DRED SCOTT *AND ASIAN AMERICANS*: WAS CHIEF JUSTICE TANEY THE FIRST CRITICAL RACE THEORIST?

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ABSTRACT

This commentary considers Professor Jack Chin's analysis in Dred Scott and Asian Americans *of the white supremacist underpinnings and modern legacy of U.S. Supreme Court Chief Justice Roger Taney's decisions in* United States v. Dow*, a little-known decision denying full citizenship rights to Asian Americans, and* Dred Scott v. Sandford*, an iconic Supreme Court decision that rejected full citizenship to a freed Black man and precipitated the Civil War. It further explores how Chief Justice Taney's analysis of race and racial subordination in the nineteenth century exemplifies the fundamental tenet of modern Critical Race Theory that the law operates to enforce and maintain white supremacy.*

INTRODUCTION

Critical Race Theory (CRT) posits that the law serves to operationalize, maintain, and replicate white supremacy in the United States.[1] White supremacy, in turn, stands as the unifying principle underlying the webs of subordination of many different racial groups.[2]

CRT's focus on dismantling white supremacy over all people of color, however, did not emerge overnight. Rather, it took root with maturation of the movement. The Black/white paradigm of civil rights, and the near-exclusive focus on the subordination of African Americans, initially dominated CRT scholarship, just as it dominates many Americans' general perception of the fundamental nature of civil rights struggles in the United

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1 *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017) (summarizing the basic principles of Critical Race Theory).

2 *See* Jerome McCristal Culp, Jr., *To The Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638 (1999) (observing that "the deeply embedded message of critical race theory . . . . is that race is only skin deep, *but white supremacy runs to the bone*") (emphasis added) (footnote omitted).

States.[3] For much of U.S. history, virtually any discussion of civil rights focused on the relationship between whites and African Americans. With the emergence of critical Latinx (LatCrit) theory, Asian American legal scholarship, and parallel movements, CRT evolved to also insightfully examine white subordination of Asian, Latinx, Indigenous peoples, and groups other than African Americans.[4]

At various times, the nation has experienced activism squarely confronting white supremacy and demanding the dismantling of systemic racism in the United States. One long-forgotten example is the lengthy, and unsuccessful for a century, political effort beginning at the turn of the twentieth century to push Congress to enact anti-lynching legislation at a time when whites frequently employed the horrific practice of lynching to terrorize African Americans and the states proved themselves incapable of punishing white perpetrators of the crime.[5] The historic Civil Rights Movement of the 1950s and 1960s, is a more successful—if not complete—example of a sustained challenge to white supremacy.

In response to a series of senseless police killings of African Americans in 2020, including but not limited to those of George Floyd and Breonna Taylor, mass protests spread like wildfire across the United States.[6] Police brutality contributed to monumentally high racial tensions, which were exacerbated by the words and deeds of a president who, at best, was insensitive to the civil rights concerns of people of color. Not coincidentally, non-whites other than African Americans simultaneously suffered attacks, including hate violence directed at Asian Americans.[7] Tensions hit a fever pitch in January 2021 when armed white supremacists stormed the U.S.

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3 *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1253 (1997) ("[T]he exclusive focus of most scholarship on the Black-White relationship[] constitutes a paradigm which obscures and prevents the understanding of other forms of inequality, those experienced by Non-White, non-Black Americans.").

4 *See* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1629 (1997) ("LatCrit theory . . . brings back into critical race theory a focus on white supremacy as a world system."). *See generally* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (3d. ed. 2014) (analyzing the full range of subordination of different racial groups in U.S. society).

5 *See* MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 153–55 (2011). Only in 2022 did President Biden finally sign the first federal anti-lynching law. *See* Erin B. Logan & Eli Stokols, *Biden Signs Anti-Lynching Law a Century After It Was First Introduced*, L.A. TIMES (MAR. 29, 2022), https://www.latimes.com/politics/story/2022-03-29/biden-to-sign-anti-lynching-law-a-century-after-it-was-first-introduced [https://perma.cc/7KND-VVDS].

