7-4-2007

Considering Reparations for the Dred Scott Case

Alfred L. Brophy
University of Alabama - School of Law, abrophy@law.ua.edu

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Christopher Bracey, David Konig and Paul Finkelman, editors
Dred Scott
Ohio State University Press (forthcoming 2008)

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Abstract

Considering Reparations for the Dred Scott Case, which was prepared for a volume reassessing Dred Scott on its 150th anniversary, asks how the case might fit into discussion of reparations for slavery. Is some reparative action advisable for that case standing by itself? Or might Dred Scott be used as part of a larger discussion. The brief essay begins with a brief assessment of where the movement for reparations for slavery is right now; then it turns to the case and asks what the Supreme Court's culpability might be and what, if any, harm the opinion causes today. The paper then turns to what reparations models might fit Dred Scott *today, including a truth commission, apology, or reconstructed doctrine surrounding the Reconstruction Amendments.*

Among the many tragedies of our country's history of slavery is that it left a deep, virtually inexhaustible, well of injury. There is no way to provide compensation for each injury of the past, nor for the unspeakable crimes of brutalization that took place under slavery.[2] And those crimes continue, in some ways, to multiply, for the injury and lack of hope continue from one generation to the next. As Randall Robinson has stated it, slavery "produces

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[1] Professor of Law, University of Alabama. I would like to thank Christopher Bracey, David Konig, and Paul Finkelman for inviting me to contribute to their volume on *Dred Scott* and for their assistance.

[2] *See* Alfred L. Brophy, *Reconsidering Reparations*, 81 INDIANA L.J. 813 (2006) (discussing problems of trying to order claimants to reparations).

victims *ad infinitum*, long after the active state of the crime has ended."[3] It is humanly, as well as financially, well-nigh impossible to provide a complete remedy. Some argue that there have been off-sets, from the Civil War to the war on poverty; but seemingly no matter how large the payments, a bill for tort damages–were it ever presented–would be astronomical.[4]

As a result, reparations advocates must find some principles for deciding which tragedies and which claimants will receive some form of compensation. But advocates of reparations have larger problems than trying to quantify the harms or select among recipients or apportion even limited payments. For those they would ask for compensation–the American voting public–do not want to hear those claims, as poll data reveal. When the *Mobile [Alabama] Register* polled on reparations for slavery in 2002, something like 67% of black Alabamians were in favor, while something like 5% of white Alabamians were in favor. It is "something like," because some white people became so enraged at the mere suggestion of reparations that they could not complete the poll. As a result, it was difficult to get an accurate sample.[5] Lest one think that Alabama is different from the rest of the country on this issue, those figures are pretty much the same as the United States as a whole.[6] We have a long way to go before people are even willing to contemplate, let along vote for, reparations. The figures for apologies are somewhat more

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[3] R ANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 216 (2000).

[4] *See* Alfred L. Brophy, *Reparations Talk: The Tort Law Analogy in Reparations*, 23 B.C. THIRD WORLD L.J. 81, 115-30 (2004) (discussing analogies to tort law for measuring damage due to slavery).

[5] *See* Alfred L. Brophy, *Reparations Pro and Con* 4-5 (2006).

[6] Michael C. Dawson & Rovana Popoff, *Reparations: Justice and Greed in Black and White*, 1 DUBOIS REV. 47, 62 (2004).

balanced. About twenty-five percent of white Alabamians believed in 2002 an apology for slavery was appropriate.

There are many places one might look for talk about reparations. There is talk of reparations (and occasionally action) for large-scale crimes, from the internment of more than 100,000 Japanese-Americans during World War II, to the deprivation of property from families of victims of the Holocaust. There is also talk of reparations for crimes that were large but more focused, such the Tulsa riot of 1921. There is also more general action, like apologies by the Virginia, Maryland, and North Carolina legislatures for their involvement in slavery and even a few investigations and apologies from universities of their role in the institution of slavery. Brown University's Steering on Slavery and Justice's comprehensive investigation of Brown's connections to slavery serves as a model for other schools.[7] Both the University of Alabama and University of Virginia have issued apologies for their connections to slavery.[8]

There remains resistance to talking about reparative action on a nationwide scale, which will address in significant ways such issues as the chasm between African American and non-Hispanic white income. The Great Society may provide a model for the scope and expense of such a program; as yet, we are too far away from such comprehensive plans to have a good idea of what they might look like or even what they would cost.[9] Those large-scale, often amorphous,

