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DRED SCOTT—BEYOND BLACK AND WHITE**

LEAD ARTICLE

DRED SCOTT AND ASIAN AMERICANS

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ABSTRACT

Chief Justice Taney's 1857 opinion in Dred Scott v. Sandford is justly infamous for its holdings that African Americans could never be citizens, that Congress was powerless to prohibit slavery in the territories, and for its proclamation that persons of African ancestry "had no rights which the white man was bound to respect." For all of the interest in and attention to Dred Scott, however, no scholar has previously analyzed United States v. Dow, an 1840 decision of Chief Justice Taney in a circuit court trial which is apparently the first federal decision to articulate a broad theoretical basis for white supremacy. Dow identified whites as the "master" race, and the opinion explained that only those of European origin were either welcomed or allowed to be members of the political community in the American colonies. Non-whites such as members of Dow's race, Taney explained, could be reduced to slavery, and therefore their rights continued to be subject to absolute legislative discretion. Dow, however, was not a person of African descent—he was Malay, from the Philippines. Chief Justice Taney's employment in Dow of legal reasoning which he would later apply in Dred Scott suggests that Dred Scott should be regarded as pertinent to all people of color, not only African Americans. This understanding of Dred Scott helps explain the revival of Taney's reputation during the Jim Crow era after Reconstruction. Courts declined to invalidate restrictions with respect to a broad range of civil rights on citizens and immigrants of African, Indian, Asian, and Mexican ancestry to which whites were not subject. Indeed, whites could not be subject to them, unless it is conceivable that under the U.S. Constitution, the law could provide, for example, that all races would be ineligible to testify or vote because of their race. Accordingly, even after Reconstruction—just as Dred Scott and Dow contemplated—the white race remained the master race, in the sense that members of that race were the exclusive holders of truly inalienable rights.

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INTRODUCTION

“Perhaps no legal case in American history is as famous—or as infamous—as *Dred Scott v. Sandford*.”¹ Cass Sunstein called *Dred Scott*² “probably the most important case in the history of the Supreme Court of the United States. Indeed, it was probably the most important constitutional case in the history of any nation and any court.”³ U.S. Supreme Court Chief Justice Roger Brooke Taney became notorious for his holdings that Congress had no power to prevent the spread of legal slavery in United States territories, and that no person of African descent could be a citizen, based on a conclusion that at the founding of the country, they were

regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.⁴

After more than 150 years, the decision still draws intense academic attention.⁵ Some historians have suggested that *Dred Scott* was a cause of the

¹ Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 1 (1996).

² 60 U.S. (19 How.) 393 (1857).

³ Cass R. Sunstein, *The Dred Scott Case*, 1 GREEN BAG 2d 39, 39 (1997).

⁴ 60 U.S. at 407.

⁵ See, e.g., Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1033 (1997) (“*Dred Scott v. Sandford* stands in infamy in American constitutional law and the history of the Supreme Court.”). There is of course a voluminous literature on the case. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (2d ed. 2016); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U.J.L. & POL’Y 45 (2008); Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13 (2011); Paul Finkelman, *Was Dred Scott Correctly Decided? An “Expert Report” for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1221 (2008); Paul Finkelman, *Coming to Terms with Dred Scott: A*

Civil War.⁶

This article proposes that a landmark opinion shedding light on the meaning of *Dred Scott* has been overlooked and remained unanalyzed until now. *Dred Scott*—or at least the reasoning of *Dred Scott*—was not solely about the status of enslaved African Americans. *United States v. Dow*⁷ is an 1840 decision by Chief Justice Taney, written as he presided over a trial in the U.S. Circuit Court. *Dow*, touched on by courts and scholars only rarely and in passing,⁸ analyzed the same historical and legal issues that Taney would confront in *Dred Scott* seventeen years later: Which race was “master,” and which others were sufficiently “inferior” that they might be enslaved; which race was worthy of participation in the political community, and which people among the world’s nations were “civilized.” In *Dow*, Taney held that the defendant was not a “Christian white person,” and thus was not entitled to the protections afforded that class under the law of evidence. Accordingly, for a crime for which a white person could not have been charged for lack of

Response to Daniel A. Farber, 39 PEPP. L. REV. 49 (2011); Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229, 1230 (2005); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997); Scott W. Howe, *Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737 (2020); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

6 See FEHRENBACHER, *supra* note 5, at 457 (“Clearly, the [*Dred Scott*] decision by itself did not have a convulsive effect on sectional politics, but it became one of the elements in an explosive compound.”); Paul Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 3 (2007) (“Though surely an exaggeration, it has been said that the case caused the Civil War. While other forces caused secession and the War, *Dred Scott* surely played a role in the timing of both.”); Henry A. Forster, *Did the Decision in the Dred Scott Case Lead to the Civil War?*, 52 AM. L. REV. 875 (1918); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 98 (2007) (“[I]n the crisis of 1860 *Dred Scott* had in fact become the lynchpin of Southern policy and the focus of Northern protests.”).

7 *United States v. Dow*, 25 F. Cas. 901 (C.C.D. Md. 1840) (No. 14,990).

8 *Dow* has been cited in the legal literature only a handful of times, usually in a footnote. See Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 476 n.50 (1966); Andrew T. Fede, *Not the Most Insignificant Justice: Reconsidering Justice Gabriel Duwall’s Slavery Law Opinions Favoring Liberty*, 42 J. SUP. CT. HIST. 7, 21 & 26 n.77 (2017); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 515 n.238 (1998); Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 153 n.70 (1999); *Book Notices*, 5 W. JURIST 477, 478 (1871) (reviewing edition of Taney’s “many valuable and important decisions” including “*United States v. Dow*, on the competency of the testimony of negroes, and the status of the Malay race” and noting that “[w]hen we shall, as a nation, recover our own equilibrium, and learn to make necessary and just allowances for the bias of education and surroundings, we will place Roger Brooke Taney in the front line of jurists of the nineteenth century, either English or American.”).

evidence,⁹ Dow was condemned to death (though ultimately pardoned).¹⁰ In its holding that *Dow*'s freedom was a question of state law, the opinion accurately mapped the future: Even with respect to citizens of color, the rights of non-whites were subject to the political will of the dominant race. However, Dow was not African. He was "Malay," from the Philippines.

In a certain sense, *Dred Scott*'s continued prominence requires explanation. Decided in 1857, some of its holdings were not merely rendered moot but definitively rejected and reversed no later than 1868 with the ratification of the Fourteenth Amendment.¹¹ Because the Thirteenth Amendment wholly abolished slavery, the Constitution also unquestionably prohibited slavery in the territories.¹² *Dred Scott* was deeply racist, but there are many such texts from equally prominent leaders.

Reading *Dow* and *Dred Scott* together illuminates the meaning of the latter and helps explain its continuing relevance. *Dow* and *Dred Scott* were the first federal cases articulating a political theory of race and racial status in the United States.¹³ The Constitution, of course, functioned to protect slavery, but it did not use the words "slavery," "African," or "Negro," some have argued, in an effort to minimize the appearance of constitutional approval or involvement.¹⁴ No federal cases had articulated a comprehensive theory of

⁹ See, e.g., *United States v. Beddo*, 24 F. Cas. 1061, 1062 (C.C.D.D.C. 1835) (No. 14,556) ("[T]he United States, finding that there were no witnesses for the prosecution other than free negroes and mulattoes born of colored women, ordered a nolle prosequi to be entered with the leave of the court.").

¹⁰ 25 F. Cas. at 905. He received a full pardon on August 7, 1844, less than five years after the killing.

¹¹ U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

¹² U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

¹³ There is another antecedent, Attorney General Taney's 1832 opinion, official but unpublished, evaluating the lawfulness of a South Carolina statute excluding sailors of color from South Carolina ports. In upholding the provision, Taney explored the citizenship and political position of persons of African ancestry in the United States in ways reminiscent of his later work. H. Jefferson Powell, *Attorney General Taney & the South Carolina Police Bill*, 5 GREEN BAG 2D 75 (2001).

¹⁴ Compare Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 (1999) ("The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies."); J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1707 (1997) ("One of the great debates of the first half of the nineteenth century was the extent to which the Constitution protected the institution of slavery. Although the Constitution made oblique references to slavery at several places, the protection of slavery was very much built into its structure."); with James Boyd White, *Constructing A Constitution: "Original Intention" in the Slave Cases*, 47

racial hierarchy.¹⁵ *Dow* and *Dred Scott* together outlined the rights of all races, at least as contemplated at the time. In that sense, *Dred Scott* was not about slavery alone, as critical as that issue was. It also addressed free people of color, including but not limited to persons of African ancestry, and recognized state authority to determine their status and rights—even if they were, in a technical legal sense, citizens. To this extent, *Dred Scott* remains important because it outlined a constitutional and historical theory of white supremacy that was influential for a century after Reconstruction, and the case has not yet been fully resolved. Indeed, *Dred Scott* continues to resonate for some; on white supremacist websites like Stormfront.org, it remains the law of the land in the hopes and imaginations of many.¹⁶

In addition to political theory, *Dow* and *Dred Scott* also outlined legal doctrine which could bring into operation the racial hierarchy they envisioned. Part of that doctrine was that legal principles flowing from slave law could, in the discretion of the states, apply to free people of color just as they did to enslaved persons.

Finally, *Dow* makes clear that anti-Chinese movement in the Pacific Coast jurisdictions starting in the 1860s was not the beginning of inclusion of Asians

MD. L. REV. 239, 268 (1987) (“[T]he absence in the Constitution of any talk about race, and the oblique references to slavery, could be read very differently from the way Taney suggests: not as pointing to views so deeply and obviously held that they need not be expressed, but as a deliberate attempt to escape from those views. The enormous gap between the race-free language of the Constitution and the kinds of social facts to which Taney points would then have a shouting significance. Of course, Blacks, slave or free, were systematically degraded, and in ways we could not or would not change overnight; but this fact was inconsistent with our ideals for ourselves, and in writing the Constitution as we did we chose not to perpetuate or confirm those aspects of our lives, but to disapprove them.”); Robert J. Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 162 n.29 (2004) (noting Justice Chase’s view that “[t]he framers of the Constitution sought to prevent the federal government from having anything to do with slavery, and they carefully avoided conferring any constitutional powers on the federal government to support slavery. A state could either establish slavery or not, as it saw fit. As slavery was wholly a matter of state law, the federal government possessed no constitutional power to abolish slavery in the states in which it existed; but neither could the federal government enforce slavery in the states that refused to recognize it.”).

¹⁵ The Federalist Papers touched on some issues regarding slavery but did not make a comprehensive case for or against White supremacy. See James Oakes, “*The Compromising Expedient*: Justifying A Proslavery Constitution

, 17 CARDOZO L. REV. 2023, 2048 (1996) (“A concordance to The Federalist Papers lists twenty references to the words slave, slavery, and slaves. James Madison wrote nineteen of them. His most extended discussion appeared in Federalist No. 54. He also made a brief case for the slave trade clause in Federalist No. 42 and an even briefer reference in No. 38.”).

¹⁶ For example, poster “WhiteRights,” who joined the forum in June 2004 and posted over 100,000 times, explained that President Obama was not a legitimate President because “[a]ccording to the Dred Scott decision, African Americans were ‘not and could never be citizens of the United States’ let alone president.” STORMFRONT (June 22, 2019, 4:43 PM), <https://www.stormfront.org/forum/t1282565-22/?postcount=219-post14885547> [<https://perma.cc/LDD4-KUWV>].

in U.S. race law. Supreme Court cases like *Fong Yue Ting v. United States*,¹⁷ in 1893—upholding race-based deportation—and *Lum v. Rice*,¹⁸ in 1927—approving Mississippi’s assignment of a Chinese student to a segregated school, along with all other members of the “brown, yellow, and black races”¹⁹—were not post-Reconstruction innovations, belatedly finding a place for Asians in a nation where the law had been employed to make whites supreme over Blacks.²⁰ Instead, Chief Justice Taney’s ready application to Asians in 1840 of law regulating free people of color suggests that from the very beginning of this country, white supremacy was a complete, comprehensive, and operational jurisprudence—at least to those like Taney, who made and applied the law.

Dow and *Dred Scott* make clear that there was, and had to be, a master race. To be sure, there was controversy over the words of the Declaration of Independence that “all men are created equal, and endowed by their Creator with the inalienable right to life, liberty, and the pursuit of happiness.”²¹ Perhaps this phrase sowed the seeds of liberty for all that might develop in the fullness of time, as abolitionists including Frederick Douglass and Lysander Spooner argued;²² perhaps instead it enshrined white supremacy. But interpreted broadly or narrowly, if the United States was a republic that had thrown off monarchy, racial subordination of whites became a logical impossibility, because some group had to be the holder of inalienable rights.

As will be shown, under United States law, non-whites could be, for example, denied the right to vote, own property, or testify against whites. But only in a dictatorship or monarchy could people of color and whites—that is, everyone—be denied the right to vote, own property, and testify. People of color might be deported from the United States on the basis of race, but only if the nation were to be emptied out entirely could the law seek to deport or expatriate everyone on the basis of race. Unless everyone was

¹⁷ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁸ *Lum v. Rice*, 275 U.S. 78, 82 (1927).

