parts of central Europe having been reduced to a servile condition by conquest; the transferred sense is clearly evidenced in documents of the 9th century.” 15 OXFORD ENGLISH DICTIONARY 665 (2d ed. 1989).

what might be meant by "civilization."

D'Souza's discussion of African involvement in the slave trade may impress readers who know little about world slavery, but anyone acquainted with the subject realizes that the fact that some Africans enslaved other Africans, and occasionally even some of their own people, is hardly unique. As Moses Finley, the great classical scholar, observed, "there were Greek slaves in Greece, Italian slaves in Rome." Similarly, there were Arab slaves in the Middle East, Chinese slaves in China, Russian slaves in Russia, and Indian slaves on the Indian subcontinent. On the other side of the world, Scandinavians enslaved each other. As the sociologist Orlando Patterson has argued, slavery "has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized." Patterson found slavery in every "region on earth" and concluded that "probably there is no group of people whose ancestors were not at one time slaves or slaveholders." Thus, the fact that Africans enslaved each other only reinforces the generally accepted view that before the settlement of the Western Hemisphere, slavery was never distinctly racial.

C. Free Black Ownership of Slaves

D'Souza also argues that because some African Americans owned slaves, slavery in the United States was not racist. In doing so, he vastly overstates the significance and frequency of black slaveowners. For example, he asserts that free black slaveowners were "not unusual" in Texas, Florida, and Mississippi. But in 1860 there were only a total of 355 free blacks in Texas, 932 in Florida, and 773 in Mississippi. The overwhelming majority of these did not own any slaves at all. At the same time, these states had slave populations of 182,560 (Texas), 61,745 (Florida), and 436,631 (Mississippi), and white populations of 420,891, 77,747, and 353,899, respectively. Rather than saying black slaveowners in these states were not unusual, D'Souza could more accurately have stated that free blacks, whether they owned slaves or not, were "unusual."

He also asserts black slaveholding in South Carolina was "fairly common." Yet in 1860 only 171 of the 9914 free blacks in the state owned

100. See RUTH MAZO KARRAS, SLAVERY AND SOCIETY IN MEDIEVAL SCANDINAVIA (1988); CARL O. WILLIAMS, THRALDOM IN ANCIENT ICELAND (1937).
102. Id.
103. D'SOUZA, supra note 3, at 77.
104. See U.S. BUREAU OF CENSUS, POPULATION OF THE UNITED STATES IN 1860: COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS at xii, 594-95 (1864) [hereinafter U.S. BUREAU OF CENSUS].
105. See id.
106. D'SOUZA, supra note 3, at 77.
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slaves. By comparison, there were 402,406 slaves in the state and 291,300 whites. 107 Again, the more accurate statement would be that free blacks in the state were unusual, and free black slaveowners incredibly rare.

D'Souza points out that there were "several cases of husbands who bought their wives to ensure their good behavior." 108 A more accurate portrayal of black slaveholding would have been the hundreds of cases of blacks who bought relatives to free them. For example, in New Orleans, "while constituting only a small fraction of the city's slaveholders," free blacks "filed nearly one-third of all emancipation petitions. . . . Parents often sacrificed a life's work and savings to extricate their children from bondage by purchasing them from a white owner and then holding a pro forma ownership rather than seeking legal emancipation that could result in forced emigration." 109

Indeed, most black slaveowners owned just their own relatives. 110 They often lived in states where it was illegal to manumit slaves, but they had somehow saved enough money to buy their spouses, children, or parents out of bondage. As a result, they owned them. A hundred or so free African Americans, mostly people of mixed ancestry living in the Gulf Coast states or in South Carolina, owned slaves as investments. Some had inherited slaves from their white fathers. Others bought them because slaves were a good investment. 111 But even where they owned slaves, free blacks faced restrictions. In Georgia, for example, free blacks could not buy or sell "their" slaves and had to rely on a white guardian to administer their estates. 112 Free blacks, even those who owned slaves, were subject to the same racial discrimination slaves faced. As the Supreme Court of Georgia noted:

[T]he act of manumission confers no other right but that of freedom from the dominion of the master, and the limited liberty of locomotion . . . that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the "darkling sea." 113

In 1830 only about 3775 free blacks owned slaves, out of a Southern free black population of over 180,000. 114 By 1860 the number of free blacks in the South had increased to over 250,000, but the number of black slaveowners was in decline. In South Carolina, for example, there had been 450 free black

108. D'SOUZA, supra note 3, at 77.
110. See FRANKLIN & MOSS, supra note 36, 37, at 156-57.
111. See id.
112. See Bryan v. Walton, 14 Ga. 185, 192-94 (1853).
113. Id. at 198.
114. Schweninger, supra note 109, at 665.
owners in 1830, but there were only 171 in 1860.\textsuperscript{115}

What can we really make of the fact that a handful of free blacks owned slaves? Not much. The few African Americans who invested in slaves are merely anomalies, whose existence shows that there were some inconsistencies in the American South. By the eve of the Civil War, there were strong movements in the South to force free blacks to leave the region or choose masters. In Charleston, the large free black community was under tremendous pressure, and many members of that community were making plans to leave.\textsuperscript{116}

D’Souza finds it “morally disturbing that some African Americans owned black slaves.”\textsuperscript{117} Surely all slaveholding is morally disturbing. But only a minuscule number of African Americans—mostly mulattos of mixed ancestry trying very hard to distinguish themselves from “blacks”—owned slaves as investments. D’Souza argues that “free blacks debased their African kinsmen, sometimes their own relatives, into chattel slavery.”\textsuperscript{118} In fact, of course, all but a handful of black slaveowners simply tried to make life easier for their relatives.