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[7] http://www.brown.edu/Research/Slavery_Justice/

[8] Andy Guess, Facing Up to a Role in Slavery (April 25, 2007), available at: http://insidehighered.com/news/2007/04/25/uvaslavery

[9] *See, e.g.,* Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. CIVIL RIGHTS- CIVIL LIB. L. REV. 279 (2003); Charles J. Ogletree, *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEMPHIS L. REV. 245 (2003).

programs are part of an attempt to deal with general societal discrimination, which the Supreme Court–and the American public more generally–have viewed with suspicion in recent years.[10] Something that is often missing from "reparations talk" is a specific plan for repairing for past tragedies.

This volume on the *Dred Scott* case invites two sets of questions related to reparations. First, what was the culpability of the Supreme Court in *Dred Scott*? How do we even measure that culpability? Should we ask questions like, was the Supreme Court merely carrying out "the law" (however that is interpreted) or was it contributing its own proslavery interpretation? What effect did the decision have? Second, what are we to make of that legacy today? Is there something that should be done either by the Supreme Court or someone else to repair for this decision in particular? Should we separate our *Dred Scott* from the rest of our nation's actions to protect slavery? I hope to use the *Dred Scott* decision as a site for exploring the issues of reparations for specific past racial crimes in two ways: first, by understanding how we might

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[10] *See City of Richmond, Appellant v. J. A. Croson Company,* 488 U.S. 469, 499 (1989) (requiring evidence of discrimination in the construction industry in Richmond, Virginia, in the past–rather than general evidence of societal discrimination). As Justice O'Connor wrote in the majority opinion,

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Seel also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276–77 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A] public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.").

measure the harm of a specific past even. Then, second, by trying to understand how we might pick among the matrix of possible responses to those events.

Culpability of the Supreme Court for *Dred Scott*

In assessing the Supreme Court's culpability in *Dred Scott*, we might start by remembering that the opinion is about a human being–in fact, about a number of human beings, as Lea VanderVelde's work reminds us. For the opinion implicated the freedom of Harriet Scott and their children, as well as Dred Scott.[11] Even the name of the opinion ought to serve as a reminder of the human interests involved here, although perhaps there is something that also is disturbing about continuing to refer to a case by the name of the "property" involved, much as admiralty cases involved the name of the ship.[12]

But beyond the opinion's role in keeping the shackles of slavery fastened upon the Scott family for at least a limited time, we ought to begin to assess the opinion's impact, as well as its relationship to other proslavery actions by state and federal courts and legislatures. There are the other cases of people traveling in territories who could no longer claim freedom on the basis, what one might call the immediate doctrinal impact. Then there is the larger impact: the subordination of the rights of African Americans; the delimiting of Congressional power over the territories and, thus, the nationalization fo slavery; and the legitimacy that it gave to a proslavery interpretation of the Constitution.

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[11] *See* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

[12] At least I once thought so, which accounts for why in my first published work I referred to the case as *Scott v. Sanford*. *See* Alfred L. Brophy, *"Let Us Go Back and State Upon the Constitution": Federal-State Relations in Scott v. Sanford*, 90 COLUM. L. REV. 192 (1990).

Two of the under-recognized elements in the proslavery movement are the contributions of both professors and judges to the movement. In the rush to talk about legislative expressions of proslavery, we forget that much of the proslavery argument was generated and refined in the academy.[13] Thomas Roderick Dew, Albert Taylor Bledsoe, William Smith, George Frederick Holmes, Thomas R.R. Cobb, and a host of other now-obscure professors, developed in substantial depth the proslavery argument. They worked in conjunction with judges like Thomas Ruffin and Henry Lumpkin who developed a comprehensive proslavery doctrine. Amidst all of the recent writing on southern intellectual history, from Michael O'Brien's *Conjectures of Order* to Elizabeth Fox-Genovese's and Eugene Genovese's *Mind of the Master Class*, the stories of those judicial and academic progenitors and promulgators of proslavery thought is surprisingly absent.