¹⁹ *Id.*

²⁰ For example, the great historian Oscar Handlin wrote: “By the end of the [nineteenth] century the pattern of racist practices and ideas seemed fully developed: the Orientals were to be totally excluded; the Negroes were to live in a segregated enclave; the Indians were to be confined to reservations as permanent wards of the nation” OSCAR HANDLIN, *RACE AND NATIONALITY IN AMERICAN LIFE* 48 (1957). His point was insightful and correct as far as it went. But the legal foundation had been laid before.

²¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

²² See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323, 1353 (2006) (describing how Frederick Douglass and Lysander Spooner viewed the Constitution as anti-slavery).

to be potentially a slave and no one secure in the inalienable rights of citizenship, choices had to be made: (1) race-based classifications had to be prohibited, (2) slavery had to be prohibited and citizenship made universal, or (3) there had to be a race exempt from enslavement and denial of some basic rights of citizenship. *Dred Scott* and *Dow* explained that U.S. law elected the third possibility.

Dred Scott remained vital after Reconstruction because its main point was not the denial of citizenship, as cruel and wrong as that decision was. Being native-born, rather than an “alien,” Dred Scott probably was a national of the United States in the international law sense of the term.²³ Even had he been deemed a citizen, that classification would have availed him nothing except the opportunity to sue for freedom in a federal court and lose. Citizenship hardly impeded many forms of segregation. Even the right of U.S. citizens not to be deported was valuable only to a point, given the power of Congress to expatriate and the practice of extralegal deportation. As *Dred Scott* and *Dow* held, the states were allowed to arrange their internal affairs, including the status of residents, largely as they pleased. Neither the states nor the federal government was burdened by a meaningful prohibition on racial discrimination until the Civil Rights Revolution of the 1960s.

Part I discusses *United States v. Dow* in relation to *Dred Scott*. Together, they identified civilized Christian nations populated by members of the white race who sent their people to what became the United States and formed the political community there. As a white Christian nation, people of other races or religions were not encouraged to immigrate to the United States, and if they did were not allowed to participate in government. Africans, Indians, and Malays, and other races which could be enslaved by law, were not part of the People of the United States.

Part II discusses application of the theory of *Dred Scott* to free people of color. Courts, scholars, and the press, including the African American press, did not consider *Dred Scott* to have been effectively repudiated by the Thirteenth and Fourteenth Amendments. At least after the end of Reconstruction, these observers frequently claimed that free people of color had no rights that the white man was bound to respect. They had a point. Even when possessed of legal citizenship, people of color could be

²³ For international law purposes, one who owes allegiance or is subject to protection by another country is a “national” of that country. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 587 (1953) (“A state ‘is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.’”) (citation omitted).

disenfranchised, denied the right to own property, denied the right to testify, segregated in various contexts, and arbitrarily deprived of their liberty. On the other hand, given the self-conception of the United States as a free republic, it is not conceivable that whites could have been deprived of liberty or property because of their race, as people of color were—so that, in effect, *no one* could, vote, testify, or own property. The legal regime *Dow* and *Dred Scott* had mapped was in place until the Second Reconstruction of the 1960s.

I. *DOW AND DRED SCOTT*

In 1840, seventeen years before he decided *Dred Scott*, Chief Justice Roger Brooke Taney as Circuit Justice faced another case in which he had to determine the legal relationship between the races.²⁴ Sailor Lorenzo Dow was accused of murder on the high seas of William Langdon, captain of the *Frances*,²⁵ a U.S.-flag vessel, and tried in the U.S. Court for the District of Maryland, the Chief Justice presiding as trial judge.

At the time of the murder, the captain was the only white person on board; the crew consisted of the Malay, three negroes, and one mulatto; two of the negroes were natives of Philadelphia, and one a native of the state of Delaware; the mulatto was a native of the British province of Nova Scotia; they were all free.²⁶

Under the law at the time, federal judges applied state rules of evidence at trial.²⁷ Taney understood Maryland law to provide that “negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons.”²⁸ The witnesses against Dow were free persons of African ancestry. The evidence showed that Dow

was a native of the town of Manilla, in one of the Philippine Islands; that his parents were both Malays, living in that town, and subjects of the queen of Spain; that they were Christians, and that the prisoner was baptized and

²⁴ United States v. Dow, 25 F. Cas. 901, 902 (C.C.D. Md. 1840) (No. 14,990).

²⁵ *Murder on the High Seas*, BURLINGTON FREE PRESS (Vt.), Feb. 21, 1840, at 4; *Sentence of Death*, MORNING HERALD (N.Y.C.), May 21, 1840, at 1.

²⁶ *Dow*, 25 F. Cas. at 902.

²⁷ *Vance v. Campbell*, 66 U.S. 427, 430 (1861) (“The thirty-fourth section of the judiciary act provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States. This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law not within the exceptions therein mentioned.”); *United States v. Reid*, 53 U.S. 361, 366 (1851) (“the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed”), *overruled in part by* *Rosen v. United States*, 245 U.S. 467 (1918).

²⁸ *Dow*, 25 F. Cas. at 902.

educated in the Christian religion, and had always professed to be a Christian.²⁹

Dow claimed the exemption of the evidence rule, insisting that persons of African ancestry could not testify against him. Taney understood that in ruling on the objection “[t]he only question is, whether he is to be regarded as a Christian white person?”³⁰

In an opinion as prolix and convoluted as *Dred Scott* would later be, Taney explained why he answered the question in the negative. He had three reasons.

First, anticipating the scientific racism embraced by later Supreme Court jurisprudence,³¹ the Chief Justice noted that “the Malays have never been ranked by any writer among the white races.”³²

Second, Taney explained that Dow was not white because when Maryland was founded, Dow would not have been desired as a member of the political community, nor have been invited to participate in it. The basis for the doctrine of testimonial exclusion was not “the differences, moral or physical, which have been supposed to exist between the different races of mankind; the law was made for practical purposes, and grew out of the political and social condition of the colony.” In particular, only white Christian men were granted political power, and only they were invited to immigrate:

The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized,

²⁹ *Id.*

³⁰ *Id.* at 903.

³¹ See, e.g., *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (“The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.”). For further discussion of the pseudo-scientific racial ideology in the United States, see IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016); *YELLOW PERIL: AN ARCHIVE OF ANTI-ASIAN FEAR*, ch. 3 (John Kuo Wei Tchen & Dylan Yeats eds., 2014).

³² *Dow*, 25 F. Cas. at 903. See also *id.* (“But it is admitted, that he is a Malay; and the Malays are not white men, and have never been classed with the white race.”).

were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.³³

A third and final consideration was that some races were susceptible to enslavement by the white race. Taney explained that the origin of testimonial disqualification of enslavable races was the potential risk to whites:

Christian white men could not be reduced to slavery, or held as slaves in the colony; but they might, according to the laws of the colony, lawfully hold in slavery negroes or mulattoes, or Indians. The white race did not admit individuals of either of the other races to political or social equality; they were regarded and treated as inferiors, of whom it was lawful, under certain circumstances, to make slaves. These three races existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degradation, it was natural, that feelings should be created by such a state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded.³⁴

How was enslavability relevant, and how did a person of Malay ancestry fit into this structure? The Chief Justice found that enslavability supported treatment of a Filipino as non-White: “In Maryland, they were certainly regarded as belonging to one of those races of whom it was lawful to make slaves, and who, according to the laws of England and of the colony, were legitimate objects of the slave trade.”³⁵ Taney derived this conclusion from his own historical research into a terse Maryland decision rejecting a freedom suit. The entire reported decision in *Mary v. Vestry of Williams & Mary’s Parish* consists of the following: “Madagascar being a country where the slave trade is practised, and this being a country where slavery is tolerated, it is incumbent on the petitioner to show her ancestor was free in her own country to entitle her to freedom. The petition was dismissed.”³⁶ Taney expanded on the meaning of the case:

This case is not fully stated in the report; I have examined the original papers. It was proved that the mother of the petitioner was a yellow woman with straight black hair, and that she was not of the negro race, and the testimony shows that it was upon this fact that the petitioner chiefly relied; she was undoubtedly a Malay, according to the description in the evidence. The court said that as Madagascar was a country where the slave trade is practised, the petitioner must show that her ancestor was free in her own country, in order to entitle her to freedom here. Now, it is well known that

³³ *Id.* (“The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter.”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Mary v. Vestry of Williams & Mary’s Par.*, 3 H. & McH. 501, 502, 1796 WL 636 (Md. Gen. 1796).

the Malay race form a part of the population of Madagascar; and consequently, under this decision, may be held in slavery in this state, if they were slaves in their own country, and when imported here as slaves, they are presumed to have been slaves in their own country, till the contrary appears.³⁷

Taney concluded that because “Malays might lawfully be held in slavery in the colony of Maryland, and consequently, are not embraced by the description of white men as mentioned in the act of 1717, and the testimony offered is not excluded by that law.”³⁸ China and other Asian nations then had lawful chattel slavery and the slave trade.³⁹

Importantly, the Chief Justice’s reasoning did not classify as enslavable, and hence non-white, only individuals who were actually enslaved. Indeed, during the Antebellum period, not only were some people of African ancestry not enslaved—free African Americans could sometimes themselves own human property.⁴⁰ Nevertheless, Maryland, in common with other slave states,⁴¹ disqualified even free members of an enslavable race from testifying

³⁷ *Dow*, 25 F. Cas. at 903–04 (citations omitted).

³⁸ *Id.* at 904.

³⁹ Angela Schottenhammer, *Slaves and Forms of Slavery in Late Imperial China (Seventeenth to Early Twentieth Centuries)*, 24 *SLAVERY & ABOLITION* 143 (2003); PAMELA KYLE CROSSLEY, *Slavery in Early Modern China*, in 3 *CAMBRIDGE WORLD HIST. OF SLAVERY: AD 1420–AD 1804*, 186 (David Eltis & Stanley L. Engerman eds., 2011); *Anderson v. Poindexter*, 6 Ohio St. 623, 675 (1856) (Brinkerhoff, J., concurring) (“If it were so, then a Greek or Asiatic, held in slavery in Turkey, would, on his arrival in Europe or Ohio, be deemed a slave, and there subject to be treated as mere property; and this, too, in contravention of the laws of England and Ohio.”). Of course, which races were enslavable was a matter of state law. *Phillis v. Lewis*, 1 Del. Cas. 417, 418 (Ct. Com. Pl. 1796) (“There is no law which recognizes slaves of any other description, nor any custom which has allowed others to be held in slavery. The law would warrant us to say that a Negro or mulatto might be a slave, but we know of no authority which would justify us in expressing the same opinion as to any other description of people.”).

⁴⁰ Paul Finkelman, *Not Only the Judges’ Robes Were Black: African-American Lawyers As Social Engineers*, 47 *STAN. L. REV.* 161, 171–72 n.73 (1994) (citing inter alia CARTER G. WOODSON, *FREE NEGRO OWNERS OF SLAVES IN THE UNITED STATES IN 1830*, at v (1924) (pointing out that “a considerable number of Negroes were slave owners themselves, and in some cases controlled large plantations). However, “[t]he majority of Negro owners of slaves had some personal interest in their property. Frequently the husband purchased his wife or vice versa; or the slaves were the children of a free father who had purchased his wife; or they were other relatives or friends who had been rescued from the worst features of the institution by some affluent free Negro. There were instances . . . in which free Negroes had a real economic interest in the institution of slavery and held slaves in order to improve their own economic status.” A. Leon Higginbotham, Jr. & Greer C. Bosworth, “*Rather Than the Free*”: *Free Blacks in Colonial and Antebellum Virginia*, 26 *HARV. C.R.–C.L. L. REV.* 17, 35–36 n.91 (1991) (quoting JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 144 (6th ed. 1988)).

⁴¹ Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415, 451 (1986) (“The most important due process right—to testify in court without

against whites. Dow himself was free, not enslaved, and from Manila, not Madagascar. But those facts were irrelevant: Taney found enslavement of completely unrelated strangers of his race, at some other time and place, was a dispositive factor in measuring Dow's status in the United States.

Note that because there was enslavement of particular races—not, say, of individuals due to misconduct—it became a logical impossibility to enslave a white person because of race. “White slavery” in U.S. law was “a revolting crime”⁴² rather than a possibly legitimate labor arrangement in a system where degradation of one meant potential degradation of all. Whites were, Taney explained in *Dow*, in what is apparently the first use of the term in any federal or state decision, “the race of which the masters were composed,”⁴³ that is, the master race.⁴⁴ Taney admitted evidence of non-white witnesses, and Dow was convicted.⁴⁵ After a new trial granted based on a defect in the indictment, Dow was convicted again, sentenced to death, but pardoned.⁴⁶

Dred Scott raised important issues about the power of Congress to prohibit slavery in the territories which were not at issue in the *Dow* case. But *Dred Scott*, like *Dow*, also mapped a vision of racial status in the political community. *Dred Scott* was a freedom suit, brought in federal court after a

racial restrictions—was available to blacks in all but four northern states by 1860. This contrasts with the South where only in Louisiana did free blacks have an unfettered right to testify against whites.”).

⁴² *Rogers v. Desportes*, 268 F. 308, 317 (4th Cir. 1920).

⁴³ *Dow*, 25 F. Cas. at 903.