Oddly enough, D’Souza misses the far more obvious point that thousands and thousands of white masters bought and sold their own relatives or kept them enslaved. Thomas Jefferson, to use a famous example, enslaved his half-sister-in-law, his half-brothers-in-law, and numerous nieces and nephews who were either the blood relatives of his wife, himself, or both.\textsuperscript{119} Whether Jefferson enslaved his own children is open to speculation and remains

\textsuperscript{115} Id. at 667.

\textsuperscript{116} Arkansas actually passed a law requiring free blacks to leave. See An Act to Remove the Free Negroes and Mulattoes from the State, 1858 Ark. Acts 151; see also IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 372-80 (1974) (discussing harassment of free blacks in Arkansas). See JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA (1943) and NO CHARIOT LET DOWN: CHARLESTON'S FREE PEOPLE OF COLOR ON THE EVE OF THE CIVIL WAR (Michael Johnson & James Roark eds., 1984), for a discussion of other harassment of free blacks in the South.

\textsuperscript{117} D’SOUZA, supra note 3, at 79.

\textsuperscript{118} Id. at 77. Curiously, he does not make similar comments about white masters who held in bondage or sold their slave children. In fact, he questions the validity of the whole idea that “white slaveowners produced innumerable illegitimate offspring by raping slave women.” Id. at 70-71. It may be that many master-slave heterosexual relationships did not involve violence or forcible rape. Some were certainly consensual, and some were based on love. See Mitchell v. Wells, 37 Miss. 235 (1859) (involving contest to will that demonstrated love of master for slave to whom he left property); Shaw v. Brown, 35 Miss. 246 (1858) (describing love of master for mulatto children). But, the key fact in rape is the lack of consent, freely given, and this is legally and morally problematic between a master and a slave.

\textsuperscript{119} Sally Hemings and her siblings, all of whom Jefferson owned, were the children of a mulatto slave and John Wayles, Thomas Jefferson’s father-in-law. That made Sally the half-sister of Jefferson’s wife, Martha Wayles Jefferson. The scholars most sympathetic to Jefferson claim that the father of Sally’s children was Jefferson’s nephew, Peter Carr, or his brother, Samuel Carr. See JOHN CHESTER MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 171 (1977); MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 707 (1970). If they are correct, then the children of Sally Hemings were Jefferson’s relatives by blood as well as marriage.

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unprovable by traditional historical methods.\textsuperscript{120} But, we know that thousands of white masters had children with their slaves and either sold their offspring or continued to hold them in bondage.\textsuperscript{121} That, it seems, is far more "morally disturbing" than the handful of blacks of mixed ancestry who owned slaves for profit.\textsuperscript{122}

Had free blacks owned white slaves, or had whites owned white slaves, then D'Souza would be on strong ground in arguing that American slavery was not racist. But that did not happen. From at least the 1670s, whites owned and controlled black labor; blacks never controlled white labor.\textsuperscript{123} It is true that some whites also controlled white labor, in the form of indentured servants, but by the 1680s Virginians and other Southerners had begun to make clear that, while whites would become free at the end of their indenture, blacks were subject to lifetime servitude that would be passed on to their children.

D. \textit{Race and the Distinctiveness of American Slavery}

What makes slavery in the New World distinct—peculiar—is that it was clearly racially-based. The peculiarity is compounded in the United States by political considerations. Unlike any other nation at the time, the United States was predicated on the assumption that "all men are created equal."\textsuperscript{124} This forced American masters to defend slavery, usually with racist arguments, and/or to reject the Declaration of Independence.

Thomas Jefferson, for example, used racist arguments to explain why blacks could not be emancipated. In the process he helped set the stage for what would later be called scientific racism. By contrast, Roman masters felt no need to defend slavery. In Rome, "[i]deological openness was facilitated by the nakedness of the oppression and exploitation: no "false consciousness" was necessary or possible."\textsuperscript{125} In Rome, there was nothing peculiar about slavery,

\textsuperscript{120} We do not know whether Jefferson also maintained a sexual relationship with Sally Hemings and fathered children with her. It is possible that DNA testing of the remains of Sally's children and Jefferson might provide an answer. See FINKELMAN, supra note 12, at 138, for more on Jefferson and Sally Hemings.

\textsuperscript{121} See JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MUTATIONS IN THE UNITED STATES (1984) (discussing relationships between masters and slaves).

\textsuperscript{122} D'SOUZA, supra note 3, at 79.

\textsuperscript{123} Indeed, even before Anglo-Americans had established slavery in Virginia, the colony's legislature prohibited free blacks from owning white indentured servants. An Act of 1670 declared: "no Negro or Indian though baptised and enjoyned their owne ffredome shall be capable of any such purchase of christians, but yet not debarred from buying any of their owne nation." \textit{Noe Negros nor Indians to Buy Christian Servants}, Act V. Oct. 1670, in \textit{2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 280, 281 (William Waller Hening ed., New York, R. & W. & G. Bartow, 1823) [hereinafter HENING'S VIRGINIA STATUTES].}

\textsuperscript{124} THE DECLARATION OF INDEPENDENCE preamble (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.").

\textsuperscript{125} FINLEY, supra note 99, at 117.
and therefore no need to defend it. In America, slavery was very peculiar, and thus the master class felt the necessity of defending it at every turn. Racial difference, which had helped create American slavery in the first place, thus became the basis of defending slavery after the Declaration of Independence declared that we are all “created equal.”

Historians disagree on the precise moment when slavery emerged in colonial Virginia. In 1619 the first Africans arrived and were most likely treated as indentured servants. During the next three decades, Virginia treated blacks in inconsistent ways. Sometimes they treated blacks exactly the same as whites. For example, in 1624 a Virginia court allowed a black to testify in a legal case involving a white. But, at other times, Anglo-Virginians singled out blacks in various ways. In 1642-43, for example, the House of Burgesses declared that black women would be tithable and thus subject to a tax not levied on white women.