6 *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/82RL-U299].

7 *See infra* note 47 and accompanying text.

Capitol in a brazen and lawless attempt to violently overturn the 2020 election loss of President Donald J. Trump.[8] With the nation reeling from racial turmoil, President Trump added fuel to the fire by attacking Critical Race Theory, and its challenge to systemic racial injustice and white supremacy, as little more than unpatriotic propaganda that must be eliminated in its entirety from the public schools and all of government.[9]

At the outset, a word about Professor Jack Chin's impactful scholarship is warranted. An influential race and civil rights scholar, he has made significant contributions to immigration law,[10] criminal law,[11] Asian American legal scholarship,[12] and other substantive areas. Through the lens of the history of race and racial discrimination in the United States, Professor Chin insightfully analyzes the law and its impacts. Exhibiting his academic breadth, he recently brought to light state and local efforts to regulate out of existence Chinese restaurants—ironically enough, a mainstay of popular cuisine in the country today—as a racial, moral, and economic danger to white society.[13] The deep and important analysis in his article Dred Scott *and Asian Americans*[14] will no doubt add luster to Professor Chin's scholarly legacy.

In his article, Professor Chin analyzes the decisions of Chief Justice of the U.S. Supreme Court Roger Taney, a historical figure who helped to

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8 *See* Stephanie K. Baer, *Trump Supporters Who Attempted the Coup at the US Capitol Flaunted Racist and Hateful Symbols*, BUZZFEED NEWS (Jan. 7, 2021, 1:34 PM), https://www.buzzfeednews.com/article/skbaer/trump-supporters-racist-symbols-capitol-assault [https://perma.cc/9N52 -FKCF].

9 *See* Char Adams, *How Trump Ignited the Fight Over Critical Race Theory in Schools*, NBC NEWS (May 10, 2021, 6:05 AM), https://www.nbcnews.com/news/nbcblk/how-trump-ignited-fight-over-critical-race-theory-schools-n1266701 [https://perma.cc/QK8G-7RPP]. President Trump previously had suggested that there were "good people" among the White supremacists who rallied in Charlottesville, Virginia in 2017. *See* Joan Coaston, *Trump's New Defense of His Charlottesville Comments Is Incredibly False*, VOX (Apr. 26, 2019, 2:30 PM), https://www.vox.com/2019/4/26/18517980/trump-unite-the-right-racism-defense-charlottesville [https://perma.cc/PW4P-FEZE].

10 *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) [hereinafter Chin, *Segregation's Last Stronghold*]; Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

11 *See, e.g.*, Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

12 *See, e.g.*, Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359; Gabriel J. Chin & Hrishi Karthikeyan, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1 (2002).

13 *See* Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018).

14 Gabriel J. Chin, Dred Scott *and Asian Americans,* 24 U. PA. J. CONST. L. 633 (2022) [hereinafter Chin, Dred Scott].

rationalize and normalize the legal subordination of African Americans in pre-Civil War America. As it turns out, Taney understood racial matters in a way that in rather remarkable fashion serve as textbook examples of fundamental tenets of contemporary Critical Race Theory. As he often has done in an illustrious career, Professor Chin adds measurably to our understanding of the racial jurisprudence of a Supreme Court justice who is central to the history of the law of racial subordination in the United States. As we shall see, Chief Justice Taney's endorsement of white supremacy unfortunately lives in perpetuity and remains part and parcel of contemporary U.S. law.[15]

Professor Chin specifically turns his scholarly attention to Chief Justice Taney's decision for the Supreme Court in the infamous antebellum case of *Dred Scott v. Sandford*,[16] which held that a freed slave was not a U.S. citizen afforded access to the federal courts. Naturally enough given the time in U.S. history when the case was decided, Chief Justice Taney's racism has been assumed by some, perhaps most, knowledgeable observers to be confined to African Americans—the specific racial minority that the Supreme Court denied full rights of U.S. citizenship. Adding to our collective understanding of the *Dred Scott* decision as well as race and racism in U.S. history, Professor Chin uncovers and analyzes another one of Taney's opinions, *United States v. Dow*.[17] In denying full rights of U.S. citizenship to an Asian American, the *Dow* decision demonstrates that Taney's paradigm of white dominance extended beyond African Americans, and represents a broader overarching principle—that the law can and should enforce and maintain white supremacy over all other races in the United States.