⁴⁴ John Howard, soon to become a Confederate lawyer, later argued before Chief Justice Taney using the term, contending that slaves could “are punishable by the statute law, yet in a mode, and to an extent, that recognizes no rights of any character in themselves, but, on the contrary, demonstrates the absolute legal dominion and supremacy of the master race, and the absolute subjection of the slave.” *Argument of Counsel in United States v. Amy*, 24 F. Cas. 792, 794 (C.C.D. Va. 1859) (No. 14,445) (Taney, Cir. J.). The term was later used in connection with slavery. GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914* 61 (1971) (quoting the speech of William Yancey) (“Your fathers and my fathers built this government on two ideas: the first is that the white race is the citizen, and the master race, and the white man is the equal of every other white man. The second idea is that the Negro is the inferior race.”); Louis Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1, 23 n.62 (1942) (“The vastness of the gulf between slave status and minority status should nevertheless not be overlooked. At this distance it is not easy to envisage the full extent of the human subjugation which this country has known. But the words of Chief Justice Taney, writing for the Court in *Dred Scott v. Sandford*, 19 How. 393, 404–405, 407–408 (U. S. 1857), warn against the easy assumption that the idea of a master race is wholly alien to American tradition.”).

⁴⁵ *Dow*, 25 F. Cas. at 904.

⁴⁶ *Id.* at 905.

similar suit in Missouri state courts failed.⁴⁷ Dred Scott's argument made, more or less, three claims, each of which was necessary for Dred Scott to get relief: (1) Dred Scott was a U.S. citizen resident in the State of Missouri, so he could invoke the federal court's diversity jurisdiction to sue his purported owner, a resident of New York, for freedom and damages; (2) though admittedly born enslaved, he had become free by living in Illinois or the Northwest Territory where the law prohibited slavery; and (3) that such freedom continued upon his return to Missouri.

Chief Justice Taney's opinion rejected each proposition: (1) As a person of African descent, Dred Scott could never be a citizen, whether born enslaved or free; (2) congressional prohibition on slavery in the Northwest territory was unconstitutional, and could not result in freedom because that would take slaveowners' property without due process of law, and (3) whether an enslaved person became free after living in a free state or territory was a matter of state law, which had been conclusively decided adversely to Dred Scott in the courts of Missouri. As Jamal Greene explained, the third point alone sufficed to explain the outcome of the case:

[I]t is easy to defend the result in the case—a loss for Scott—under then-existing precedents and legal norms. In *Strader v. Graham*, decided six years before *Dred Scott*, Taney had written (in dicta) that the laws of the domiciliary state—not those of a state or territory of prior residence or inhabitation—conclusively determined whether someone was slave or free.⁴⁸

For its part, *Strader* recognized that “[e]very state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution.”⁴⁹

Strader addressed not the general distribution of rights, property, and obligation, but the particular and significant state authority to determine that

⁴⁷ Although the Missouri courts held that Scott was a slave, it was, they explained, for his benefit. See *Scott v. Emerson*, 15 Mo. 576, 587 (1852) (“As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing with them the blessings of civilized life, we are almost persuaded, that the introduction of slavery amongst us was, in the providences of God, who makes the evil passions of men subservient to his own glory, a means of placing that unhappy race within the pale of civilized nations.”).

⁴⁸ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 408 (2011).

⁴⁹ *Strader v. Graham*, 51 U.S. 82, 93 (1850). See generally Robert G. Schwemm, *Strader v. Graham: Kentucky's Contribution to National Slavery Litigation and the Dred Scott Decision*, 97 KY. L.J. 353 (2009).

individuals or races were to be enslaved. Of course, after the Thirteenth Amendment, states could not impose slavery, with the significant exception of enslavement as punishment for crime. But *Dow* and *Strader* anticipated the aggressively states' rights-oriented doctrinal conclusion of *Dred Scott*, that the federal Constitution left states the authority to determine personal status.

Criticism of *Dred Scott* turned in large part on its rhetoric as well as its doctrine. As Jack Balkin and Sandy Levinson wrote of *Dred Scott*, "its most notorious single passage is Taney's declaration that '[Negroes were] beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that *they had no rights which the white man was bound to respect* . . .'"⁵⁰ *Dow* made clear that Malays and by extension other non-whites could be enslaved if state law so provided. To the extent that slaves had no rights that the white man was bound to respect, the cases were complementary. Before emancipation and abolition, Lorenzo Dow and *Dred Scott* seemed to be in the same boat.

Although *Dred Scott* did not cite *Dow*, Taney's opinion in *Dred Scott* borrowed from *Dow*'s second rationale, emphasizing African Americans' exclusion from political participation. Taney explained that "[t]he words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."⁵¹ The Taney decision in *Dred Scott*, as in *Dow*, relied on identification of the foreigners who

⁵⁰ Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 58 (2007).

⁵¹ *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857). See also *id.* at 406 ("It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded."); *id.* at 416 ("The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens.").

were welcomed to this country as evidence of racial status. The Court pointed to the Naturalization Act of 1790, which “confines the right of becoming citizens ‘to *aliens being free white persons*’”; this language “shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.”⁵² *Dow* makes clear that this language excludes not only people of African descent, but all non-whites.

In *Dow*, Taney explained that the defendant and other Malays would have been excluded from political participation for a good reason: “The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.”⁵³

⁵² *Id.* at 419–20 (italics in original). Justice Woodbury’s earlier comment that “[t]he progress of civilization and commerce, and the whole character of our institutions and laws, are more and more friendly to foreigners, regarding them more as brethren, of one blood and origin, and hope, rather than barbarians and enemies” must be regarded as limited to immigrants of European “blood.” *Taylor v. Carpenter*, 23 F. Cas. 744, 749–50 (C.C.D. Mass. 1846) (No. 13,785) (Woodbury, Cir. J.).

⁵³ *United States v. Dow*, 25 F. Cas. 901, 903 (C.C.D. Md. 1840) (No. 14,990); *id.* (“The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter.”). There is much other evidence in the cases of the judicial view of the uncongeniality of other races to American liberty. *Wilcocks v. Phillips*, 29 F. Cas. 1198, 1200 (C.C.D. Pa. 1843) (No. 17,639) (Baldwin, Cir. J.) (“China is a country with which, as yet, we have had no treaties nor any diplomatick intercourse; and nearly all that we know of its government, laws and institutions, is derived from the relations of merchants, missionaries, and other persons who have been there. It would be too much, in the late or even in the present condition of that country, to require a party to produce certified copies of its statutes. The nation, it is well known, is isolated and peculiar; and we know of no way in which access could be had to its records. These are facts which, in a case so notorious, the court will judicially notice.”); *Siemssen v. Bofer*, 6 Cal. 250, 252–53 (1856) (“To assert the proposition that the President and Senate are above the Constitution in this particular, and that they may do in this behalf what the President and both Houses of Congress cannot do, would be destructive of the government; for, under the cover of a resort to the treaty-making power, every outrage and injustice which illiberality can conceive, or fanaticism execute, may be perpetrated. By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatic, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe; and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouque, of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.”); *State v. Foreman*, 16 Tenn. 256, 270–71 (1835) (“The tribes found inland have passed under the dominion, and melted away under the influence and superior powers, mental and moral, of the white man, as did the savages of Europe, Asia, and Africa pass under the dominion of the Romans, and as will him of Australasia, Africa, and the Rocky Mountains be compelled to submit to the stroke of fate sooner or later—to accept a master or perish. It is the destiny of man. Ignorance and division

Dred Scott also drew on Taney's judgments about the collective wisdom of the civilized world. Taney explained that the broad language of the Declaration of Independence "would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."⁵⁴ This was "the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted."⁵⁵ Resort to the

cannot stand before science and combination, nor can the civilized community exist by the side of a savage foe . . .").

⁵⁴ *Dred Scott*, 60 U.S. at 410 (1857). As many scholars and others have noted, Taney was a poor historian and legal analyst, at least in *Dred Scott*. His errors were highlighted in a remarkable decision of the Maine Supreme Court within weeks of *Dred Scott*, rejecting the U.S. Supreme Court's conclusions and holding the opposite: "[i]t is therefore demonstrable, by recurring to the constitution of this state, that those who framed the constitution, and the people by whom it was adopted, regarded free colored persons (natives) as citizens of the United States, and entitled to the right of suffrage." Opinion of Judge Appleton, 44 Me. 521, 574 (1857). The Maine Court drew on the dissents by Justices McLean and Curtis. They failed to persuade Taney, but protect the honor and reputation of the colonies and states which made Blacks citizens. *Dred Scott*, 60 U.S. at 533 (McLean, J., dissenting) ("In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida."); *id.* at 582 (Curtis, J., dissenting) ("It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.").

⁵⁵ *Dred Scott*, 60 U.S. at 407 (1857).

views of the “Christian” and “civilized” nations as authority was common in this era in slave trade cases,⁵⁶ Indian property cases,⁵⁷ and others.⁵⁸

Finally, as in *Dow*, *Dred Scott* concluded that because some persons of African descent were enslaved, the rule of non-citizenship based on enslavement and degradation applied to all members of the race. The status or situation of individual people, the specific litigants, was irrelevant.

Dred Scott contains some language inconsistent with the argument that it was about all non-whites. *Dred Scott* emphasized that its reasoning

applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. . . . [T]he court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.⁵⁹

⁵⁶ Chief Justice Marshall, for example, explained why he upheld the general legality of the slave trade: That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world with whom we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage, and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

The Antelope, 23 U.S. 66, 114–15 (1825).

⁵⁷ *Martin v. Waddell's Lessee*, 41 U.S. 367, 409 (1842) (Taney, C.J.) (noting that “according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.”).

⁵⁸ *Dinsman v. Wilkes*, 53 U.S. 390, 405 (1851) (Taney, C.J.) (in an action for wrongful punishment of a Marine, explaining “from whatever motives he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect; and that he did not suffer for the want of those necessities which the humanity of civilized countries always provides even for the hardened offender”); *United States v. Percheman*, 32 U.S. 51, 86–87 (1833) (Marshall, C.J.) (“it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled . . .”).

⁵⁹ *Dred Scott*, 60 U.S. at 403 (1857).

In particular, *Dred Scott* distinguished the situation of Indians.⁶⁰ Although the Court would hold even after the Fourteenth Amendment that Indians born in tribal relations were not birthright citizens,⁶¹ there was also no question in *Dred Scott* that Congress could grant them the privilege of naturalization.⁶²

Do these passages demonstrate that *Dred Scott* was solely about the degraded status of persons of African descent? One test of the accuracy of Taney's limitation is to examine whether Asians born in the United States prior to the Fourteenth Amendment would have enjoyed birthright citizenship.

One legal question in *Dred Scott*, eligibility to sue or be sued in diversity, was not in doubt with respect to Malays or other Asians. Foreign-born Asians were citizens or subjects of foreign states who could invoke federal jurisdiction.⁶³ On the other hand, because they were not white, Asians could not become citizens by naturalization.⁶⁴ The open question, before and after the Fourteenth Amendment, was whether Asians born in the United States were citizens.

Before the Fourteenth Amendment, the Supreme Court regarded the question as undecided; under *Dred Scott*, "all white persons, at least" born in the United States were citizens.⁶⁵ In the 1880s and 1890s, the government

⁶⁰ *Id.* at 403–04. See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights As Racial Remedy*, 86 N.Y.U. L. REV. 958, 977 (2011) ("The Court's opinion in *Dred Scott* exemplifies not only how both groups were excluded from U.S. citizenship, but also how the particular racial stereotypes associated with each group led the Court to cast their exclusions differently.").

⁶¹ *Elk v. Wilkins*, 112 U.S. 94, 109 (1884). See generally Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016).

⁶² *Dred Scott*, 60 U.S. at 404 (1857) ("But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.").

⁶³ U.S. Const., Art. III, § 2 (diversity jurisdiction extends to cases and controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."). See *Hinckley v. Byrne*, 12 F. Cas. 194, 196 (C.C.D. Cal. 1867) (No. 6,510) ("Admitting the facts as affirmatively stated in the plea, the court has jurisdiction, because the plaintiff is a citizen of the state of Massachusetts, and the defendants, Soo Chung, Hip Hing and Kroning, are subjects of a foreign state."); *Fisher v. Consequa*, 9 F. Cas. 120 (C.C.D. Pa. 1809) (No. 4,816) (Washington, Cir. J.) (upholding jurisdiction over "Hong merchant at Canton"). U.S.-born Indians, however, were not aliens for diversity jurisdiction purposes. *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831) ("The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.").

⁶⁴ See *infra* note 107, and accompanying text.

⁶⁵ *United States v. Wong Kim Ark*, 169 U.S. 649, 674–75 (1898).

repeatedly excluded U.S.-born persons of Chinese ancestry at the border on the ground that they were not citizens. They were admitted only after resort to the courts.⁶⁶

The citizenship of U.S.-born persons of Chinese ancestry also divided the post-Reconstruction law review writers. Some argued that the language of the Fourteenth Amendment plainly made them citizens,⁶⁷ while others contended that the children of Chinese born here were not citizens because not fully “subject to the jurisdiction” of the United States.⁶⁸

Finally, in 1898, there was a Supreme Court test. The Department of Justice insisted that “Chinese children born in this country” did not “share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth,” and if they did, “then verily there has been a most degenerate

⁶⁶ See *In re Wy Shing*, 36 F. 553 (N.D. Cal. 1888); *In re Yung Sing Hee*, 36 F. 437 (C.C.D. Or. 1888); *Ex parte Chin King*, 35 F. 354 (C.C.D. Or. 1888); *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884) (Field, Cir. J.).