The tithing statute illustrates the way in which race played a major part in the development of American society less than twenty-five years after the first blacks arrived in Virginia. It also shows how discrimination against blacks set the stage for their enslavement. Finally, this act, along with others discussed in a moment, demonstrates that, at least for British North America, there was in fact something quite original about racially-based slavery.

By requiring the owners of black female servants to pay a tax on them equal to the tax they paid on male servants (black or white) the tithing statute encouraged owners of black female servants, and later slaves, to treat them as field hands, rather than domestic servants. This set the stage in Virginia for the social notion that black women were fundamentally different from white women and could be more brutally treated. It is easier to enslave people if they are first brutalized, and it becomes common to treat them differently from other people. This is an early and unambiguous example of how the legal system of the American colonies treated blacks differently from whites. Whatever the motivation, the result was the development of a racist legal system, which led to a racially-based system of slavery.

Finally, this statute was the beginning of something original. Enslavement itself was certainly not original, as D’Souza states and every historian of world


127. Act Concerning Church Government, Act I. Mar. 1642-43, in 1 HENING’S VIRGINIA STATUTES, supra note 123, at 240, 242. This statute also had the pernicious effect of lowering the status of blacks within Virginia society. At the time this law was passed interracial marriage was not yet illegal. Thus, the 1643 law led to the bizarre outcome that Francis Skiper, a white Virginian, had to pay a tax for his black wife Ann. He would not have had to pay a similar tax for a white wife. See EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 334 (1975).

128. Act Concerning Church Government, supra note 127.
slavery knows. Nor was the enslavement of blacks in the New World unique to the British colonies. That had been going on since the early sixteenth century. The Spanish, Portuguese, Dutch, and French were all deeply involved in African slavery long before the British established their first settlement in Virginia. But, for English people, discrimination on the basis of race was original. The 1642 law was certainly an innovation in English, or Anglo-American, law because women were never tithable under English law.

In 1662, the Virginia House of Burgesses passed another law that created a major distinction based on race, which was original in terms of English law, and led directly to slavery. The law was entitled: “Negro womens children to serve according to the condition of the mother.” Its preamble noted that “some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or ffree.” The obvious answer, according to well-accepted notions of English common law, was that a child, even a bastard, took the status of the father. But a growing population of free mulatto children was more than the tobacco barons of Virginia could stand. Thus, the 1662 law declared that “all children borne in this country shalbe held bond or free only according to the condition of the mother.” This was a dramatic break with the common law that was forced by race. Race also drove the Burgesses to create enhanced punishments for interracial sex and ultimately to prohibit interracial marriage. Thus, the 1662 law doubled the fine of any “christian [who] shall committ fornication with a negro man or woman.” Just as “Negro” became synonymous with slave, “christian” in this context applied only to whites. These laws were new to English common law and were truly innovations both because they recognized race—something English law had never done—and because they contravened traditional notions of gender roles, inheritance of status, and the fundamental rights and well-known liberties of Englishmen.

Virginia’s early leaders used the courts, in addition to the statutes, to create racially-based slavery. A significant example of this came in 1640, when three servants indentured to one Hugh Gwyn escaped to Maryland. After much expense and inconvenience, Gwyn brought them back to Virginia, where the General Court ordered them punished. The two white servants, “Victor a
dutchman, and the other a Scotchman called James Gregory\textsuperscript{136} were whipped and sentenced to serve their master for one extra year and then work for the colony for three more years.\textsuperscript{137} The court record for the third runaway is worth quoting in full: “and that the third being a negro named John Punch shall serve his said master or his assigns for the time of his natural Life here or elsewhere.”\textsuperscript{138}

This court order illustrates the way in which Anglo-American slavery was a racial institution from the beginning. Victor and James Gregory were not Englishmen. Had white Englishmen in Virginia been interested in enslaving other Europeans, this case afforded them the opportunity to do so. But, despite the non-English status of the two white defendants, they did not. Only the “negro named John Punch” received this punishment. This makes sense because, with the exception of the occasional enslavement of Indians, which did not last past mid-century, only Africans and their descendants were subject to enslavement in British North America. There is no record that any person classified as white was ever sentenced to lifetime enslavement by an Anglo-American court.\textsuperscript{139}

The English in Virginia stumbled into slavery, without any careful thought or consideration of what they were really doing.\textsuperscript{140} They came without any experience with bondage and for the first few years treated blacks more or less like other non-English people. Most blacks in Virginia before 1650 were

\textsuperscript{136} Mellwaine, supra note 126, at 466 (June 4, 1640 and July 9, 1640).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} It is worth noting that throughout the United States there were many slaves with substantial amounts of white ancestry, but they were not classified as white. Unlike most other New World slaveholding jurisdictions, the United States and its predecessor colonies made no distinctions between people of full and partial African ancestry. The one exception to this was Louisiana, with its French and Spanish heritage. Thus a Louisiana Court could write:

We do not think there could be any serious denial of the fact that in Louisiana the words 'mulatto,' 'quadroon,' and 'octoroon' are of as definite meaning as the word 'man' or 'child,' and that, among educated people at least, they are as well and widely known. There is also the less widely known word 'griff,' which, in this state, has a definite meaning, indicating the issue of negro and a mulatto. The person too black to be a mulatto and too pale in color to be a negro is a griff. The person too dark to be a white, and too bright to be a griff, is a mulatto. The quadroon is distinctly whiter than the mulatto.