Read together, Chief Justice Taney's decisions in *Dow* and *Dred Scott* demonstrate how he understood the law as dutifully protecting, enforcing, and maintaining white supremacy over all non-whites. Reflecting a de facto presumption that whites possess ultimate and unfettered power over all non-whites, his opinions offer powerful support for CRT's fundamental tenet that white supremacy is the invisible hand that guides the law's efforts to subordinate all non-white groups, including African Americans, Asian Americans, and others. The races may be malleable, but white supremacy is not. To Taney, the law permits the unquestionably dominant white race to impose the scourge of white supremacy on all non-whites. White

15 *See infra* notes 34–48 and accompanying text.

16 60 U.S. 393 (1857).

17 25 Fed. Cas. 901 (C.C.D. Md. 1840).

supremacy is one of Roger Taney's enduring legacies to American jurisprudence.

Characteristic of his writings, although not of legal scholarship in general, Professor Chin takes the reader on an unusually enjoyable intellectual journey as well as one chock full of insights. For example, in the article, a reader encounters flavorful references to non-law popular icons, such as the legendary American author Mark Twain.[18] We also can only chuckle at Professor Chin's wonderfully illustrative quip that, with the Reconstruction Amendments to the U.S. Constitution, "after 1868 *Dred Scott* seemed as dead as the Whig Party," a long-defunct political party unknown to most Americans today.[19] Professor Chin's wit and wisdom unquestionably come through in Dred Scott *and Asian Americans*.

Part I considers Professor Chin's analysis of the white supremacist underpinnings and legacy of *United States v. Dow*, a little-known decision denying full rights to Asian Americans, and the iconic *Dred Scott v. Sandford*, a decision that became a national symbol of African American subordination. The commentary then explores how Chief Justice Taney's analysis of race and racial subordination in the nineteenth century exemplifies fundamental tenets of Critical Race Theory, which emerged in legal scholarship at the tail end of the twentieth century.

I. JUSTICE TANEY, CRITICAL RACE THEORY, *DOW*, AND *DRED SCOTT*

Professor Chin's valuable and enduring contribution in Dred Scott *and Asian Americans* is uncovering and analyzing Roger Taney's virtually unknown opinion in *United States v. Dow* (1840),[20] a case that Taney decided as a circuit judge. Enforcing a discriminatory Maryland law to deny full rights of citizenship to a Filipino man and subjecting him to the same inferior status reserved under the law for African Americans, the decision adds measurably to our understanding of the full sweep of racism in the United States and the endorsement of the legal principle that whites could define the inferior races and their legal rights in the Supreme Court's watershed decision in *Dred Scott v. Sandford*.[21]

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18 *See* Chin, Dred Scott, *supra* note 14, at 656 (referring to "Mark Twain's discussion of violence against Chinese in 1860s California") (footnote omitted).

19 *Id.* at 653.

20 25 Fed. Cas. 901 (C.C.D. Md. 1840).

21 60 U.S. 393 (1857).

Professor Chin's analysis of *United States v. Dow* specifically reveals how Chief Justice Taney's 1857 opinion in *Dred Scott* represented not simply his steadfast commitment to the subordination of African Americans. Although *Dred Scott* unquestionably stands for that proposition, Professor Chin's analysis reflects the more expansive principle that whites as a legal matter could powerfully dominate any and all non-white racial groups as they see fit. Political philosophers characterize such raw and unrepentant domination as "the state of nature—a situation where people have not been formed or shaped by society."[22] The state of nature continues in modern times to govern how whites exert legal power and authority over people of color.