⁶⁷ See D. H. Pingrey, *Citizens, Their Rights and Immunities*, 36 AM. L. REG. 539, 540 (1888) (“So a Chinese, born of alien parents within the dominion and jurisdiction of the United States, who reside therein, and not engaged in any diplomatic official capacity, under the Chinese government, is a citizen of the United States.”); Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 7 (1886) (“The court [in *Look Tin Sing*] could have made no other decision under the constitution. The child when born was absolutely and completely subject to the jurisdiction of the United States, and so were his parents, if at the time they were both in this country.”).

⁶⁸ See George D. Collins, *Citizenship by Birth*, 29 AM. L. REV. 385, 391–92 (1895) (“the children born in California, of Chinese parents, are at the moment of birth subject to a foreign power, China claiming as subjects the children born abroad of Chinese parents . . .”); George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 834 (1884) (“Their children born upon American soil are Chinese from their very birth in all respects, just as much so as though they had been born and reared in China; they inherit the same prejudices, the same customs, habits, and methods of their ancestors; in short, they are subject to the same civilization and adhere to it with as much tenacity as did their forefathers. Now it is evident that such persons are utterly unfit, wholly incompetent, to exercise the important privileges of an American citizen, a title which it was the aim of our ancestors to make as proud as that of king; and yet under the common-law rule they would be citizens.”); Prentiss Webster, *Acquisition of Citizenship*, 23 AM. L. REV. 759, 772 (1889) (commenting on *Ex parte Chin King*, 35 F. 354, 355 (C.C.D. Or. 1888): “Suppose that China has a similar rule [of citizenship by parental descent], certainly the positions of the United States and China would be the same in this regard; and under this rule Chin King would be held to be a citizen of China when in China, and a citizen of the United States when in the United States, if the rule *jure soli* is to govern. Certainly such an anomaly cannot be considered.”). Scholar Collins would become embroiled in a notorious bigamy and perjury case, which went to the U.S. Supreme Court and led to his disbarment and imprisonment. *In re Collins*, 206 P. 990, 993 (Cal. 1922); *Ex parte Collins*, 90 P. 827, 829 (Cal. 1907), *aff’d sub nom. Collins v. O’Neil*, 214 U.S. 113 (1909).

departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.”⁶⁹

Nevertheless, in *Wong Kim Ark v. United States*, the Court found that American-born Chinese were U.S. citizens.⁷⁰ Among other considerations it found persuasive, the Court noted that if China’s claim of citizenship to children born overseas meant they were not U.S. citizens “would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.”⁷¹

But *Wong Kim Ark* required reargument, suggesting the difficulty of the issue. The ultimate decision was not unanimous. Chief Justice Fuller and Justice Harlan dissented, explaining:

Considering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that “natural-born citizen” applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the Presidency⁷²

Remarkably, then, decades after the Fourteenth Amendment became law, a justice noted for his dedication to civil rights could conclude that Asians born in in the U.S. were not citizens.

If the question had arisen before enactment of the Fourteenth Amendment, it is certainly plausible that other members of the *Dred Scott* majority would have agreed with Fuller, a dissenter in *Fong Yue Ting*, and Harlan, the great dissenter himself, that formerly enslavable unnaturalized Asians and their children were not part of the people of the United States. This view is consistent with the with what may be the central conclusion of *Dred Scott*: “[C]itizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government”—language foreshadowed by *Dow*’s conclusion that “[t]he political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government

⁶⁹ See Brief for the United States at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 449), reprinted in 14 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT: CONSTITUTIONAL LAW 37 (Philip B. Kurland & Gerhard Casper eds., 1975).

⁷⁰ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), *affg* *In re Wong Kim Ark*, 71 F. 382 (N.D. Cal. 1896).

⁷¹ *Id.* at 694.

⁷² *Id.* at 715 (Fuller, C.J., joined by Harlan, J., dissenting).

granted by the charter.” Unless Asians were regarded as civilized white Christians, and if *Dow* was right that Asians would not have been part of the political community, much of the logic of *Dred Scott* applied to them with full force, including its reasoning about ineligibility for birthright citizenship.

II. *DRED SCOTT* AND THE JURISPRUDENCE OF FREE PEOPLE OF COLOR

From a modern perspective, after 1868 *Dred Scott* seemed as dead as the Whig Party. Chief Justice Taney had gone to his reward, African Americans had been made citizens by virtue of the Fourteenth Amendment, and the Thirteenth Amendment abolished slavery. Yet, *Dred Scott*’s embrace of *Strader*, like *Dow*’s recognition of state evidence rules, meant that the principle of the case remained at issue where there was a contest over the legal regulation of the rights of non-whites. This may explain the post-Reconstruction revival of both interest in *Dred Scott*, and in Taney’s reputation.

Justice Harlan’s famous dissent in *Plessy v. Ferguson* predicted that “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case.”⁷³ There was wisdom in recognizing the deep connection between the cases.⁷⁴ Yet, during Jim Crow, *Dred Scott* was hardly anathema to courts. The Supreme Court uncritically relied on it in support of originalism⁷⁵ and territorial powers.⁷⁶ In 1913, the Kentucky Supreme Court concluded that state pension

⁷³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

⁷⁴ This passage suggests the possibility of a certain overlap in the views of Harlan and Taney about white supremacy: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.” *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting). In fairness to Harlan, it is perfectly possible to read this as racial flattery rather than a genuine prediction.

⁷⁵ See, e.g., *South Carolina v. United States*, 199 U.S. 437, 449 (1905), in which the Court stated: As said by Mr. Chief Justice Taney in *Scott v. Sandford*, 19 How. 393, 426, 15 L. ed. 691, 709: “It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.”

⁷⁶ *DeLima v. Bidwell*, 182 U.S. 1, 196 (1901) (“But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the *Dred Scott* Case.”).

payments to Confederate veterans were valid public expenditures in part based on northern opposition to *Dred Scott*—as well as, among other things, the fact that state funds were used to erect “[m]onuments . . . to Generals John C. Breckenridge, John H. Morgan, and other distinguished Confederates.”⁷⁷

Jim Crow-era law reviews were effusive about Taney’s jurisprudential excellence, not only in general, but with respect to *Dred Scott* itself. A former Confederate wrote in 1912: “[N]otwithstanding the calumny and abuse which were heaped upon the Chief Justice because of his decision in the *Dred Scott* case, as far as we have been able to discover, not one statement of fact or principle of law as set forth by him in that opinion has ever been successfully controverted.”⁷⁸ In 1923, F. Dumont Smith, a prominent Kansas lawyer wrote *The Story of the Constitution*⁷⁹ for the American Bar Association, a nationally-distributed pamphlet which told “the story of our race,” declaring that “[n]o racial history is more romantic or fascinating.”⁸⁰ That year, in the *Texas Law Review*, he defended Taney’s view of history, observing: “The experience of one hundred and fifty years since that time [the framing of the Constitution] has shown us that the Negro in the mass will never be fitted for citizenship.”⁸¹ Another lawyer wrote that “[t]he decision in the *Dred Scott* case was sound in principle. When the tumult of anger and outrage, engendered by the slavery question had passed away, and judges were confronted with the principles announced by that decision, they did not disregard it.”⁸² Many other journals punished defenses of Taney’s

⁷⁷ *Bosworth v. Harp*, 157 S.W. 1084, 1087 (Ky. 1913). *See also Ex parte Reynolds*, 20 F. Cas. 582, 584 (C.C.W.D. Ark. 1879) (No. 11,719) (“The supreme court of the United States again gave its views of the status of the Indian in the case of *Dred Scott v. Sandford*, 19 How. [60 U. S.] 403.”); *In re Silkman*, 84 N.Y.S. 1025, 1031 (App. Div. 1903) (Woodward, J., concurring) (“‘The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing,’ say the court in *Dred Scott v. Sandford*, 19 How. 404, 15 L. Ed. 691. ‘They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty.’”).

⁷⁸ George L. Christian, *Roger Brooke Taney*, 46 AM. L. REV. 1, 14 (1912).

⁷⁹ F. DUMONT SMITH, *THE STORY OF THE CONSTITUTION* (A.B.A. Citizenship Comm. 1923), <https://babel.hathitrust.org/cgi/pt?id=njp.32101065096768&view=1up&seq=1&q1=race> [<https://perma.cc/E54G-3BAA>].

⁸⁰ *Id.* at 12.

⁸¹ F. Dumont Smith, *Roger Brooke Taney*, 1 TEX. L. REV. 261, 271 (1922–1923).

⁸² Morris M. Cohn, *The Dred Scott Case in the Light of Later Events*, 18 VA. L. REG. 401, 409 (1912).

reputation and the decision.⁸³ To be sure, others suggested *Dred Scott* was wrongly decided, but even they tended to be diplomatic.⁸⁴

To many Americans, including African Americans, *Dred Scott* had not been repudiated by the Civil War or Reconstruction. After the Civil War, many commentators, both supporters of racial classifications and opponents, described the legal rights of African Americans as akin to what they enjoyed under *Dred Scott*. More surprising was that the situation of Chinese and

⁸³ See, e.g., Henry K. Braley, *Roger Brooke Taney, Chief Justice of the United States*, 22 GREEN BAG 149, 164 (1910) (“One by one the imputations cast upon him have been shown to have been groundless, by Tyler, Curtis, Reverdy Johnson, Clarkson N. Potter, Blaine, Carson, James Ford Rhodes, Professor Mikell and others, until the eclipse of this malign influence has passed from off his fame, and in the firmament of our jurisprudence his reputation as a great jurist and upright judge glows with steady radiance.”); Horace H. Hagan, *Dred Scott Decision*, 15 GEO. L.J. 95, 112 (1927) (“Everywhere the brazen and infamous lie was spread that the Court, speaking through the Chief Justice, had decided that the Negro had no rights which the white man was bound to respect.”); *id.* at 114 (“At the present time, the clouds of misrepresentation and misunderstanding that have so long hovered around the great Chief Justice have almost entirely disappeared. The magnificence of Taney’s contribution to the judicial annals of our country is no longer a matter of dispute.”); Monroe Johnson, *Taney and Lincoln*, 16 A.B.A.J. 499, 499 (1930) (“The public was content to accept, without question, the newspaper version; whereas a reading of the opinion, itself, would have shown that Taney had not stated his own views regarding the status of the negro but had merely described the conditions which he believed to have existed at the time of the adoption of the Constitution.”); *Taney, Roger B.*, 2 CHI. L. TIMES 317, 326 (1888) (“Much has been said about the Dred Scott case, and the Chief Justice has been assailed in the bitterest manner. It has been said that his name would go down to posterity covered with infamy. But the fact is, that in rendering the decision in regard to the political status of the plaintiff, he voiced the sentiment of the then majority of the American people.”).

⁸⁴ See, e.g., Henry S. Barker, *The Dred Scott Case*, 3 KY. L.J. 1, 10 (1914) (“Surely it cannot be truthfully said in the light of these facts that, at the time of the Declaration of Independence and the formation of the Constitution, slavery was viewed by the civilized world as being altogether right and expedient, and that negroes had no rights which the white man was bound to respect.”); Charles Noble Gregory, *Great Judicial Character Roger Brooke Taney*, 18 YALE L.J. 10, 21 (1908–1909) (“One may accord to Taney’s opinion logic and learning, but one cannot concede to it an enlightened and forward looking spirit. He was seventy-nine years old when he wrote this opinion, and that he should seek to crystalize the views of the past, rather than the feeling of the present or the conviction of the future, was natural to his age and his origin. At a like age we will be equally incapable of changing our views as to the ownership in horses and cattle if the world, in its advance, ever recognizes, as I sometimes hope it will, their inalienable rights.”); Francis R. Jones, *Roger Brooke Taney*, 14 GREEN BAG 1, 7 (1902) (“It is not a pleasant thing to criticise a great magistrate for unjudicial conduct, but I have seen no explanation, and can conceive of none, which satisfactorily explains his attitude and conduct in the Dred Scott case.”); Walter George Smith, *Roger Brooke Taney*, 47 AM. L. REG. 201, 230 (1899) (“He was even known to stop a child and help her with her bucket of water in the streets of Washington when he was in high position and she but a slave, the child of a despised race. [But] [l]et it be finally admitted, in the light of history, that, with intentions too pure and lofty to be doubted, six Justices of the Supreme Court committed an error, and with their chief must bear the responsibility to a greater or less extent. The majority went aside from the true path and fell into a pit. Their conclusions were riddled by the inexorable logic of Curtis and McLean, and served no other purpose than to make a solemn warning to their successors.”).