Throughout the antebellum period, the Supreme Court issued proslavery opinions. As a judge said in Harriet Beecher Stowe's 1856 novel *Dred: A Tale of the Great Dismal Swamp*, "from the communities--from the great institutions in society--no help whatever is to be expected."[14] The proslavery opinions are legion, especially in the years leading into *Dred Scott*.

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[13] SEE GENERALLY DAVIS BOWMAN, MASTERS AND LORDS: MID-19TH-CENTURY U.S. PLANTERS AND PRUSSIAN JUNKERS (1993); EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION (2006); DREW FAUST, A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH (1978) (interpreting proslavery argument as the product of intellectuals who sought to make themselves relevant). Yet, many of the leaders of the movement, like judges, were people at the forefront of southern society. While intellectuals may have employed such arguments to participate in Southern culture, the arguments reached well beyond them. *See*, *e.g.,* DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH (Paul Finkelman, ed., 2003).

[14] 2 HARRIET BEECHER STOWE, DRED: A TALE OF THE GREAT DISMAL SWAMP 76 (Boston: Phillips, Sampson & Co., 1856).

Those opinions, which rested on the understanding of the centrality of slavery to American life and the need to allow states extraordinary power over it include *Groves v. Slaughter* (essentially freeing Mississippi from the constraints of the federal regulation of interstate slavery) and *Prigg v. Pennsylvania* (setting the stage for federal intrusion into Northern states through the Fugitive Slave Act of 1850). At the state level, there are a number of opinions that upheld slavery at points where there might have been alternatives. The infamous 1829 North Carolina *State v. Mann* opinion delimited control over white people's physical punishment of slaves in their possession; other cases restricted, for example, emancipation by will.[15]

In its attempt to strip Congress of the power to decide for the territories, the Supreme Court adopted a decidedly southern and proslavery interpretation of the Constitution. Much can be (and has been) said about whether that was appropriate; this is important in thinking about the Supreme Court's culpability. For if the Supreme Court was merely adopting what others had wrought, they would be a part of a larger system. If, however, it went beyond that, and became an advance advocate for proslavery thought, then it has additional culpability.

So what, then, do we make of the opinion's two prongs, which struck down the Congress' power over the territories and, therefore, the Missouri Compromise and that excluded African Americans from the protection of citizenship. Until recently, the weight of historical opinion, illustrated by Don Fehrenbacher's 1978 *The Dred Scott Opinion in Law and Politics* and William

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[15] *See, e.g.,* Bailey v. Poindexter's Ex'r, 14 Gratt. 132 (Va. 1858) (denying enforcement to a will that permitted slaves to choose emancipation or continued slavery); Read v. Manning 1 George 308 (Miss.Err.App 1855) (applying Mississippi statute that prohibited emancipation by will); Hinds v. Brazeale, 2 Howard (Miss.) 837 (1837).

Wiecek's work,[16] was that the Taney Court was wrong. Those looking at it concluded it was wrong for several reasons. It decided issues that were not necessary to the decision of the case–like the constitutionality of the Missouri Compromise. It was wrong because it supposed that there might be a "constitutional" settlement of largely political issues. And it was wrong because it substituted a Southern interpretation of the Constitution–developed largely in the 1840s–in place of what people had understood as constitutional up to that point.

If the constitutionality of the Missouri Compromise were settled by reference to the accepted notions of constitutionalism at the time, it appeared to be constitutional. In 1820 when the Missouri Compromise was adopted, no one thought it beyond the scope of Congress' authority to prohibit slavery in the territories. However, in the subsequent years, under an increasingly proslavery interpretation of the Constitution, it became common doctrine among some that whatever was permitted by one state had to be allowed in the territories. John C. Calhoun advocated this strenuously. And in a series of other places, from the crisis over abolitionist literature sent through the United States mail to the interstate sale of slaves, to the rendition of fugitive slaves, this increasingly proslavery constitutional doctrine took hold.[17]

Even the antislavery forces understood the nature of the proslavery constitution. In fact, there is a lot of wisdom about popular constitutionalism that appears in those works, as well as much learning on jurisprudence. For much of the abolitionist attack was a critique of the law of slavery, as well as the slave system. And while some like Lysander Spooner argued fancifully

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[16] *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE IN LAW AND POLITICS (1978); William Wiecek, *Slavery and Abolition before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34-59 (1978).

[17] *See* Brophy, *supra* note 12, at 204-06, 223-24.