Through his analysis, Professor Chin ably demonstrates that *Dred Scott* is not simply a decision about the rights of African Americans—important and significant as those are—but about the rights of *all* non-whites. In Roger Taney's view, all non-whites are subject to unqualified, if not downright brutal, legal domination and the unrestrained power of white supremacy. Professor Chin's cogent analysis lends considerable support to the central tenet of Critical Race Theory that white supremacy is the glue holding together the systematic subordination of all non-whites—with whites possessing the unfettered power to define those groups and their legal rights—in the United States.[23]

A. Dow *and* Dred Scott

By holding that a freed slave was not a U.S. citizen for purposes of accessing the federal courts, the Supreme Court decision in *Dred Scott v. Sandford* had monumental impacts on the nation's racial sensibilities. Volumes of scholarship analyze the decision and its enduring legacy.[24] Most importantly, the decision's impacts went far beyond the law. First and foremost, the *Dred Scott* decision's denial of rights to freed Blacks is generally understood to be one of the causes of the Civil War.[25] The War literally tore

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22 George A. Martínez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799, 801 (2010); *see* George A. Martínez, *Further Thoughts on Race, American Law, and the State of Nature: Advancing the Multiracial Paradigm Shift and Seeking Patterns in the Area of Race and Law*, 85 UMKC L. REV. 105 (2016) (analyzing issues of race in U.S. law through the philosophical lens of the state of nature).

23 *See infra* Section II.B.

24 *See, e.g.*, PAUL FINKLEMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS (2010); AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM *DRED SCOTT* TO THE DREAMERS (2021); LEA VANDERVELDE, REDEMPTION SONGS: SUNG FOR FREEDOM BEFORE *DRED SCOTT* (2014).

25 *See* Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 139 (2007) ("*Dred Scott* may not have been a sufficient cause of the [Civil] War, or the only cause, but it was a cause, a major cause, and in the minds of Americans then it was at the very eye of the storm.").

apart the nation through mass bloodshed and in innumerable ways forever transformed the racial terrain of the United States. It was followed with constitutional amendments, a turbulent, often violent, Reconstruction, and tremendous social ferment. Put simply, freeing the slaves through war had racial ripple effects that forever shaped the nation.

In its time, *Dred Scott* almost naturally placed at center stage the role of the law in subordinating African Americans, specifically freed slaves. That conventional understanding of the decision epitomizes the Black/white paradigm of civil rights.[26] Today, the decision continues to be remembered as one of the high-water marks of invidious discrimination against African Americans in the United States. It was decided when the law vigorously enforced Black enslavement through the fugitive slave laws and severely restricted the rights of freed slaves, which at the time were the focal point of the nation's contentious civil rights debates.

In the relatively unknown 1840 case, *United States v. Dow*, Circuit Judge Roger Taney more than a decade before *Dred Scott* addressed the rights of a Filipino man vis-à-vis whites and demonstrated how the law subordinated and punished Asians as well as African Americans. The Maryland law that Taney applied in *Dow* provided that "negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian white person is concerned . . . ."[27] Similar to laws on the books in other states,[28] the Maryland law targeted "negroes and mulattoes," not Filipinos or Asians generally. Taney in *Dow* extended the language of the law to disadvantage Filipinos, who he viewed as inferior to whites.

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26 *See supra* notes 3–4 and accompanying text.

27 United States v. Dow, 25 Fed. Cas. at 902.

28 *See, e.g.*, People v. Hall, 4 Cal. 399 (1854) (holding that a Chinese person could not testify against a White defendant in a criminal trial). The California Supreme Court in *People v. Hall* upheld a California law similar to Maryland's, explaining in detail its application to Chinese immigrants:

> [t]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench and in our legislative halls. . . . The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds in which they indulge in open violation of the law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the rights to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

Id. at 404–05.

In addition, as is frequently done today with Muslims,[29] Taney in *Dow* combined the common understanding of the races with religion in defining whiteness. He explained that a "Christian white person" had rights under the law, while a non-Christian "Malay" (Filipino) had none.[30] Taney further explained that "[t]he 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."[31] To Taney, the central question under the Maryland statute was whether a Filipino man "is to be regarded as a Christian white person? We think he is not; the Malays have never been ranked by any writer among the white races. . . . [The person at issue] is Malay; and the Malays are not white men, and never have been classed with the white race."[32] Based on that common sense understanding of race and whiteness, Taney concluded that, the Maryland law rendered a Filipino man, just as Blacks and "mulattoes," incompetent to testify against a white criminal defendant.