Indians was described in the same terms. Typical is an editorial in the African American newspaper *The Appeal* following the Supreme Court's holding that racial deportation of noncitizens was permissible:

The popular expression 'This is a white man's country' is an extension of Judge Taney's notorious dictum 'Negroes have no rights that white men are bound to respect.' As thus amplified, the dictum includes the Chinaman and Indian as well as the Afro-American, and the Chinese Exclusion Bill is an instance of its practical application.⁸⁵

Other notable examples include Mark Twain's discussion of violence against Chinese in 1860s California,⁸⁶ judicial decisions addressing anti-Chinese legislation,⁸⁷ debates in Congress and state legislative bodies,⁸⁸ African American newspaper discussion of *Lum v. Rice*,⁸⁹ upholding

⁸⁵ Editorial, *APPEAL: A NAT'L AFRO-AM. NEWSPAPER* (St. Paul & Minneapolis, Minn.), June 18, 1892, at 2.

⁸⁶ Mark Twain, *Disgraceful Prosecution of a Boy*, *GALAXY* 722, 723 (May 1870) ("It was in this way that the boy found out that a Chinaman had no rights that any man was bound to respect; that he had no sorrows that any man was bound to pity; that neither his life nor his liberty was worth the purchase of a penny when a white man needed a scapegoat; that nobody loved Chinamen, nobody befriended them, nobody spared them suffering when it was convenient to inflict it; everybody, individuals, communities, the majesty of the State itself, joined in hating, abusing, and persecuting these humble strangers.") <https://babel.hathitrust.org/cgi/pt?id=pst.000066654452&view=1up&seq=749> [<https://perma.cc/T2WK-Q9T4>].

⁸⁷ *The Stockton Laundry Case*, 26 F. 611, 612–13 (C.C.D. Cal. 1886) ("Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can in fact doubt the purpose of this ordinance. It means, 'The Chinese must go;' and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California,—of the Caucasian race as well as upon the rights of the Mongolian."); *Chapman v. Toy Long*, 5 F. Cas. 497, 499 (C.C.D. Or. 1876) (No. 2,610) (discussing "'the heathen Chinee,' who appear to have no rights on Poorman creek that a miner is bound to respect.").

⁸⁸ 19 CONG. REC. 8984 (1888) (Remarks of Sen. Randall L. Gibson) (Senators supporting Chinese Exclusion "have, in effect, invoked the Senate to re-enact the *Dred Scott* decision, and to take the ground with respect to the Chinese race upon which that famous decision rested in respect to the colored people in this country. They who hold with the Declaration of Independence, that all men are created free and equal, find themselves under an imperious necessity, political and social, of their people to adapt their doctrine to the exclusion of the Chinese race."); *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878* 720 (1878–1879) (remarks of Eli Blackmer) ("While I am anxious to do all that is legal, I do believe that even the Chinaman, obnoxious as he is, has some rights that the white man is bound to respect."). Another possible reference came in the Virginia Constitutional Convention of 1901–02: "What about John Chinaman under the protecting agis of the Constitution of the United States? If he has any rights on earth except to wash clothes and smoke opium I do not know what they are. (Laughter.)" *REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA, HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902* 77 (1906).

⁸⁹ 275 U.S. 78 (1927).

segregation of Chinese students in Mississippi,⁹⁰ and Harvard Law Professor Zechariah Chafee Jr.'s analysis of the due process rights of Chinese immigrants under federal law.⁹¹ Later nineteenth and early twentieth

⁹⁰ *Running True to Form*, PITT. COURIER, Dec. 10, 1927, at A8 (“Standing above all law and all legislatures, the United States Supreme Court has ever been the bulwark of conservatism. In 1857 it informed the world that ‘A Negro has no rights that a white man is bound to respect,’ and in 1927, it tells a Chinese citizen the same thing in a decision handed down by Chief Justice Taft on November 21.”); see also Kelly Miller, *Chinese in Negro Schools*, N.Y. AMSTERDAM NEWS, Dec. 7, 1927, at 20 (“A taste of *Dred Scott* is still in the mouths of the people.”).

⁹¹ ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH 255 (1920) (“It is all very well to say that only Communist citizens run this risk anyway, and that they and Chinese citizens have ‘no rights that a white man is bound to respect.’”). Other notable commentators compared the Chinese Exclusion laws to the fugitive slave laws. Edward S. Corwin, *Constitutional Law in 1921–1922*, 16 AM. POL. SCI. REV. 612 n.54 (1922) (“The position of such Chinese is akin to that of people of color who were arrested as fugitive slaves, before the Civil War. See *Prigg v. Pa.*, 16 Pet. 539.”); Henry S. Cohn & Harvey Gee, “*No, No, No, No!?: Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*,” 3 CONN. PUB. INT. L.J. 1, 58 (2003) (discussing Senator Joseph Roswell Hawley who stated that the whole thing looked to him like “old fugitive-slave law.”) (13 CONG. REC. 3264 (1882)).

century newspapers⁹² and scholarship⁹³ routinely invoked *Dred Scott* in the context of Chinese.⁹⁴

⁹² *Hard on the Chinese*, HAW. STAR, Dec. 10, 1900, at 1 (“Judging from the present unfriendly attitude of the Americans it looks as if the Chinese, even in Hawaii, are ‘up against it.’ In fact they are almost as badly off as was the negro in the fifties when the Dred Scott decision was handed down, practically holding that a negro had no rights which a white man was bound to respect.”); *The Early Courts*, L.A. HERALD, Jan. 6, 1899, at 4 (“At that early period in the judicial history of California the dictum of the supreme court of the United States, given by Judge Taney in the Dred Scott case, that a slave had no rights which a white man was bound to respect, was quite commonly held in California with regard to the Chinese. It was quite difficult to convict any white man who should kill a Chinaman.”); *Gone to the Jury*, L.A. HERALD, Apr. 16, 1898, at 12 (“The real question at issue was . . . whether a Chinaman has any rights under the laws of the country that a man in a policeman’s uniform is bound to respect.”); *They Will Fight: Chinese Raise a Protective Fund and Retain a Lawyer*, L.A. TIMES, May 4, 1897 (“Frank F. Davis, attorney for the Chinaman, took the stand that the whole case was an outcropping of the too-common feeling that a Chinaman was a dog, with no rights that anyone was bound to respect.”); *Pan-Presbyterian Council: The Clergyman Who Saved Mrs. Grimeson’s Life Publicly Thanked*, N.Y. TIMES, Sept. 27, 1892, at 2 (noting that Dr. Robert J. George “said the record of the United States in regard to the Chinese was as infamous as the Dred Scott decision. How could they talk of Christianizing Chinamen when they would not let them come into the country?”); *No Law for the Chinese*, 2 PUB. OP. 498 1887 (“[I]t appears that the Chinaman in this country who is not a citizen has no rights which the white man is bound to respect.”); *Editorial Notes*, WEEKLY ARGUS (Rock Island, Ill.), Mar. 18, 1886, at 2 (“The storm now raging has been brewing ever since Dennis Kearney uttered the ominous threat ‘The Chinese must go.’ Professional ‘agitators’ . . . have added fuel to the flames from time, until a sentiment has been fulminated in the breasts of many toiling laborers that Chinamen have few if any rights a white man is bound to respect.”); *The Anti-Chinese Crusade*, DAILY ARGUS (Rock Island, Ill.), Mar. 23, 1877, at 2 (“It was long a standing reproach to the national character that there was one section of the union where a negro had no rights a white man was bound to respect. That reproach has been exchanged for another. On the Pacific coast the members of a race as much above the African as the African is above the gorilla are actually denied the right to live and work.”); *A Brutal Outrage: Has a Chinaman Any Rights Which an American Citizen of Foreign Birth Is Bound to Respect?—A Policeman Who Believed Not*, CHI. DAILY TRIB., Nov 23, 1873, at 16 (describing the abuse of a migrant at the hands of police); *Chinese Charity*, WATERTOWN WEEKLY REPUB. (Wis.), Nov. 22, 1871, at 4 (“The Chinese are, according to the Los Angeles creed, but an inferior race, fit to be mobbed, persecuted and murdered, with no rights which a white man is bound to respect, and this is the way they prove it.”); *A Perjured Jury—Killing Chinamen No Murder*, S.F. CHRON., Jun. 10, 1871, at 2 (“The fact that a sworn jury, in the face of incontrovertible facts, could perjure themselves to shield one of their own blood from the consequences of crime, is a terrible commentary on the lessons which have been taught by those who say that the Chinese have no rights which the white man is bound to respect.”); *Will Discussion Do Good?*, TRINITY WEEKLY J. (Cal.), Sept. 17, 1870, at 2 (“The outcry against the Chinese made by politicians is but a repetition of the old cry that ‘the black man had no rights, that the white man was bound to respect.’”); *The New Dodge*, JACKSON STANDARD (Ohio), June 9, 1870 at 2 (“It is a cardinal point in the California Democratic creed that ‘a Chinaman has no rights that a white man is bound to respect,’ as it has heretofore been the ‘infallible dogma’ of Democrats, everywhere, that the ‘negro had no rights that the white man was bound to respect.’”); *Murder Tolerated and Encouraged*, STOCKTON DAILY INDEPENDENT (Cal.), May 6, 1870, at 2 (attributing murder of Chinese person in part to “the idea that no other race has rights that Caucasians are bound to respect”); *San Francisco: Black Made White by the Supreme Court of California, A Chinaman Has No Rights Which a Negro Is Bound to Respect*, CHI. TRIB., Feb. 2, 1869; *Persistent Brutality*, DAILY

Indians were also said to be subject to *Dred Scott*. Many have called the Court's 1903 decision in *Lone Wolf v. Hitchcock*⁹⁵ the *Dred Scott* of federal Indian

MORNING CHRON. (S.F.), Nov. 18, 1868, at 2 ("The majority of the [police] force are probably of the opinion that 'Chaynaymin and naygurs' have no rights that white ruffians are bound to respect."); *Chinamen in the Cars*, DAILY DRAMATIC CHRON. (S.F.), July 3, 1868, at 2 ("It is a fact not generally known by San Franciscans, that over in Oakland, Chinamen have 'rights which whites are bound to respect.'").

93 NAJIA AARIM-HERIOT, CHINESE IMMIGRANTS, AFRICAN AMERICANS, AND RACIAL ANXIETY IN THE UNITED STATES, 1848–82, 38 (2003) ("Or, as a forty-niner stated in 1852, Americans were confident that the Chinese had 'no rights that a white man [was] bound to respect.'"); MARY R. COOLIDGE, CHINESE IMMIGRATION 258–59 (1909) ("the tradition that a Chinaman had no rights which white men were bound to respect was being established" in 1860s); 4 THEODORE HENRY HITTELL, HISTORY OF CALIFORNIA 618 (1898) ("They seems to have a notion that the Chinese were not human beings and had no rights which anybody was bound to or ought to respect."); AARON M. POWELL, PERSONAL REMINISCENCES OF THE ANTI-SLAVERY AND OTHER REFORMS AND REFORMERS 273 (1899) ("We are sending missionaries abroad to China, but what are we teaching by example in America with reference to the Chinese except the Godless doctrine that they have no rights which we are bound to respect?"); S. WELLS WILLIAMS, CHINESE IMMIGRATION 46 (1879) ("The laws of California declare that the Chinese are Indians and aliens, and her legislators have treated them as if they had no rights which we were bound to respect."); Morris M. Cohn, *The Dred Scott Case in the Light of Later Events*, 46 AM. L. REV. 548, 557 (1912) (noting that Pacific Coast states "have, notwithstanding the lessons in liberty taught by the civil war, found ways to carry through legislation, in the halls of Congress, which put the contention of the judges in the Dred Scott case entirely in the shade, and make slavery a lesser evil."); *Constitutional, but Evil*, 1 AM. LAWYER 4 (1893) (noting that *Fong Yue Ting v. United States* "with its dissentient accompaniment reminds one forcibly of the event of the *Dred Scott* decision by the same court."); Some contemporary scholars make the same point. See ROBERT G. LEE, ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE 49 (1999) ("In California, . . . until a year after the Federal Civil Rights Bill in 1868, a Chinaman had no rights that the man was bound to respect."); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2522–23 (2007) ("Asiatic exclusion was the most complete race-based legal exclusion from citizenship since *Dred Scott* and was instituted, significantly, in the 1880s, after the Fourteenth Amendment nullified *Dred Scott*."); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 68 (2002) ("The Chinese Exclusion Case, sometimes called the *Dred Scott* decision for Asians, rivals the Japanese internment cases for harshness and injustice.");

94 Relatedly, some authorities referred to Western treatment of China in a similar way. 2 HOSEA BALLOU MORSE, THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE: THE PERIOD OF SUBMISSION 1861–1893 357 (1917) (citing *Dred Scott*; "It is only on the ground that an Asiatic nation has no rights which the white man is bound to respect that the Course of France is to be explained.") <https://archive.org/details/internationalrel02mors/page/356/mode/2up/search/bound+to+re+spect>. See also *Papers Relating to the Foreign Relations of the United States*, H.R. EXEC. DOC. No. 42-1, at pt. 186 (1871) ("Foreigners residing here are much too prone to exhibit by acts, if not by words, their belief in the doctrine that 'a Chinaman has no rights that a white man is bound to respect.'"); W.E.B. DUBOIS, W.E.B. DUBOIS ON ASIA: CROSSING THE WORLD COLOR LINE 37 (2005) (speaking of the U.N., "[t]here will be six hundred million colored and black folk inhabiting colonies owned by white nations, who will have no rights that white people are bound to respect.");

95 187 U.S. 553 (1903).

law.⁹⁶ *Lone Wolf* held “that Congress could unilaterally abrogate tribal treaty rights and exchange their territory for allotments and money.”⁹⁷ The year it was decided, Senator Matthew Quay called *Lone Wolf* “the Dred Scott decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the man is bound to respect, and, that no treaty or contract made with him is binding.”⁹⁸

Although Asian “coolies” were for practical purposes enslaved in parts of the Americas such as Cuba,⁹⁹ and the story of Indian slavery in the Americas is now beginning to be told,¹⁰⁰ in the United States, African slavery is a unique historical crime. So too, in a different way, is the brutality and treachery associated with treatment of Indian nations by the United States.