(and unsuccessfully) that the Constitution was anti-slavery,[18] the collection of excerpts from Madison's notes, *The Constitution A Pro-Slavery Compact*, was more accurate. William Goodell's *American Slave Code in Theory and Practice* and William Weld's *Slavery as It Is* both relied extensively on statutes and cases for evidence about the nature of slavery. Goodell's understanding of the legal system made his books important treatises on jurisprudence–about the gap between law and justice and the gap between law on the books and law in practice. In short, the Supreme Court's proslavery jurisprudence comes as no surprise.

Nevertheless, the main stream of historical scholarship has seen *Dred Scott* as an outlier, even in the proslavery constitutional world of the antebellum era.[19] Two recent and important accounts have called that account into question. Austin Allen's *Origins of the Dred Scott Case* maintains that Taney's broad opinion was necessary, given the precedent and professional norms of the time.[20] Mark Graber's *Dred Scott and the Problem of Constitutional Evil* also interprets the case as in line with precedent.[21] However, it also suggests that certain problems, like slavery, were inherent in the Constitution as drafted (hence the "problem of constitutional evil.") One aspect that separates Allen and Graber from the mainstream of writing on *Dred Scott* is the former's willingness to accept the opinion as reasonable constitutional doctrine at the time. If the opinion was, indeed, within the mainstream of constitutional thought, then that is testimony to

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[18] *See, e.g.,* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845).

[19] *See, e.g.,* FEHRENBACHER, *supra* note 16.

[20] AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857 (2006).

[21] MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

just how far proslavery Southerners bent both constitutional thought and practice. If it was consistent with law, that testifies both to the amount that the law was bent between the Missouri Compromise and 1857, by the steady proslavery drift of popular thought. Certainly many people at the time believed it an extreme opinion–beyond what was necessary to keep the Scotts in slavery.

Abraham Lincoln discussed the partisan and extreme nature of the opinion shortly after it was issued. He did not resist the opinion, but he urged that it be overturned at some point. The case for overturning was in part that it was so erroneous:

> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.[22]

Amidst all the recent talk of "popular constitutionalism," there has been surprisingly little talk of the ways that popular, Southern thought migrated into Chief Justice Taney's opinion. For the opinion goes a long way towards establishing a distinctly Southern interpretation of federalism. Much of this derives from ideas that John C. Calhoun popularized.[23] Moreover, these ideas had been percolating in the judiciary for a while. Key pieces of Dred Scott appeared

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[22] Abraham Lincoln, *Speech on the Dred Scott Decision, June 26, 1857*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832-1858 388, 393 (Don E. Fehrenbacher ed. 1989).

[23] *See* Cong. Globe, 25th Cong., 2d Sess. app. 55, 58-59 (1838) (speech of Sen. John C. Calhoun) (resolutions regarding slavery in the territories); Cong. Globe, 31st Cong., 1st Sess. app. 375, 379 (1850) (speech of Sen. Robert M.T. Hunter) (whatever is recognized as property by individual states must be protected in the territories).

in the California Supreme Court's opinion *In re Perkins* several years before, in 1852.[24] Certainly at the time the dissenting justices and others believed that the opinion was the result of a political, rather than a legal interpretation:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[25]

That leads to the question: what was the effect of the opinion? Did it really lead, as some historians have suggested, to the Civil War? If it did, perhaps we ought to think about this as a critical piece of our liberation as a people, for it may have created an environment in which slavery was ended. At least after the war, it led in pretty direct ways to the adoption of the Fourteenth Amendment.

Perhaps, then, we ought to establish a monument to Taney for the contribution it made to the war and to Reconstruction afterwards. There is a similar strain of reasoning about the Compromise of 1850–that the Compromise allowed the nation to stay together long enough that when secession finally came, the United States was strong enough to fight and win the Civil War.[26] Whatever the merits of that argument regarding the Compromise of 1850, I suspect that argument is less meritorious when applied to *Dred Scott* (at least in regard to coming of war). I suspect that the decision contributed relatively little to the coming of the Civil War; that in the

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[24] In Re Perkins, 2 Cal. 424, 455-56 (1852) (applying the ideas expressed in the resolutions to determine the right of slave owner to slaves brought into California).

[25] Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857).