As Professor Chin further articulates, Taney in *Dow* makes clear that "[e]ven with respect to citizens of color, the rights of non-whites were subject to the political will of *the dominant race*."[33] In Taney's thinking, the "dominant race" was without question the white race; little explanation was necessary or provided. Nor did the law in any way restrict the "political will" of whites in the treatment of non-whites. White supremacy thus is the linchpin of Taney's analysis in *Dow*. His subsequent decision in *Dred Scott* would again enforce white supremacy and demonstrate that it extended to all non-white races.

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29 *See generally* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM (2021) (analyzing how race and religion intersect to socially construct the "racial Muslim").

30 *Dow*, 25 Fed Cas. at 903.

31 *Id*. President Trump today apparently thinks of immigrants of color in much the same way. *See, e.g.*, Eli Watkins & Abby Phillip, *Trump Decries Immigrants from "Shithole Countries" Coming to US*, CNN (Jan. 12, 2018), https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html [https://perma.cc/856U-RH8F] (quoting President Trump decrying immigrants from "shithole countries," such as Haiti and El Salvador, and expressing a preference for white immigrants from Norway); *"Drug Dealers, Criminals, Rapists": What Trump Thinks of Mexicans*, BBC NEWS (Aug. 31, 2016), https://www.bbc.com/news/av/world-us-canada-37230916 [https://perma.cc/47YM-Y5PX] (quoting Trump's derogatory comments about Mexican immigrants in announcing his successful 2016 run for president).

32 *Dow*, 25 Fed. Cas. at 903. Similar discussion of the failure of Chinese immigrants to assimilate can be found in the Supreme Court decision upholding the Chinese Exclusion Act of 1882. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1889).

33 Chin, Dred Scott, *supra* note 14, at 636 (emphasis added).

The overriding principle of white supremacy underlies Chief Justice Taney's analysis in both *Dow* and *Dred Scott*.[34] Whites mastered Blacks. Whites mastered Asians. It would also become clear that whites mastered persons of Mexican ancestry and Indigenous peoples.[35] The white race dominated all non-white races, as defined by whites. As Professor Chin puts it, whites in the eyes of the law were nothing less than "a master race."[36] *Dow* and *Dred Scott* together aptly illustrate how the white "master race" could treat non-whites as it saw fit, a practice that has prevailed in some form through to the present.

Professor Chin's insightful analysis of *Dow v. United States* standing alone is an important contribution to Asian American and civil rights scholarship. Moreover, as will be explained,[37] his insights about the centrality of white supremacy to the subordination of all non-whites is entirely consistent with the teachings of contemporary Critical Race Theory.

A famous passage from *Dred Scott*, which focuses on the power of whites to define the rights of inferior races of people (and in no way is limited to African Americans), offers additional powerful insights into the core meaning of the decision in endorsing white supremacy over all non-white races and thus the decision's racial breadth beyond African Americans. It unmistakably builds on Taney's identification of the guiding principle of white supremacy in *Dow*. Chief Justice Taney emphatically wrote in *Dred Scott* that Blacks are "*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* . . . ."[38] This most revealing passage from *Dred Scott* demonstrates that, to Chief Justice Taney, white supremacy, not only African American inferiority and subordination, is the core principle underlying the Court's holding.

Combined with his opinion in *Dow*, the deeper meaning of *Dred Scott*—that white supremacy reigned—could not be clearer. African Americans are only one of the non-white races classified as inferior by whites. As *Dow* and

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34 For analysis of the emergence of White supremacy as a central principle of social organization in California and Texas, see TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1999).