Nevertheless, there is a perfectly reasonable argument that the allusions to *Dred Scott* in connection with Indians and Asians were neither metaphorical nor hyperbolic. In this era, authors in leading law reviews argued that the Reconstruction Amendments were void, or, at the very least, bad policy.¹⁰¹

⁹⁶ Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 86 n.3 (2002) (“The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians’ *Dred Scott* decision.”) (quoting Sioux Nation of Indians v. U.S., 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff’d sub nom.* U.S. v. Sioux Nation of Indians, 448 U.S. 371 (1980)); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 182 (2002) (arguing that there is no federal supremacy clause for Indian tribes); *see generally*, Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 484 (1994); Sharon L. O’Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 480 n.190 (1995); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 221 (1984) (“*Lone Wolf v. Hitchcock* . . . has been called ‘the Indians’ *Dred Scott* decision.”).

⁹⁷ Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 630 (2009).

⁹⁸ *Id.* at 630 (citing DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 116 (1997) (citing 36 CONG. REC. 2024 (1903)).

⁹⁹ *See generally*, MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR AND SUGAR IN THE AGE OF EMANCIPATION 4 (2006) (describing the historical origins and transmutations of coolies in American culture); ELLIOTT YOUNG, ALIEN NATION: CHINESE IMMIGRATION IN THE AMERICAS FROM THE COOLIE ERA THROUGH WORLD WAR II 94 (2014).

¹⁰⁰ ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2016) (describing the history of Indian enslavement from the time of the conquistadors to the early twentieth century).

¹⁰¹ *See* Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 178 (1910) (describing the Fifteenth Amendment as a forcible annexation to the southern States); John R. Dos Passos, *The Negro Question*, 12 YALE L.J. 467, 472 (1903) (proposing to “plac[e] in the hands of the individual States the power to control the question, to determine and announce who shall and who shall not be entitled to vote within their respective borders. This means a retrograde movement in our constitutional history. It means we must retrace our steps and undo organic legislation which

Gilbert Thomas Stephenson's 1910 book *Race Distinction in American Law* took nearly 400 pages to catalog the ways in which U.S. law accepted the invitation to classify on the basis of race.¹⁰² He explained "[a]ttention will be directed not only to the Negro but to other races in the United States—the Mongolian in the Far West and the Indian in the Southwest."¹⁰³ Pauli Murray's 1950 masterpiece *States' Laws on Race and Color* was almost twice as long.¹⁰⁴ *Dred Scott* seemed to be right, that with only limited exceptions, states had the authority to regulate the status of their citizens, including along racial lines.

Whites were a majority in most states of the Union. In the former Confederate states where African Americans were a majority, or even a substantial minority, they were disenfranchised.¹⁰⁵ Accordingly, in all cases, whites made rules to govern themselves, but also decided the status of people of color. As *Dow* suggested, in the century after reconstruction whites were the master race, as *Dred Scott* held, whites constituted the sovereignty in government. This power was deployed.

The point of what follows is not to recount every form of discrimination against people of color, nor to deny significant variation across jurisdictions and over time. Indeed, as some states enforced segregation, others passed civil rights laws.¹⁰⁶ Nor is it to contend that non-white groups suffered identically, or equally, or to propose a metric for comparative injury. In addition, groups coded as white or with many white members also experienced various forms of public and private discrimination, including Southern and Eastern Europeans, Jewish and Muslim people, Jehovah's Witnesses, and Latter Day Saints. Nevertheless, what follows is designed to suggest that Chief Justice Taney's theory that the states and federal

was hastily enacted after the rebellion; to take back that which was given."'). For a contemporary evaluation of these arguments, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

¹⁰² GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* (1910).

¹⁰³ *Id.* at 6–7 ("Most of the discussion will necessarily be of the distinctions between Caucasians and Negroes, but as distinctions applicable to Mongolians and Indians arise, they will be mentioned to show that race consciousness is not confined to any one section or race.").

¹⁰⁴ PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* (Univ. Ga. Press ed., 1997).

¹⁰⁵ Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 65, 66 (2008) (noting that in 1880 African Americans constituted a majority of the population in Louisiana, Mississippi, and South Carolina, and over forty percent of the population in Alabama, Florida, Georgia, and Virginia).

¹⁰⁶ See Paul Finkelman, *The Hidden History of Northern Civil Rights Law and the Villainous Supreme Court, 1875–1915*, 79 U. PITT. L. REV. 357, 389 (2018) (detailing that fifty-nine percent of the states outside of the South passed anti-discrimination laws in response to the Supreme Court striking down the Civil Rights Act of 1875).

government had broad authority to regulate people of color, including citizens of color, prevailed until the Civil Rights era. Certain basic techniques of discrimination were deployed against all non-white groups which were not generally applied to whites.

Citizenship. Under *Dred Scott* and other legal rules, people of color were denied the right to become U.S. citizens, before and after the Civil War.¹⁰⁷ Even after Reconstruction, Congress could expatriate birthright U.S. citizens—resulting in their exclusion from the United States and potentially rendering them stateless—for race-based reasons, such as marriage to a noncitizen of a disfavored race.¹⁰⁸ More fundamentally, even if citizens, people of color were potentially subject to a range of racial discriminations.

Testimonial Disqualification. Testimonial disqualification, the legal question at issue in *Dow*, was an important form of discrimination. In various jurisdictions, Indians, African Americans, and Asians were prohibited from testifying against whites.¹⁰⁹ In the Civil Rights Act of 1866, Congress

¹⁰⁷ Even after the Fourteenth Amendment, Indians born in the United States in “tribal relations” were held not to be citizens. *Elk v. Wilkins*, 112 U.S. 94, 96–99 (1884); *see id.* at 109 (finding that the plaintiff was not a citizen of the United States because he was an Indian born in the United States). The Naturalization Act of 1790, in effect as amended until 1952, restricted naturalization to “free white person[s].” Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (in effect as amended until 1952); *see also* *Ah Hee v. Crippen*, 19 Cal. 491, 497 (1861) (Field, C.J.) (“The plaintiff is a Chinaman, and, of course, is not a citizen of the United States, or entitled to become such under any existing legislation of Congress . . .”). While persons of African nativity and descent were allowed to naturalize in 1870, one judge explained—in an opinion denying an Indian the right to naturalize—that this provision was merely symbolic: ‘

[T]here is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

In re Camille, 6 F. 256, 257–58 (C.C.D. Or. 1880) (discussing 16 Stat. 256; § 2169 Rev. St.). However, after much consideration, one judge found that a Mexican applicant was entitled to naturalize, but this was clearly a decision based on legislative intent rather than a constitutional right. *In re Rodriguez*, 81 F. 337, 354–55 (W.D. Tex. 1897) (“[W]hatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization, and his application should be granted . . .”).

¹⁰⁸ *See Inaba v. Nagle*, 36 F.2d 481, 481–82 (9th Cir. 1929) (affirming the loss of citizenship after a “native-born citizen of the United States” married an “alien ineligible to citizenship.”); *Ex parte (Ng) Fung Sing*, 6 F.2d 670, 670 (W.D. Wash. 1925) (“Racially the petitioner is a Chinese (yellow race); politically she was born a member of the citizenry of the United States. Citizenship is a political status, and may be defined and the privilege limited by the Congress. The Congress has, no doubt, power to say what act shall expatriate a citizen and forfeit right to ‘protection abroad,’ and prescribe prerequisites for resumption of citizenship. Petitioner has no vested right in the act, *supra*.”).

¹⁰⁹ *E.g.*, Gabriel J. Chin, “*A Chinaman’s Chance*” in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965 (2013) (discussing how the laws of evidence discriminated against Asian

legislatively invalidated these laws by providing that all persons an equal right “give evidence.”¹¹⁰ But after Congress prohibited Chinese from testifying in certain Chinese Exclusion cases, in 1893 the Supreme Court upheld the testimonial disqualification on a broad ground: “The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which Congress may at its discretion modify or repeal.”¹¹¹ Thus, the specific holding of *Dow* remained good law, as a constitutional matter. There was no inherent right of people of color, even if citizens, to testify.

Testimonial incapacity made people vulnerable to rape, robbery, murder, and other crimes without recourse. It also justified other discrimination. For example, under an 1802 statute, Congress restricted the right to carry mail to “free persons”; in 1862 they considered removing the limitation.¹¹² Opponents objected that race neutrality would extend employment

not only to blacks, but also to the Indian tribes, civilized and uncivilized, and to the Chinese, who have come in such large numbers to the Pacific coast. These last are not recognized there as entitled to the rights and privileges of free persons; but the effect of this bill would be, as I say, to make officers of Government, as mail carriers, of all these classes of persons who obtain contracts of the Department.¹¹³

In addition to the problem posed by the objectionable principle of racial equality, eliminating the restriction could have created a practical difficulty: “[I]n some of the States Indians and negroes, and in California and Oregon the Chinese also, are not allowed by the statutes of the State to give testimony

Americans, including treating Asian testimony as less credible or making it incompetent entirely); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993) (describing how slaves could not testify against whites, but could testify against free Blacks and Indians); BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, 2 TREATISE ON THE LAW OF EVIDENCE, INSTRUMENTS OF EVIDENCE § 716, at 22–24 (1904) (explaining the historical application of the laws of evidence to Blacks, Indians, and Asians). See also *Dupree v. State*, 33 Ala. 380, 387 (1859) (“Negroes, mulattoes, Indians, and all persons of mixed blood descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be witnesses in any cause, civil or criminal, except for or against each other.”) (emphasis omitted) (quoting ALA. CODE § 2276 (1852)); *People v. Hall*, 4 Cal. 399, 399, 404 (1854) (holding that a statute providing “no Indian or Negro shall be allowed to testify as a witness in any action or proceeding in which a white person is a party” also excluded Chinese testimony).

¹¹⁰ 42 U.S.C. § 1981.

¹¹¹ *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893).

¹¹² Act of May 3, 1802, ch. 48, § 4, 2 Stat. 189, 191, *amended by* Act of Apr. 30, 1810, ch. 37, § 4, 2 Stat. 592, 594, *amended by* Act of Mar. 3, 1825, ch. 64, § 7, 4 Stat. 102, 104; CONG. GLOBE, 37th Cong., 2d Sess. 2231 (1862).

¹¹³ CONG. GLOBE, 37th Cong., 2d Sess. 2231 (1862).

in the courts against persons . . . [W]hen you repeal the law of 1825, and allow persons to be mail contractors who are not legal witnesses, they could not testify against a thief who robbed the mails before their eyes; and you thus impair the security of our mail-bags and their contents.”¹¹⁴ This argument sufficed to kill the proposal.

Racial Disenfranchisement. States also had no obligation to allow citizens to vote.¹¹⁵ Before Reconstruction, explicit racial discrimination was common.¹¹⁶ After 1870, the Fifteenth Amendment prohibited racial discrimination against citizens with respect to the right to vote. But Congress consciously decided to allow discrimination against Chinese and other non-whites; in an era when many states allowed non-citizens to vote, under the Fifteenth Amendment particular races of non-citizens could be enfranchised or not.¹¹⁷ States sometimes successfully disenfranchised Indians on various

¹¹⁴ *Id.* at 2232.

¹¹⁵ In *Minor v. Happersett*, 88 U.S. 162 (1874), the Court famously held that native-born women, though citizens, could be denied the right to vote.

¹¹⁶ Thus, the California Constitution in effect in 1864 enfranchised:

Every white male citizen of the United States, and every white male citizen of Mexico who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Queretaro on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, . . . provided, that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting to the right of suffrage Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body shall deem just and proper.

Bourland v. Hildreth, 26 Cal. 161, 178 (1864) (quoting Cal. Const., art. II, § 1). *United States v. Lucero*, 1869-NMSC-003, ¶ 21, 1 N.M. 422, 439 (“On the sixteenth of February, 1854, the legislative assembly of New Mexico passed the following act, section 70: ‘That the pueblo Indians of this territory for the present, and until they shall be declared by the congress of the United States to have the right, are excluded from the privilege of voting at the popular elections of the territory, except in the elections for overseers of ditches to which they belong, and in the elections proper to their own pueblos to elect their officers according to their ancient customs.’”).

¹¹⁷ See Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL. 223, 231 (1994) (explaining that the Fifteenth Amendment left to the states extension of voting rights to non-Black, non-white non-citizens.); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 82–83 (1996) (describing the opposition to extend suffrage to Chinese immigrants).

pretexts.¹¹⁸ Mexican Americans were disenfranchised by the Texas white primary, among other laws.¹¹⁹

In addition, the Supreme Court approved disenfranchisement of African Americans under authority of a legal principle which would have systematic application beyond voting and beyond African Americans. At the turn of the twentieth century, the Supreme Court held that states were free to enact laws with the intent to disenfranchise non-whites, or disadvantage them in any other way, so long as the laws were facially neutral, and challengers could not prove they were discriminatorily applied.