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indentured servants or, as they served out their time, former servants. However, by the 1640s Virginians had begun to make clear distinctions between whites and blacks. Punishments for blacks were harsher, and in at least one case a black runaway servant was sentenced to lifetime slavery.\(^{141}\) While scholars dispute what racial ideas the English brought with them,\(^{142}\) it is clear that by the 1640s the English in Virginia had come to see the African as different and, more importantly, as enslaveable. Quite clearly, the English never thought other Europeans—other whites—could be enslaved. By the 1660s Virginians had established race-based slavery. After that, the House of Burgesses and the General Court began to use “slave,” “African,” and “Negro” as almost interchangeable terms. Race became the driving force in slavery, and naturally enough, slavery became a racist institution.

This history demonstrates that slavery was racial from the beginning. With the exception of a very small number of Native Americans,\(^{143}\) only one group of people in America—Africans—were enslaved. Was slavery racist? It is hard to come up with another term to describe what happened in early America. During the next two centuries, slave status was always limited to people of African ancestry. Throughout their legal codes, court cases, and political discussions, Southerners used the terms “black,” “Negro,” and “slave” almost interchangeably. Illustrative of this was the statement of South Carolina’s Pierce Butler at the Constitutional Convention during a debate over counting slaves for purposes of representation. Butler declared: “The security the Southern States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do.”\(^{144}\) Butler did not make a distinction between “slaves” and “negroes.” He, like most other Americans (at least in the South), used the terms interchangeably.

E. Slavery, the Constitution, and D’Souza’s Constitutional History

Butler’s brief speech leads to a consideration of the relationship between slavery and the American Founding, as embodied by the Constitution. D’Souza rejects what he believes to be conventional wisdom—that is, that the Constitution was proslavery. He challenges the idea that “the Constitution’s compromise with slavery discredits the American founding as racist and morally corrupt”\(^ {145}\) and asks, “[m]ust we agree with the abolitionist William Lloyd

\(^{141}\) See McIlwaine, supra note 126, at 466.

\(^{142}\) Compare WINHROP JORDAN, WHITE OVER BLACK (1968) (arguing that English came predisposed to see blacks as inferior) with MORGAN, supra note 127 (arguing against this position).

\(^{143}\) For a variety of reasons, the enslavement of Indians never worked in the British mainland colonies. However, the enslavement of Indians underscores the racial aspect of Anglo-American slavery; like Africans, Indians were not white.

\(^{144}\) 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

\(^{145}\) D’SOUZA, supra note 3, at 2.
Garrison who charged that far from being a beacon for the world, the American founding was 'a covenant with death,' an 'agreement in hell,' and a 'refuge of lies,' an appraisal endorsed by the great black leader Frederick Douglass?"146

This is, in part, a straw man because in the nineteenth century few Americans accepted the Garrisonian view of the Constitution as a proslavery compact. Even Frederick Douglass eventually rejected the Garrisonian interpretation of the Constitution. Furthermore, many, perhaps most, modern scholars reject this view of the Constitution. It is also a straw man because D'Souza implies that all people who accept the proslavery analysis of the Constitution necessarily accept the argument that the Founding was "morally corrupt." It is entirely possible to accept the idea that the Constitution was proslavery, even to see immorality or moral ambiguity in the Founding, without requiring a wholesale denunciation of the era. Most sophisticated scholars do not seek to make lofty pronouncements about the immorality of the Founding; rather, they try to explain and understand it.147 This requires that we fully analyze and explore the many proslavery aspects of the Constitution without apologizing for the actions of the Founders.

D'Souza argues that it would have been impossible to end slavery at the Convention. He is on firm ground in asserting that "[i]n practical terms as well, the choice facing the men gathering in Philadelphia was not to permit or to prohibit slavery. . . . Any suggestion that Southern states could be persuaded to join a union and give up slavery can be dismissed as unlikely."148 This is entirely true. But, as presented by D'Souza, it is another straw man because he implies that he is arguing against conventional wisdom. In reality, no serious scholar suggests that ending slavery was possible at the Philadelphia Convention.

That said, it is important to ask harder questions, which D'Souza refuses to do. If the framers could not end slavery, what could they have done? And what did they do about putting slavery, to use Lincoln's language, "in course of ultimate extinction?"149 They might have done a great deal to limit the power of slavery and to favor freedom; in fact, they did almost nothing to harm slavery but did a great deal to protect and preserve the institution, ensuring that there would be no constitutional way ever to touch it.150 It is

146. Id. at 71.
147. See, e.g., WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977) [hereinafter WIECEK, SOURCES].
148. Id. at 109.
150. Ratification of a Constitutional amendment requires three-fourths of all the states to vote in favor of the amendment. U.S. CONST. amend. V. In 1860, there were 15 slaves states. Had they not attempted to leave the Union, the slave states could have perpetually prevented a constitutional amendment ending slavery. To this day—in a 50-state Union—it only takes 13 states to block a
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no wonder that the most proslavery delegates were gleeful about the Constitution. In trying toconvince his fellow South Carolinians to endorse the Constitution, General Charles Cotesworth Pinckney of South Carolina crowed to his state’s House of Representatives:

We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.151

D’Souza’s discussion of slavery and the Constitution is particularly odd because he seems to have ignored the relevant scholarship on the issue. My point is not that he has missed a few articles here and there; rather, he has ignored major books and articles, available in any university or law library as well as many public libraries. A number of scholars have written careful and thoughtful analyses of the Constitutional Convention’s relationship to slavery. All these scholars have demonstrated the important connections between slavery and the adoption of the Constitution. Yet D’Souza, in his 249 footnotes, has managed to overlook all of these works.152

This literature undermines D’Souza’s arguments in a number of ways. Despite disagreements, most of these scholars recognize that slavery was a central issue at the Constitutional Convention, about which the framers constantly debated. Even conservative politicians, like William Bradford Reynolds and Reagan cabinet member Donald Hodel, concede that the Constitution protected slavery.153 Because “conservative” and “liberal” (whatever those terms might mean) scholars agree on this, D’Souza is hard pressed to find anyone who thinks otherwise. Few, if any, of the scholars who have written on slavery and the Founding, however, argue that the compromis-

151. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 286 (Jonathan Elliot ed., 1881) [hereinafter ELLIOT, DEBATES].