35 *See* Leticia M. Saucedo, Property, Conquest and White Sovereignty (2021) (unpublished manuscript) (on file with author) (analyzing Chief Justice Taney's opinion in *Fremont v. United States*, 58 U.S. 542 (1854), which resulted in the transfer of property in the United States from Mexican citizens to Anglos).

36 Chin, Dred Scott, supra note 14, at 638.

37 *See infra* Section II.B.

38 *Dred Scott v. Sandford*, 60 U.S. at 407 (emphasis added).

Dred Scott read in tandem demonstrate, whites possess the sole and exclusive power to determine which races were non-white and thus per se inferior. Unquestionably, at the pinnacle of the nation's racial hierarchy, whites could define, without constitutional or other legal restrictions, the races that were inferior, and thus subject to the political will of whites in determining what legal rights they possessed. *Dred Scott* ultimately stands for the powerful proposition that non-whites were "beings of an inferior order" as defined by whites and held no legal rights except those recognized by whites. Of course, that is the very epitome of white supremacy.

As the nineteenth century came to a close, the multiplicity of inferior races subject to the destructive power of white supremacy in the United States became increasingly evident. A prolonged period at the end of the century saw widespread discrimination and violence directed at Chinese immigrants, demonstrating once and for all that rabid racial animus in the United States was not limited to African Americans.[39] That was entirely consistent with Roger Taney's classification of Filipinos as non-white in *Dow*. While the violence of Reconstruction and the social war over the integration of freed slaves into U.S. society wracked the nation,[40] anti-Chinese political agitation and violence ran rampant, especially in the Western part of the United States. A virtual tidal wave of anti-Chinese laws followed, including the infamous Chinese Exclusion Act of 1882[41] barring almost all immigration from China to the country. White vigilante mobs during this period regularly terrorized Chinese residents through deadly violence and literally sought to chase them out of Western towns in what amounted to an attempt at what today would be called an ethnic cleansing.[42] At the same historical moment,

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39 *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1943–49 (2000) (analyzing the widespread legal subordination of the Chinese in the 1800s).

40 *See generally* JEFFERY A. JENKINS & JUSTIN PECK, CONGRESS AND THE FIRST CIVIL RIGHTS ERA, 1861–1918 (2021) (reviewing in detail the political maneuvering in Congress over Reconstruction legislation after the Civil War).

41 Pub. L. No. 47-128, 23 Stat. 58 (1882); *see* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (rejecting constitutional challenges to the Chinese Exclusion Act and holding that the courts could not review the constitutionally of the U.S. immigration laws). *See generally* Chin, *Segregation's Last Stronghold*, *supra* note 10 (analyzing the bar on the constitutional review of the immigration laws, with the political branches of government having absolute power over immigration).

42 *See* Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. (forthcoming 2022). *See generally* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION AND THE MAKING OF THE ALIEN IN AMERICA (2018) (analyzing the discrimination and violence directed at Chinese immigrants in the United States); JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS (2007) (to the same effect).

all-too-frequent lynchings of African Americans in towns and cities across the United States generally went unpunished by the law.[43] This same era also saw the U.S. military slaughter thousands of native peoples with impunity.[44]

Even after the Reconstruction Amendments to the Constitution rendered *Dred Scott* legally obsolete, the racial hierarchy in the law, and the white supremacy that it enforced, continued unabated in new and different forms. White supremacy unquestionably was a constant in the law. Although frequently cloaked in color-blind laws and policies, racial subordination of African Americans, Asian Americans, Latinx persons, Indigenous peoples, Muslims, and other non-white groups, as defined by whites, continues to this day.[45] Consequently, stark racial disparities exist in U.S. society with respect to voting, housing, employment, education, health, and virtually every aspect of social life. The killings of George Floyd, Breonna Taylor, and other African Americans by police,[46] the epidemic of hate crimes against Asian Americans during the pandemic,[47] and mass detention and deportation of Latinx immigrants[48] are painful contemporary reminders of white supremacy at work. Law plays a central role in its maintenance and replication.