A leading U.S. Supreme Court case involved the Mississippi Constitution of 1890, which, the Mississippi Supreme Court explained, had been drafted by a convention which

swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it, as a race, from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.¹²⁰

Jurors had to be voters in Mississippi, so all-white civil and criminal juries were a consequence of electoral disenfranchisement.

¹¹⁸ Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 135 (2004) (“From 1924 to 1956 many western states would deny Indians the right to vote. Despite the changes brought about by the Fourteenth and Fifteenth Amendments, the Constitution still granted the states great autonomy with regards to suffrage, and until the Voting Rights Act of 1965, states had almost unlimited power to make rules for franchise. The states used this unlimited power to exclude Indian citizens from voting. Using poll taxes, literacy tests, English language tests, and refusing to place polling places in or near Indian communities, western states were successful in their efforts to prevent Indians from voting.”); see, e.g., *In re Liquor Election in Beltrami Cty.*, 163 N.W. 988, 989 (Minn. 1917) (“That these 52 mixed and full blood Indians were not citizens, and as such entitled to vote, because they were born within the territorial limits of Minnesota, must be considered settled.”) (citing, inter alia, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Elk v. Wilkins*, 112 U.S. 94 (1884)).

¹¹⁹ See Orville Vernon Burton, *Tempering Society’s Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 12 (2015) (discussing how Mexican American voters were eliminated from the Texas primary in 1914); see also Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of “Law and Order” Politics in Texas*, 45 LAW & SOC’Y REV. 631, 638 (2011) (noting that the Texas redemption constitutional convention “explicitly targeted the political disenfranchisement of Blacks, Mexicans, and Native Americans”).

¹²⁰ *Ratliff v. Beale*, 74 Miss. 247, 266 (1896).

The Mississippi Supreme Court's candor regarding the state's intent to discriminate is startling to the modern ear, but the Court was right to be confident that its frankness would be legally unproblematic. Mississippian Henry Williams was sentenced to death after being charged by an all-white grand jury and convicted by an all-white petit jury. On review, the U.S. Supreme Court unanimously held that the motives of the Mississippi constitutional convention in structuring its laws to deny African Americans the right to vote were entirely irrelevant. After quoting the language of Mississippi Supreme Court above, the U.S. Supreme Court explained:

nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the Federal Constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the State.¹²¹

Laws enacted with a discriminatory motivation could be invalidated in a particular case based on proof of discriminatory enforcement. But after *Yick Wo v. Hopkins*¹²² warned of this possibility, discriminators had every reason to be discreet. For example, in 1970, after legal doctrine had changed, California invalidated its literacy test for voting, noting that one of the reasons is that it had been enacted to prevent U.S.-born Chinese from voting.¹²³ But no successful challenge had been brought to the law in the decades it had been in effect.

Miscegenation Laws. People of color were prohibited from marrying white persons, a policy which not only reinforced racist principles¹²⁴ but also

¹²¹ *Williams v. Mississippi*, 170 U.S. 213, 222 (1898), *aff'd* 20 So. 1023, 1023 (Miss. 1896) (citing *Radliff v. Beale*, 74 Miss. 247, 266 (1896)). For discussions of the history of judicial review of legislative motive, see Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008). Under more recent doctrine, a law enacted with a discriminatory motive and continuing to have a discriminatory effect is unconstitutional. See e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that section 182 of the Alabama Constitution of 1901 is unconstitutional, because it was originally enacted with a racially discriminatory purpose and continued to have a discriminatory effect).

¹²² 118 U.S. 356 (1886).

¹²³ *Castro v. California*, 466 P.2d 244, 248 n.11 (Cal. 1970) ("The Constitution adopted in 1879 excluded 'natives of China' from voting. In 1891 the children of those thus excluded were nearing voting age and, since the Chinese tended to retain their language and customs, partly as a response to intense discrimination, the proposed literacy test would serve to prevent them from voting as well.").

¹²⁴ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) ("The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified,

profited the state through escheat, as spouses and out-of-wedlock children were deemed legal strangers and denied inheritance.¹²⁵ An Oregon statute, upheld by its supreme court, made it a crime for “any white person male, or female, to intermarry with any Negro, Chinese, or any person having one-fourth or more negro, Chinese, or Kanaka blood, or any person having more than one-half Indian blood.”¹²⁶ Arizona law provided that “[t]he marriage of persons of Caucasian blood, or their descendants, with Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants, shall be null and void.”¹²⁷ Mexicans were not specified in formal anti-miscegenation legislation,¹²⁸ although “whatever the law, registrars often

is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”), *abrogated in part on other grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975); Terrace v. Thompson, 263 U.S. 197, 220 (1923) (“But it is not to be supposed that [Acts of Congress] defining eligibility [for naturalization] are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.”); Brunson v. Bd. Of Trs. of Sch. Dist. No. 1 of Clarendon Cty., 429 F.2d 820, 825 (4th Cir. 1970) (“Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with. By condemning the practice as ‘inherently unequal,’ the Court, at long last, expunged the constitutional principle of black inferiority and white supremacy introduced by *Dred Scott*, and ordered the dismantling of the ‘impassable barrier’ upheld by that case.”).

¹²⁵ *In re Shun T. Takahashi's Estate*, 129 P.2d 217, 219 (Mont. 1942) (“Marriage between a Japanese and a white person is prohibited in this state.”); *In re Walker's Estate*, 46 P. 67, 68 (Ariz. 1896) (Indian spouse and child could not inherit; “[i]t is readily seen that this pretended marriage, if it had been a marriage in fact, was illegal and void, and imposed no obligation on either party thereto.”); *In re Morgan's Estate*, 265 P. 241, 244 (Cal. 1928) (“The evidence shows that the father was a white person and that the two women, whom we are asked to presume that he married, were mulattoes. It has been the law of this state from its earliest days, and long before either Annie Morgan or Susan O. Casey was born, that a marriage between a white person and a mulatto was illegal. In the absence of any evidence to the contrary, we must presume that the laws of the state of Mississippi and Louisiana are and were the same. With an express statutory inhibition against a marriage between persons of these two races, no presumption can be indulged in that this law was violated and a marriage entered into between these parties.”).

¹²⁶ *In re Paquet's Estate*, 200 P. 911, 913 (Or. 1921).

¹²⁷ *State v. Pass*, 121 P.2d 882, 882 (Ariz. 1942). See Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 352 (2007) (describing the Virginia's Racial Integrity Act, which prohibited interracial marriage); Karen M. Woods, *A “Wicked and Mischievous Connection”: The Origins of Indian-White Miscegenation Law*, 23 LEGAL STUD. F. 37 (1999).

¹²⁸ Dean Moran reports that:

By treaty, former Mexican citizens enjoyed the full privileges of American citizenship, so anti-miscegenation laws never formally prohibited mixed marriages with Anglos. Yet, the

informally denied marriage licenses to Mexicans who looked too dark to marry a white person.”¹²⁹

Segregation. Citizens of color could be subject to segregation in schools and other places.¹³⁰ After passage of the Fourteenth Amendment, the Nevada Supreme Court upheld a statute providing that “Negroes, Mongolians and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education, and use the public school funds for the support of the same.”¹³¹ While segregation of African American students was the most systematic, Indian,¹³² Mexican,¹³³ and Asian¹³⁴ pupils were also excluded from white schools.

subordinated status of Mexicans in their new home country led to a steep drop in the number of intermarriages.

Rachel F. Moran, *Love with A Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663, 1670 (2004) [hereinafter Moran]. In invalidating California’s anti-miscegenation statute, the California Supreme Court reported that the law does not “set up ‘Mexicans’ as a separate category, although some authorities consider Mexico to be populated at least in part by persons who are a mixture of ‘white’ and ‘Indian.’” *Perez v. Lippold*, 198 P.2d 17, 22–23 (Cal. 1948).

¹²⁹ Moran, *supra* note 128.

¹³⁰ *Smith v. State*, 46 S.W. 566, 570 (Tenn. 1898) (“No good reason can be perceived why such legislation is objectionable, or why it might not even be extended. If California or any of the states of the West should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it seems clear that for the same reasons they might enact the same laws, and, indeed, yet others, for the separation of other races who might be hostile or prejudiced towards each other.”).

¹³¹ *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 346 (1872) (quoting Act of Mar. 8, 1867, ch. 52, sec. 50, § 21, 1867 Nev. Sess. Law 89, 95).

¹³² *See Sing v. Sitka Sch. Bd.*, 7 Alaska 616, 624 (D. Alaska 1927) (upholding segregation of Indians, noting that “it seems to be well settled law, by numerous decisions, that the Fourteenth Amendment to the Constitution of the United States does not guarantee to the colored races a community of rights with the white race, and that it is within the power of the state to establish separate schools for the colored race, but that such schools must be on an equal plane with those maintained for the white race.”); *see also Goins v. Bd. of Trustees of Indian Normal Training Sch. at Pembroke*, 86 S.E. 629, 630 (N.C. 1915) (discussing statute providing that Croatan Indian children were to have separate schools, school committees of their own race and color, and teachers of their own choice).

¹³³ *See Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (invalidating segregation of Mexican American students not authorized by California law). Other courts had disagreed about whether segregation was lawful only if authorized by statute. *Compare People ex rel. King v. Gallagher*, 93 N.Y. 438, 450 (1883) (upholding regulation segregating African American students, despite lack of statutory authorization, as there was for Indian students), *with Crawford v. Dist. Sch. Bd. for Sch. Dist. No. 7*, 137 P. 217, 221 (Or. 1913) (“There is no statute in this state expressly granting authority to school boards to establish separate schools for black or red children, and to exclude the colored children from the schools intended for white children; nor can this power be implied from any power that has been granted to school boards.”).

¹³⁴ California’s path was particularly tortuous. It first authorized separate schools for African American and Indian children. *See Ward v. Flood*, 48 Cal. 36, 48 (1874). In 1885, the California Supreme Court held that there was no authority to entirely exclude Chinese children. *See Tape v.*

Property Ownership. People of color were restricted in their rights to own property. All were subject to restrictive covenants which, in 1926, seemed to have been upheld by a unanimous Supreme Court.¹³⁵ A typical covenant provided “that no part of said premises shall ever ever be conveyed, transferred, let or demised to any person or persons of African, Mexican, Mongolian or Indian descent.”¹³⁶ Of course, as *Lone Wolf* held, tribal possession of reservations was subject to the authority of Congress to determine that it was time for Indians to relocate, and their land made available to others.¹³⁷ Asian immigrants were subject to laws prohibiting “aliens ineligible to citizenship” from owning land,¹³⁸ and their U.S.-born citizen children were subject to restrictions on ownership designed to prevent ineligible noncitizens from controlling real property.¹³⁹

Physical Liberty. In very different ways, the bodily liberty of members of each of these groups was subject to arbitrary termination. In connection with the displacement authorized by *Lone Wolf*, of course, many Indians were forced to move. In a later period, Indian children were removed from their homes and sent to boarding schools.¹⁴⁰ If the perpetrators had been

Hurley, 6 P. 129, 130 (Cal. 1885). Nevertheless, the legislature then authorized separate schools for white and Asian children. See *Wong Him v. Callahan*, 119 F. 381, 382–83 (C.C.N.D. Cal. 1902); but see *Wysinger v. Crookshank*, 23 P. 54, 56 (Cal. 1890) (finding that segregation of African Americans was unauthorized under that law); . *Piper v. Big Pine Sch. Dist.*, 226 P. 926, 928, 931–31 (Cal. 1924) (blocking segregation for Indian and Asian children).

¹³⁵ See *Corrigan v. Buckley*, 271 U.S. 323, 332 (1926) (finding lack of sufficient constitutional or statutory basis to challenge racial covenant).

¹³⁶ *McRae v. Lois Grunow Mem'l Clinic*, 14 P.2d 478, 479 (Ariz. 1932). On the other hand, where there was no valid covenant, an owner could sell to anyone. See *State Realty Co. v. Wood*, 57 S.E.2d 102, 103 (Va. 1950) (“There is no limitation or restriction upon the seller to select a purchaser from any racial, social or religious group. He is free to sell to any one—to an Eskimo, Chinaman, Buddhist, Mohammedan or Communist.”).

¹³⁷ See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER*, 245 (2007).

¹³⁸ Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 49 (1947) (quoting *Frick v. Webb*, 263 U.S. 326, 330 (1923)).

¹³⁹ *Oyama v. California*, 332 U.S. 633, 647 (1948) (finding that California law subordinating the rights of American citizen based on his father’s Japanese nationality was unconstitutional as applied); see also Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1002 (2010) (“[T]he Supreme Court held that the State of California’s attempted taking of Fred Oyama’s property by enforcing the Alien Land Law against him because of his father’s ancestry constituted a form of race discrimination.”).

¹⁴⁰ See DENISE K. LAJIMODIERE, *STRINGING ROSARIES: THE HISTORY, THE UNFORGIVABLE, AND THE HEALING OF NORTHERN PLAINS AMERICAN INDIAN BOARDING SCHOOL SURVIVORS* (2019) (describing interviews with sixteen American Indian boarding school survivors and the trauma that the survivors endured); DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995) (exploring

communists or non-white, these schools might well have been called reeducation camps.