152. For example he ignores the most important book yet written on the relationship between slavery and the new nation, DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820 (1971). He also ignores the essential literature demonstrating the connection between slavery and the Constitution, including ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1974); DON. E. FEHRENBACHER, THE DRED SCOTT CASE (1978); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854 (1990); STAUXTON LYN, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION (1967); WIECEK, SOURCES, supra note 152; Paul Finkelman, Slavery and the Constitutional Convention: Making a Covenant With Death, in BEYOND CONFEDERATION (Richard Beeman et al., eds., 1987), rewritten and revised as chapter 1 of FINKELMAN, supra note 12; William M. Wiecek, Slavery and Abolition Before the United States Supreme Court 1820-1860, 65 J. AM. HIST. 34 (1978). All of this literature seriously undermines his contentions about slavery and the Constitution. Oddly, D’Souza even ignores scholarship that might have supported his position, like DON E. FEHRENBACHER, THE FEDERAL GOVERNMENT AND SLAVERY (1984), and William W. Freehling, The Founding Fathers and Slavery, 77 AM. HIST. REV. 77 (1972).

es over slavery "discredit the American founding" or make it morally corrupt, although many point out the moral ambiguities created by slavery. Most historians looking at this issue rarely cast blame at all. Rather, scholars have offered critiques of the Founding that demonstrate the importance of slavery to the making of the Constitution and have suggested that this affected public policy then, and may do so today. Rather than seeking to condemn the Constitution or the entire Founding, most scholars writing on these subjects have stressed its moral ambiguity.

D'Souza's dubious analysis of the Constitution and slavery stems from three problems. First, he does not see or admit that the Constitution did in fact protect slavery. Second, he distorts the record of the framers themselves. He asserts that they did not want to protect slavery in the document, but did so because of popular prejudice, which he erroneously argues, they did not share. Finally, he vastly overstates the antislavery views of his favorite founder, Thomas Jefferson, who was not at the Convention but has become the symbol of the Founding.

1. The Proslavery Constitution

William Lloyd Garrison, the great nineteenth-century abolitionist, denounced the Constitution as a "covenant with death" and "an agreement with Hell." Was this correct? Or is D'Souza correct that the proslavery provisions of the Constitution represent a compromise "between anti-slavery and popular consent?" Or is the real answer something different?

If D'Souza is correct, then the delegates at Philadelphia must have been more opposed to slavery than the national population. This is not the place to recapitulate a detailed analysis of the Constitutional Convention and slavery, however, a brief examination of a few aspects of the Convention illustrates that D'Souza has it backwards.

Throughout the Convention, the delegates from New England and Pennsylvania fought to give Congress power to regulate commerce by a simple majority. Most Southern delegates (George Washington and James Madison are the two big exceptions) opposed this. At the same time, the delegates from South Carolina and Georgia demanded that the Constitution protect the African slave trade from congressional interference. Almost all the other delegates agreed that the African slave trade was fundamentally

155. FINKELMAN, supra note 12, at 1.
156. D'SOUZA, supra note 3, at 109.
157. See generally, FINKELMAN, supra note 12, at 1-33.
158. See Diamond, supra note 153, at 114-21.
159. See id. at 114-15.
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immoral. Despite even committed slaveowners making a careful distinction between continuing slavery and importing new slaves from Africa, a majority of the state delegations, led by Virginia, could have easily defeated the motion to protect the slave trade from congressional interference.

Near the end of the Convention, however, the New England states backed South Carolina's demands for explicit protection of the African slave trade in the Constitution. In return, the South Carolina delegation voted with New England on the Commerce Clause. During the debate over the Commerce Clause, Pierce Butler of South Carolina declared that the interests of the South and New England were "as different as the interests of Russia and Turkey." Nevertheless, he was "desirous of conciliating the affections of the East" and so he supported the Commerce Clause. Similarly, General Charles Cotesworth Pinckney agreed that "it was the true interest of the S. States to have no regulation of commerce." But in one of the most revealing statements of the Convention, he explained his support for a clause requiring only a simple majority for passage of commercial legislation arose because of "their [the New England states'] liberal conduct towards the views of South Carolina." The "views of South Carolina" concerned the slave trade. In the margins of his notes, James Madison made this clear. He wrote that Pinckney meant the permission to import slaves. An understanding on the two subjects of navigation and slavery, had taken place between those parts of the Union, which explains the vote on the Motion depending, as well as the language of General Pinckney and others.

It is impossible to reconcile this debate with D'Souza's far-fetched notion that the antislavery delegates at the Convention were constrained by their pro-slavery constituents to protect slavery. On the contrary, when the northern delegates returned home to campaign for ratification of the Constitution, they deliberately misled their constituents on what the slave trade provision meant. Pennsylvania's James Wilson, for example, who surely knew better, tried to convince the Pennsylvania ratifying convention that the slave trade clause would allow Congress to end all slavery in the United States. Wilson argued that after "the lapse of a few years, . . . Congress will have power to exterminate Slavery within our borders."