B. Critical Race Theory and White Supremacy

In the end, Professor Chin demonstrates something in Dred Scott *and Asian Americans* that he may not have intended: Roger Taney's opinions in *United States v. Dow* and *Dred Scott v. Sandford* in combination lend powerful illustrations of the central understanding of Critical Race Theory (CRT) that

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43 *See generally* AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861–1900: BLACK FREEDOM/WHITE VIOLENCE 1865–1900 (Donald G. Nieman, ed. 1994) (reviewing the widespread violence directed at African Americans after the Civil War).

44 *See American-Indian Wars*, HISTORY.COM (Nov. 17, 2019), https://www.history.com/topics/native-american-history/american-indian-wars [https://perma.cc/C5MD-2B28].

45 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th ann. Ed. 2020) (analyzing critically the systematic racial injustice of the modern criminal justice system in the United States).

46 *See, e.g.,* Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years for the Murder of George Floyd*, NBC NEWS (June 25, 2021), https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332 [https://perma.cc/M48F-HKGP].

47 *See* ASIAN AM. BAR ASS'N OF N.Y., A RISING TIDE OF HATE AND VIOLENCE AGAINST ASIAN AMERICANS IN NEW YORK CITY DURING COVID-19: IMPACT, CAUSES, SOLUTIONS (2021), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf [https://perma.cc/U846-SC8E].

48 *See generally* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019) (reviewing the Trump Administration's series of immigration enforcement measures directed at Latinx noncitizens).

law protects, legitimates, and replicates white supremacy.[49] While CRT condemns that function of the law, Taney unabashedly embraced it. Read together with *Dow*, *Dred Scott* represented a principle well beyond the supposed inferiority of, and denial of rights to, African Americans, which, of course, was at the forefront of the nation's racial consciousness as the Civil War neared. As Professor Chin cogently and insightfully explains, *Dred Scott* in fact stands for unbridled white domination of *all* non-whites, not only African Americans.

As CRT teaches, the desire to maintain and enforce white supremacy helps explain the simultaneous development of many bodies of law subordinating communities of color. In that way, *Dred Scott*, and its focus on African Americans, simply represented the tip of the proverbial iceberg of racial domination in the United States. Roger Taney's earlier decision in *Dow* places in perspective how, despite being expressly overruled by the Reconstruction Amendments to the Constitution following the Civil War, *Dred Scott*'s deep commitment to white supremacy endures to this day. That is the case even though the decision is widely understood today as a dramatic, despicable, and discarded symbol of African American subordination. History has severely marginalized *Dred Scott's* continuing racially discriminatory influence and impacts even though its enduring legacy of white supremacy remains firmly intact.

From *Plessy v. Ferguson* (1896)[50] and "separate but equal," to *Korematsu v. United States* (1944),[51] which upheld the internment of the Japanese during World War II, to *Trump v. Hawaii* (2018),[52] refusing to disturb President Trump's ban on Muslim immigration, racial subordination and white supremacy continued to be firmly entrenched in the law long after the formal constitutional repudiation of *Dred Scott*. White supremacy, of course, also dominated the law long before the infamous decision endorsing white power over non-whites. One clear example is the naturalization statute, first enacted by Congress in 1790, which limited eligibility for citizenship to white

49 *See supra* notes 1–4 and accompanying text.

50 *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

51 *See* Korematsu v. United States, 323 U.S. 214 (1944) (rejecting constitutional challenges to the internment of persons of Japanese ancestry during World War II), *overruled*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

52 138 S. Ct. 2392 (2018).

immigrants (with the statute amended after the Civil War to allow immigrants of African descent to naturalize).[53]

Drawing deep insights about race and racism in the American consciousness from *Dow* and *Dred Scott*, Professor Chin rightly observes that the two decisions "were the first federal cases articulating a political theory of race and racial status in the United States."[54] A corollary of the principle of white supremacy, the concept that race is a social and political construction, not one based in biology and science, is a central tenet of CRT.[55] Roger Taney fully embraced the notion that race is a social and political construction, and believed that whites had sole and exclusive power to determine who was white and what rights, if any, non-whites possessed. In his political theory of race and racial status, Taney adopted the conception of race as a social and political construction long before it was generally embraced by CRT.