Before the Civil War, African Americans, free and enslaved, were subject to decades of discussion about whether it would be best for the United States to deport them to a colony, although few, other than enslaved persons unlawfully brought to the United States by slave traders, were forcibly removed.¹⁴¹ Free people of color, north and south, were susceptible to kidnapping and sale into slavery.¹⁴² While the United States abandoned the colonization project, afterwards, particularly in the former Confederate states, African Americans were subject to a criminal justice system corrupted to force them into involuntary servitude.¹⁴³ Although vague laws like

how American Indian children were removed to boarding schools to be “reformed into fully civilized members of the human race”); Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45 (2006) (discussing how American-Indian children were forcibly removed to boarding schools and, as a result, suffered severe physical and emotional harm).

¹⁴¹ See NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN RECOLONIZATION (Beverly C. Tomek & Matthew J. Hetrick eds., 2017) (analyzing the notion of separating the races by removing Black Americans to Africa); P.J. STAUDENRAUS, *THE AFRICAN COLONIZATION MOVEMENT 1816–1865* (1961) (reviewing how the African colonization movement took hold in the United States).

¹⁴² See JONATHAN DANIEL WELLS, *THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR* (2020) (describing New York City as proslavery based on its enforcement of the Fugitive Slave Act, resulting in kidnapping of free Blacks within the city).

¹⁴³ See *Stratacos v. State*, 748 S.E.2d 828, 833 n.6 (Ga. 2013) (“Georgia’s labor contract act was just one of many Jim Crow statutory schemes that used criminal sanctions, or the threat of criminal sanctions, to coerce African-Americans into providing labor.”) (citing DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008)); see also *Jackson v. City & Cnty. of Denver*, 124 P.2d 240, 241 (Colo. 1942) (affirming conviction of a Black and white unmarried couple for cohabiting because their actions violated an ordinance providing that “[a] vagrant within the meaning and provisions of this article shall be deemed to be *** any person who shall lead an *** immoral *** course of life”).

vagrancy statutes were most often turned against African Americans, Indians,¹⁴⁴ Asians,¹⁴⁵ and members of other groups were also caught up.¹⁴⁶

During World War II, “citizen and alien Japanese alike” were incarcerated in camps.¹⁴⁷ Asian immigrants were also potentially subject to race-based deportation at the pleasure of Congress:

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.¹⁴⁸

In order to carry out Asian Exclusion, Asian appearance was made probable cause to arrest, and a sufficient ground to impose the burden of proving lawful presence on the Asian.¹⁴⁹ Although the weight of immigration policy fell most harshly on Asians, immigration laws also discriminated against African¹⁵⁰ and some Indian¹⁵¹ noncitizens.

¹⁴⁴ See Chauncey Shafter Goodrich, *The Legal Status of the California Indian*, 14 CALIF. L. REV. 83, 93 (1926) (discussing vagrancy statute applicable solely to Indians).

¹⁴⁵ See *Ex parte Tom Wong*, 10 P.2d 797, 798 (Cal. Dist. Ct. App. 1932) (affirming conviction under a statute providing that “[e]very person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him * * * is a vagrant and is punishable”); see also *Territory v. Matsumoto*, 16 Haw. 267, 268 (1904) (“The evidence shows that some thirty Japanese were arrested on suspicion, being held on charges of vagrancy and other charges.”).

¹⁴⁶ See generally *United States v. James*, 952 F.3d 429, 434 (3d Cir. 2020) (noting that vagrancy laws “invited selective enforcement by police officers, judges, and juries, with the burden commonly falling on disfavored racial and social groups. See Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, at 15–20, 115–27 (2016).”).

¹⁴⁷ See *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943) (recommending the evacuation and incarceration for all persons of Japanese ancestry, even U.S. citizens).

¹⁴⁸ *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 336 (1909) (quoting *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)).

¹⁴⁹ Gabriel J. Chin, “*A Chinaman’s Chance*” in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 979 n.79 (2013) (discussing *Morrison v. California*, 291 U.S. 82, 89 (1934) (quoting *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902) (“[T]he inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.”))).

¹⁵⁰ See, e.g., Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (discussing how U.S. immigration policies send messages of exclusion to African Americans).

¹⁵¹ American Indians born in Canada have a right under the Jay Treaty—the treaty ending the Revolutionary War—to free passage into the United States, but U.S. law imposes a blood quantum requirement, limiting the ability of such persons to marry or adopt. See Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301 (2009) (discussing the history behind the free passage right and the implications that it has on contemporaneous federal Indian law and immigration law). In addition, Mexicans are treated differently: “[t]ransborder tribes that straddle the U.S.-Mexico border do not benefit from the Jay Treaty or section 289 of the INA.” Leti Volpp, *The Indigenous As Alien*, 5 U.C. IRVINE L. REV. 289, 313, n.147 (2015).

The power of race-based removal was sometimes exercised even more vigorously against Mexicans than it had been against the Asians for whom the doctrine was invented.¹⁵² In the 1930s and the 1950s, in combined federal-state operations called the “Mexican repatriation” and “Operation Wetback,” “citizen and alien Mexicans alike” were sent to Mexico to reduce their economic competition with domestic workers.¹⁵³ More recently, the Supreme Court held that, in immigration enforcement, “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in making a forcible stop to investigate their status.¹⁵⁴ Even today, U.S. citizens—mostly, apparently, non-white—are regularly detained as noncitizens, and sometimes deported, through casual administrative procedures.¹⁵⁵

¹⁵² A U.S. District Court recently found that the main immigration crimes in U.S. law were enacted with an anti-Mexican animus. See *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330, at *5 (D. Nev. Aug. 18, 2021) (“[T]he evidence Carrillo-Lopez provides demonstrating the animus which tainted the Act of 1929, along with other proffered evidence contemporaneous with the INA’s enactment in 1952, is sufficient for Carrillo-Lopez to meet his burden that discriminatory intent was a motivating factor of both the 1929 and 1952 enactments.”). See also Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022), <https://ssrn.com/abstract=3827488> (noting how the Undesirable Aliens Act of 1929 was motivated by pseudoscientific racism and preventing Latin American immigrants from permanently settling in the United States).

¹⁵³ See Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019) (exploring the historical episodes of Mexican mass deportation and likening President Trump’s immigration agenda to another concerted effort to remove Latinx people from the United States); Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1 (2005) (arguing that the United States should acknowledge the repatriation campaign of the 1930s and its enduring impact on Mexican-Americans).

¹⁵⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975). It is not difficult to combine ethnic appearance along with other factors such as language, dress, and location, to corroborate the “evidence” that a non-white person could well be an unauthorized migrant. See, e.g., *Lee v. Immigr. & Naturalization Serv.*, 590 F.2d 497, 502 (3d Cir. 1979) (citing *Brignoni-Ponce*, 422 U.S. at 881) (“[T]he men’s conversation in Chinese, their mode of dress and their proximity to the China Inn, a known employer of illegal aliens in the past, aroused an initial suspicion in Hughes’ mind that the two men might be illegal aliens employed at that restaurant.”).

¹⁵⁵ See Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2017 (2013) (“Yet race remains profoundly present in the adjudication of contemporary citizenship claims. The vast majority of recent cases that have come to light regarding deportations of citizens have involved individuals deported to Latin America and the Caribbean, and in particular to Mexico.”); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 682 (2011) (noting “the presumption of U.S. citizenship on the part of those born abroad to U.S.-born parents who seem White, and the presumption of foreign citizenship for similarly situated children of U.S. parents who are racialized as non-White”); ACLU FLA., *CITIZENS ON HOLD: A LOOK AT ICE’S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY* (Mar. 20, 2019), https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_

Citizens of Color and the Master Race. Undoubtedly, the Civil Rights Revolution of the 1960s substantially changed the status and day-to-day lives of millions of people of color in the United States. But during the Jim Crow era, states and the federal government had broad power to regulate the rights and status of people of color in ways which would have been inconceivable with respect to whites as a class. The point is illustrated by two of the most important federal statutes protecting civil rights, the Civil Rights Act of 1866,¹⁵⁶ and the Enforcement Act of 1870,¹⁵⁷ which operated by granting a set of enumerated rights to the protected classes to the same extent “as is enjoyed by white citizens.”¹⁵⁸ For all people to have “equal rights” and for people of color to enjoy the same rights as “white citizens” were the same thing.

To be sure, throughout American history, individual white persons and families also suffered accident, misfortune, and unfair treatment at the hands of the government and others. Yet, one searches in vain for examples of systematic denial of citizenship, deportation, deprivation of property, disenfranchisement, or other degradation of white people, based on race alone, because they were white people. As Chief Justice Taney wrote, from the earliest colonial precursors of the United States until modern times, white people as a race held the sovereignty in government, and they had the power to share the blessings of liberty with people of color, or not, partially or completely. No race or group ever held any similar power over white people.

system_in_miami-dade_county.pdf [https://perma.cc/SA6V-YVGT] (discussing recent patterns of ICE detainers in Miami-Dade County, including 420 detainer requests for people listed as U.S. citizens, of which 83 were eventually cancelled); David J. Bier, *U.S. Citizens Targeted by ICE, in* IMMIGR. RSCH. & POL’Y BRIEF NO. 8 (Cato Inst., 2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf [https://perma.cc/X6ML-JB6J] (describing ICE practices in Travis County, Texas). For reports from the Northwestern Deportation Research Clinic, see NW. BUFFET INST. FOR GLOBAL AFF. DEPORTATION RSCH. CLINIC, *U.S. Citizens Detained and Departed*, https://deportation-research.buffett.northwestern.edu/us-citizens/index.html [https://perma.cc/XHQ8-PZB5].

¹⁵⁶ Act of Apr. 9, 1866, Pub. L. No. 39-31, § 1, 14 Stat. 27, 27 (1866).

¹⁵⁷ Act of May 31, 1870, Pub. L. No. 41-114, § 16, 16 Stat. 140, 144 (1870).

¹⁵⁸ 42 U.S.C. § 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”); 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”). See also Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421 (2021) (arguing that section 1981 and section 1982 are unique because they explicitly grant rights regarding contracts and property to the same extent as white people).

CONCLUSION

By 1964, Chief Justice Taney's vision of the political structure of the United States and the places of the races in it was in the process of destruction. Nevertheless, he had proved to be prescient; the states did have the right to determine the status of their residents, and people of color could be put at the bottom. Taney's vision was reflected in 1964 by a Mississippi Supreme Court decision unanimously upholding the convictions of a group of Freedom Riders who attacked by mob.¹⁵⁹ The court at least implicitly recognized the right of the police to order people of color out of public accommodations, rather ordering out white mobs or stopping them from rioting. In their decision, the court offered a revealing description of the history of the relationships between the races:

This Court, like everyone else, is somewhat conversant with historical facts. Hence it knows that slavery, as a legal institution, existed in this country from the earliest Colonial days. That status continued unabated even after the Declaration of Independence was proclaimed to the world in 1776 and thereafter beyond the adoption of the Constitution itself.¹⁶⁰

The court explained that the Civil War and Reconstruction had no effect:

Even after the newly freed slaves were enfranchised, there was little difference thereafter in the racial attitudes insofar as social intercourse and acceptance were concerned. . . . Even the Great Crusader for Freedom and the Emancipator of the Slaves recognized that these differences placed a severe limitation on the full measure of freedom for them.¹⁶¹

But for some reason, northern courts and civil rights protesters complained: "The cry by certain groups for conformity to their beliefs rings out endlessly over the land through the various media of communications."¹⁶² However, agitators would have to face reality:

Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. . . . From the lessons of history, it has been learned that "though the mills of the gods grind slowly, yet they grind

¹⁵⁹ *Knight v. State*, 161 So. 2d 521 (Miss. 1964), *cert. granted, judgment rev'd sub nom.*; *Thomas v. Mississippi*, 380 U.S. 524 (1965). While *Knight* was reversed, that fact was not recognized by Westlaw until decades later, and *Knight* was treated as valid authority; for example, in *Hunter v. State*, 489 So. 2d 1086, 1088 (Miss. 1986), the court cited *Knight* with approval in an opinion authored by Justice Roy Noble Lee, son of *Knight* author Chief Justice Percy Mercer Lee.

¹⁶⁰ 161 So. 2d at 522–23.

¹⁶¹ *Id.* at 523.

¹⁶² *Id.*

exceeding small” and that human nature makes little change from day to day, month to month, year to year, and century to century.¹⁶³

The faith of Dred Scott and Lorenzo Dow had proved to be irrelevant, and a century later, an elected court—presumably familiar with the political views of the voters of Mississippi—candidly admitted that racial considerations were more important than religion, and to challenge that was to war with human nature itself.

Chief Justice Taney’s jurisprudence, and his vision for America, left much to be desired from a modern perspective. Yet, as an historian, and as legal realist describing the law as it actually was, his work is entitled to attention. As a descriptive matter, *Dow*, *Strader*, and *Dred Scott* articulated the law of the United States not only before, but for at least a century after the Civil War. Taney’s work makes clear that like African Americans, Asian, Native Americans and other non-whites had no rights the law was bound to respect.

¹⁶³ *Id.*