During the ratification controversy, the slave trade clause was one of the
most debated provisions of the Constitution in all of the states north of the Carolinas. Even some Southerners were appalled that the great men in Philadelphia had committed the United States to protecting the African slave trade for at least twenty years. In Virginia, "Republicus" sarcastically commented that the slave trade provision was "an excellent clause... in an Algerian Constitution" but thought it less well suited to a free Republic. In New York (where slavery was legal and would remain so until 1799), "A Countryman from Dutchess County" thought that Americans might become "a happy and respectable people" if the Constitution were "corrected by a substantial bill of rights" and, among other changes, the states were forced into "relinquishing every idea of drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants." Similarly, in New Hampshire, which had already abolished slavery, Joshua Atherton claimed no desire to force the South to end slavery, but he did object to protecting the slave trade: "There is a great distinction in not taking a part in the most barbarous violation of the sacred laws of God and humanity, and our becoming guaranties for its exercise for a term of years." 

Was the slave trade provision a betrayal of the ideals of the Revolution? James Madison, who valiantly and unsuccessfully opposed this clause, complained that it was "dishonorable to the National character" and to the Constitution and that the "twenty years will produce all the mischief that can be apprehended from the liberty to import slaves." Of course, Madison was right. In the period that the trade remained legal, South Carolina imported more than 80,000 new slaves. Anyone who argues that this does not taint the American Founding has a truly peculiar, indeed perverse, sense of morality.

Shortly after the Convention agreed to the Slave Trade Clause and the Commerce Clause, Pierce Butler proposed a fugitive slave provision. The Convention accepted this addition without a formal vote or any debate. Moreover, the northern delegates failed to ask for any quid pro quo from the Southerners. The clause guaranteed that fugitives would be "delivered up" on claim of their owners. It provided no due process to protect against mistaken

167. One of the common misunderstandings of the Constitution is that the slave trade provision — U.S. Const. art. I, § 9, cl. 1 — guaranteed an end to the trade in 20 years. It did not. It only prohibited Congress from ending the trade until 1808. Most people at the Convention expected the South, especially the deep South, to grow more rapidly than the North. Had this in fact occurred, it is conceivable that there would have been enough support in Congress for the trade to block any bill banning it.


171. 2 FARRAND, RECORDS, supra note 144, at 414-15.
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identity. Eventually the Supreme Court would interpret this clause to mean that the federal government was obligated to help masters recover fugitives, that the masters could do so without any process or procedure whatsoever, and that any interposition by the states to prevent the kidnapping of free blacks was unconstitutional. This provision was a great victory for the South, gained at no cost at all.

The proslavery delegates helped shape a Constitution with more than a dozen clauses that protected slavery. Conversely, nothing in the Constitution threatened slavery or protected free blacks. Summing up the entire Convention, General Charles Cotesworth Pinckney, who had been one of the ablest defenders of slavery at the Convention, proudly told the South Carolina House of Representatives: “In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad.” It is hard to disagree with Pinckney.

2. Democracy and Antislavery

D’Souza’s oddest argument is that an abolition of slavery, or presumably any constitutional provisions that undermined the institution, would have been undemocratic. He writes: “The dilemma of Jefferson and the American founders may be summarized as follows: they fully recognized that a democratic society depends not just on wisdom, but also on consent.” He then goes on to argue that, “[t]o outlaw slavery without the consent of the majority of whites would be to destroy democracy, and thus to destroy the very basis for outlawing slavery.”

Given notions of federalism in the 1780s, any national abolition would have been doomed. To even raise this is to offer up yet another straw man. But the idea that the Convention might have been less deferential to slavery, that it might not have protected the African trade, or not adopted a fugitive slave provision, is hardly far-fetched. Thus it is worth considering, as best we can, what the public might have supported.

It is hard to understand the basis of D’Souza’s claim that a voting majority in the nation favored slavery. During the Revolution, Pennsylvania passed a gradual emancipation statute, and New Hampshire and Massachusetts banned slavery outright, as did the settlers in what became the fourteenth state, Vermont. A year after the Revolution ended, Connecticut and Rhode Island

173. See FINKELMAN, supra note 12, at 3-7.
174. 4 ELLIOT, DEBATES, supra note 151, at 286.
175. D’SOUZA, supra note 3, at 108.
176. Id. at 109.
also passed gradual emancipation statutes. In 1782, Virginia adopted a law allowing for masters to free their slaves voluntarily. In the next three decades, the free black population in that state grew from 2000 to 30,000 as hundreds, if not thousands, of masters voluntarily manumitted their slaves. Meanwhile, in Maryland and Delaware, thousands of slaves gained their freedom. Even in the Carolinas there was a noticeable, albeit brief, increase in private manumission. Indeed, in the era following the Revolution, because of private manumissions, free blacks made up the fastest growing segment of the Southern population.

Given this history, which D’Souza ignores, it is quite likely that in the 1780s a majority in the nation would have supported some form of gradual emancipation. Surely a majority of the whites in Georgia, the Carolinas, Virginia, and perhaps Maryland, would have opposed such a law, but the opposition would not have been unanimous, especially north of South Carolina. The much larger free populations in the North might very well have out-voted the South on a straight popular vote. This does not mean that a national emancipation was politically possible. Surely any attempt to end slavery at the national level would have destroyed the nation. But, it does suggest that concern for “democratic,” as opposed to federalist, values did not mean the Constitutional Convention had to give in to the demands of the Deep South for a continuation of the slave trade or for the fugitive slave clause.

It is not entirely clear what D’Souza has in mind when he talks about “democracy.” The very terms of his own presentation are themselves questionable. Why limit the vote to the “consent of the majority of whites?” Were free blacks not part of the polity? They could vote in much of the North, as well as in North Carolina. D’Souza presumably thinks their votes did not count. Moreover, D’Souza somehow thinks that democracy can exist when large portions of the population are completely voiceless.