CRT views the subordination of different non-white groups as governed by the overarching principle of white supremacy.[56] As acknowledged by Taney in *Dow* and *Dred Scott*, the political will of whites determined that Asians and African Americans would be subject to discrimination and denied the full rights of U.S. citizens. The same was true for Indigenous peoples, treated as "savages" under the law.[57] White supremacy binds the complex, and inextricably related, systems of racial subordination in U.S. history as well as in modern times.

Contemporary events illustrate the relationship between the subordination of different non-white racial groups. Under President Trump, Latinx and Muslim immigrants by design suffered the wrath of ever-tougher immigration law and policy.[58] As the Trump presidency waned, a spree of police killings of African Americans triggered mass protests in cities across the country; that in turn caused a powerful, and violent, counter-reaction by

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53 *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th ann. Ed. 2006) (analyzing judicial application of the law barring Asian immigrants from naturalizing and becoming U.S. citizens).

54 Chin, Dred Scott, *supra* note 14, at 636 (footnote omitted).

55 *See e.g.*, Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2014) (analyzing the social construction of race).

56 *See supra* notes 1–4 and text accompanying notes (citing authority).

57 *See generally* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) (analyzing the impacts of the concerns with Indigenous peoples on the framing of the U.S. Constitution).

58 *See supra* text accompanying note & note 48 (citing authority).

the U.S. government.[59] With the global pandemic exacerbating racial ferment in U.S. society, hate violence against Asians escalated to frightening levels.[60] An attempted coup led by armed white supremacists in January 2021 reveals the stunning and fervent passion behind the modern forces dedicated to defending and maintaining the vestiges of white supremacy.[61] Almost simultaneously, President Trump vigorously attacked Critical Race Theory and its intellectual challenge to white power.[62] These racial developments in combination reveal the deep contestation of white supremacy in contemporary U.S. society.

CONCLUSION

In a thoughtful excavation of an important decision discriminating against Asian Americans by a famous jurist, Professor Jack Chin provides much food for thought about racial subordination throughout U.S. history. Not only enforcing African American inferiority and subordination, *Dred Scott* is a ringing endorsement of white supremacy over *all* non-whites. The unquestioned villain of *Dred Scott*, Chief Justice Roger Taney fully understood the core unifying principle of white supremacy in U.S. law and social life in the subordination of all non-whites. His opinions in *United States v. Dow* and *Dred Scott v. Sandford* together reveal his enduring commitment to the unquestioned domination of non-whites by whites in the nation's racial hierarchy, enforced by law and, at that time, truly legal in every sense of the word. The tandem of Taney opinions reveals volumes about how white supremacy informed and justified the various forms of discrimination in U.S. society against a variety of non-white racial groups throughout U.S. history.

Today, from a vastly different vantage point—condemning, not enforcing, racial subordination, the central tenets of Critical Race Theory are entirely consistent with Chief Justice Taney's views about the relationship between the legal subordination of different racial groups and the political and social construction of race. With white supremacy the core organizing principle of his racial paradigm, Chief Justice Taney's understanding of racial power dynamics squares with CRT's modern explanation of racial subordination in the United States. In essence, Chief Justice Taney's analysis

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59 *See* ASSOCIATED PRESS, *Portland Protest Groups Sue U.S. Over Tear Gas, Rubber Bullets*, POLITICO (July 28, 2020, 3:20 PM), https://www.politico.com/news/2020/07/28/portland-protest-groups-sue-tear-gas-rubber-bullets-384758 [https://perma.cc/V782-3XRB].

60 *See supra* note 47 and text accompanying note.

61 *See supra* note 8 and accompanying text.

62 *See supra* note 9 and accompanying text.

of issues of race, as exemplified by *Dow* and *Dred Scott*, lends powerful support to the fundamental CRT insights that white supremacy ties together the subordination of many diverse communities of color and allows whites under color of law to define non-whites and their legal rights. Unfortunately, even though *Dred Scott* officially is not the law of the land, its modern legacy of white supremacy lives on.