D’Souza would have us reject the argument that the American Founding was

177. An Act to Authorize the Manumission of Slaves, ch. 61, May 1782, in 11 HENING’S VIRGINIA STATUTES, supra note 123, at 35.
178. The Virginia jurist St. George Tucker estimated there were 2000 free blacks in Virginia in 1782, when the state legalized private manumission. Virginia’s 200 percent increase in free blacks from 1790 until 1810 far outstripped the growth rate of slaves or whites. Similar growth rates occurred in other states. In Maryland free blacks grew to one quarter of the entire black population in this period. By 1810 free blacks outnumbered slaves in Delaware. Manumissions continued in Virginia in large numbers until at least 1805. This percentage growth in free blacks nationally occurred despite the fact that South Carolina imported more than 80,000 new African slaves between 1803 and 1808. See IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 46-50 (1974).
180. This raises questions about gender as well as race. There was, however, a major difference. Most whites—especially men—of the Founding era argued that male voters represented the interests of their wives, daughters, mothers, and sisters. The extent to which this was true varied. No one, however, argued that when slaveowners voted they represented the interests of their slaves. Moreover, even if one accepts the reality (rather than the legitimacy) of only male suffrage, one might ask, can there be a democracy if between thirty and fifty-five percent of the adult males can never vote?
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“morally corrupt” on grounds that it would have been undemocratic to end slavery. He makes this argument, however, without ever considering that slavery itself was so undemocratic as to corrupt notions of democracy. In Virginia, about one-third the population was black; in South Carolina, a majority of the inhabitants were black. D’Souza talks of democracy at the Founding, but one wonders what he means by it.

Equally odd is D’Souza’s contention that the Founders, especially Thomas Jefferson, favored an end to slavery but were stopped by the Democratic majority, which favored continuing the peculiar institution. He paints Jefferson as some sort of proto-abolitionist who “vehemently denounced slavery” and “expressed his hope that black accomplishment might prove his suspicions [on black inferiority] wrong.” Like his discussion of slavery and the Constitution, D’Souza ignores the most important literature about Jefferson and slavery. Again, he does not simply miss an article here and there. Rather, D’Souza has chosen not to cite or confront a vast literature that challenges his unsophisticated approach to Jefferson.

3. Jefferson, Democracy, and Antislavery

Much of D’Souza’s book rests on his few brief references to Thomas Jefferson and his assertions, based on very slim evidence, that Jefferson hated slavery and wanted to find proof of racial equality. If the most revered of the Founders was not a racist, and indeed hated racism and slavery, D’Souza contends, then America might not be such a racist place. On the other hand, if it turns out that the primary author of the Declaration of Independence was a racist, who never truly opposed slavery and was thoroughly committed to white supremacy, then D’Souza’s book is built on historical quicksand. Therefore, a brief examination of Jefferson is in order.

182. D’SOUZA, supra note 3, at 107.
183. Id. at 108.
185. For a more elaborate discussion of Jefferson’s profound racism and his lifetime support for slavery, see FINKELMAN, supra note 12, at chs. 5-6.
Shortly after he signed the Declaration, Jefferson left the national Congress to serve in the Virginia legislature. He remained there until June 1779, when he became Governor. Jefferson’s legislative career was one of the most satisfying and creative periods in his life. Early on he proposed a bill for a complete overhaul of Virginia’s laws. As chair of the revision committee Jefferson was able “to set forth in due course a long-range program emphasizing humane criminal laws, complete religious freedom, and the diffusion of education, and thus to appear on the page of history as a major prophet of intellectual liberty and human enlightenment.” During and after Jefferson’s service in the legislature, Virginia adopted many of the committee’s proposed laws, including bills on religious freedom, the abolition of primogeniture and entail, education, citizenship, and the criminal code. More than two centuries later these still stand out, “and the credit for all of these belongs to [Jefferson].”

As chair of the committee to revise Virginia’s laws, Jefferson was in the ideal position to work towards gradual emancipation. But he failed to take the lead. And when legislators approached Jefferson with draft legislation that would have brought gradual emancipation to Virginia, he declined to add it to the proposed revisions. He later explained it was “better that this should be kept back” and only offered as an amendment, although it is unclear why this would have been a better strategy. Jefferson’s strategy in fact killed the proposal, which was probably his intention all along. Jefferson never again proposed ending slavery in Virginia or the United States. He consistently refused to challenge slavery and, even after he left the presidency, refused to endorse gradual emancipation.

This history suggests that D’Souza is simply wrong in arguing that concern for democracy led the Founders, especially Jefferson, to refuse to take a stand against slavery. Although there certainly could have been no national emancipation, there are many concessions to slavery in the Constitution that might have been avoided. Even so, at the state level much was possible. But, in a democratically elected legislature Jefferson refused to allow a debate over slavery. In 1782, when he was temporarily out of political office, the Virginia legislature passed a law allowing for voluntary manumission of slaves. This suggests some popular support for hindering slavery, even in Virginia.

D’Souza’s notion that Jefferson “expressed his hope that black accomplishment might prove his suspicions” on the racial inferiority of blacks “wrong” also does not hold up to careful scrutiny. D’Souza was quoting a famous...
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Jefferson's letter on this point reveals his true view of the Bishop and his project to prove the intellectual capacities of blacks. Jefferson told Barlow:

I believe him [Bishop Grégoire] a very good man, with imagination enough to declaim eloquently, but without judgment to decide. He wrote to me also on doubts I had expressed five or six and twenty years ago, in the Notes of Virginia, as to the grade of understanding of the negroes, and he sent me his book on the literature of the negroes. His credulity has made him gather up every story he could find of men of color, (without distinguishing whether black, or of what degree mixture), however slight the mention or light the authority on which they are quoted. The whole do not amount, in point of evidence, to what we know ourselves of Banneker. We know he had spherical trigonometry enough to make almanacs, but not without suspicion of aid from Ellicot, who was his neighbor and friend, and never missed an opportunity of puffing him. I have a long letter from Banneker, which shows him to have had a mind of very common stature indeed. As to Bishop Grégoire, I wrote him, as you have done, a very soft answer.

Jefferson's letter to Barlow dovetails with his well-known views about blacks. D'Souza quotes Jefferson's statement from his Notes on the State of Virginia that "I tremble for my country when I realize that God is just." But D'Souza fails to consider Jefferson's profoundly racist statements about blacks. Jefferson thought that legal or political equality for blacks was impossible because "the real distinction that nature has made" between the

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191. D'SOUZA, supra note 3, at 590 n.226.
194. D'SOUZA, supra note 3, at 107.
races went beyond color and other physical attributes. Race, more than their status as slaves, doomed blacks to permanent inequality. In Notes on the State of Virginia, Jefferson asserted that a harsh bondage did not prevent Roman slaves from achieving distinction in science, art, or literature because “they were of the race of whites.” American slaves could never achieve such distinction because they were not white. Jefferson argued that American Indians had “a germ in their minds which only [lacks] cultivation;” they were capable of “the most sublime oratory.” But, he had never found a black who “had uttered a thought above the level of plain narration; never seen an elementary trait of painting or sculpture.” He found “no poetry” among blacks. Jefferson argued that blacks’ ability to “reason” was “much inferior” to whites, while “in imagination they are dull, tasteless, and anomalous,” and “inferior to the whites in the endowments of body and mind.” Jefferson conceded blacks were brave, but claimed that this was due to “a want of fore-thought, which prevents their seeing a danger till it be present.”

Jefferson’s negrophobia was profound. A scientist and naturalist, he nevertheless accepted and repeated absurdly unscientific and illogical arguments about the racial characteristics of blacks, speculating that blackness might come “from the colour of the blood” or that blacks might breed with the “Oran-ootan.” His assertion that black men preferred white women was empirically insupportable. The reverse was more likely the case, as he surely knew. Many white men, including his late father-in-law, maintained sexual liaisons with their slave women.

Jefferson’s views on race are in fact embarrassing, not just by the standards of our age but by the standards of his own age. Tragically, Jefferson’s pseudoscientific proclamations helped foster the subsequent development of proslavery science, which led to scientific racism. Jefferson helped invent scientific racism as an intellectually credible viewpoint. As Winthrop Jordan noted, Jefferson’s statements about race “constituted, for all [their] qualifications, the most intense, extensive, and extreme formulation of anti-Negro

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196. Id. at 142.
197. Id. at 140.
198. Id.
199. Id.
200. Id.
201. Id. at 139.
202. Id. at 143.
203. Id. at 139.
204. Id. at 138 (stating that proof of white “superior beauty” could be found in blacks’ “own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species”).
205. See supra note 98.
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‘thought’ offered by any American in the thirty years after the Revolution.”206 The very importance of Jefferson to the Founding era helped make racism respectable in antebellum America. Racism might have developed without his support for it in the Notes, but it is nevertheless a legacy of Jefferson.

D’Souza does not examine this legacy of Jefferson, because he imparts to Jefferson an antislavery attitude that Jefferson did not have. This is, in fact, an important part of the “new racism” that D’Souza articulates. One of the assumptions of the “new racism” is that America cannot be a racist society because we are all “created equal.” This, however, is a slippery linguistic move that does not survive careful scrutiny. It is one thing to believe that we all should be equal. But the mere articulation of this credo by the Founders did not in fact make it a social, economic, or political reality.

A thorough examination of Jefferson’s views on slavery and race make him an extremely problematic figure. Jefferson’s greatest legacy is the Declaration of Independence, with its eloquent assertion that we are all “created equal.” But it is clear Jefferson did not mean exactly what he wrote. Otherwise he could not have kept his slaves. Instead of acting on his own credo and beginning to free his slaves, Jefferson began to develop an intellectual defense of slavery based on scientific racism.

VI. CONCLUSION

Like Jefferson, the American Founding was flawed by slavery and racism. This need not mean that the entire Founding was morally corrupt; but it does mean there was a taint from the beginning. This was part of our nation’s “original sin.” All Americans still struggle with that legacy. To deny it is to misread all of American history. That denial is part of the “new racism,” and it is a primary component of The End of Racism.

D’Souza is right that we need to reconsider the way we have approached race in our country. It may be true that affirmative action has evolved into a mechanistic quota system that is a parody of what it was intended to produce. This does not mean, however, that we can afford to reject policies which seek to integrate American society fully. It is also clear that within black communities violence, drugs, poverty, rejection of education, and teenage motherhood and single parent (mothers) families undermine the ability of many African Americans to succeed in the United States.

However correct D’Souza is in identifying the problems of modern American race relations, his analysis is fatally flawed by his refusal to confront our rather grim history. D’Souza’s title proclaims the “End of Racism,” but

his message is mostly that racism has never really been that much of a problem. This is simply wrong. It is also yet another component of the “new racism,” which denies there ever was much of a problem in order to argue that we need no social policies to overcome our past or remodel our present.

In the end, D’Souza’s fundamental conclusions are wrong. Racism has been embedded in our culture since at least the 1660s. We have made some dents in it. The Civil Rights revolution, like the era of Reconstruction, did much to remove the formal and informal manifestations of racism. The Civil Rights era also altered some public attitudes. But, like the post-Reconstruction period, since 1981 the “new racism” has been leading a counter-revolution, not merely by reversing public policies but, worse yet, by arguing that we need no policies at all, because we have no problem. Thus the present and the future remain bleak. In 1903, W.E.B. DuBois predicted that “the problem of the Twentieth Century is the problem of the color line.”207 Unfortunately, as we enter the twenty-first century the problem remains, compounded by the “new racism” that refuses to even acknowledge the historical or modern manifestations of the problem. D’Souza’s book stands as a heavily footnoted manifesto for this “new racism.”

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