[26] *See* DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861 120 (1976).

multiple regression equation that explains our country's journey towards Civil War, the *Dred Scott* decision was relatively unimportant and that its major contribution was not in creating a blacklash, but in undermining legitimate opposition to slavery.

Dred Scott's major "contribution" to antebellum politics and law was most likely to further legitimize the proslavery view of the Constitution and establish the framework for a new, proslavery federalism. In that way, it give sustenance to the proslavery zealots in the years leading into Civil War. In the brief interval between its March 1857 announcement and the beginning of war in April 1861, it contributed to the intellectual machinery that supported slavery. It was part of a sophisticated defense of slavery by the leaders of American society. It also brought the Supreme Court and the rule of law into disrepute, though that was already underway, because of the Fugitive Slave Act of 1850. The corrosive effects on respect for the rule of law is illustrated by a statement in the New York Tribune that the opinion is entitled to as much weight as "the judgment of a majority of those congregated in any Washington barroom."[27]

Much as *Brown v. Board of Education* nearly one hundred years later seems to have legitimized the Civil Rights movement,[28] *Dred Scott* provided the Supreme Court's stamp of approval on the Southern interpretation of the Constitution.

What is the Harm Now?

Leaving aside the history of *Dred Scott*, there is the separate and important question:

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[27] FEHRENBACHER, *supra* note 16, at 417.

[28] *See, e.g.,* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 15-31 (1998) (assessing the multiple strands leading to *Brown* and its triumph); Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973 (2005) (reviewing MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR EQUALITY (2004)).

what, if anything, ought to be done about it now? Part of this turns on an analysis of the opinion's continuing harm. It is a piece of the legacy of slavery, though it may be particularly hard to tease out what is unique about the harm it imposed. In fact, given *Dred Scott*'s central role in the defense of slavery and its status as representative of the evil of slavery, perhaps it should occupy a central piece in the discussion of reparations. Perhaps *Dred Scott* should be at the center of discussion of an attempt to correct for "general societal discrimination." It may stand for the damage that the institution of slavery has left upon our country.

If, however, we want to try to be more specific about the opinion's continuing effect, there may be two places to look. The most likely potential harm is the statement it makes about the nature of the Constitution and the role of African Americans in our country. It is an odious statement, to be sure. For one of the most frequently quoted phrases of the opinion is Chief Justice Taney's statement that blacks "had for more than a century before been 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."[29] One certainly hopes that there are few people who take solace in Taney's white supremacy. *Dred Scott* has been served as evidence of the evil world of slavery.[30]

Rarely in the twentieth century were any of its propositions cited approvingly. I think the

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[29] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

[30] *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) ("In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination.") (citing, among other cases, *Dred Scott*); McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (citing *Dred Scott* for evidence of the history of white supremacy); Regents of University of California v. Bakke, 438 U.S. 265, 389-90 (1978) (same).

most positive statement in the last one hundred years about *Dred Scott* in a majority opinion was *Seminole Tribe of Florida v. Florida's* nod to it in a footnote, which said that even *Dred Scott* recognized the Constitution established a new federalism.[31] The footnote was not endorsing *Dred Scott*; yet, the purpose served by citation of *Dred Scott* is unclear. There has, however, been extensive quotation from it recently in the United States Court of Appeals' decision upholding an individual rights' interpretation of the Second Amendment in *Parker v. District of Columbia.*[32] The court in *Parker* focused on rights of citizens in the territories to have firearms; however, one of Taney's fears in *Dred Scott* seems to be that if Scott were a citizen, he would be entitled to all the privileges and immunities of other citizens, and he would be free from Maryland's local regulations.[33]

The second harm is that there may be fragments of doctrine that have not yet been overturned. A number of Supreme Court cases recognized that the Fourteenth Amendment was designed to overturn Dred Scott's exclusion of African Americans from the privileges of United States citizenship.[34]

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[31] 517 U.S. 44, 152 n. 43 (1996) ("Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott v. Sandford*, . . . recognized as a structural matter that '[t]he new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one.'") (citation omitted).

Another early twentieth-century case took *Dred Scott* seriously as a matter of application of the Constitution to the territories. *See* Downes v. Bidwell, 182 U.S. 244, 250 (1901).

[32] 478 F.3d 370, 391 (D.C. Cir. 2007).

[33] 60 U.S. 393, 425 (1857).

[34] Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, dissenting) ("The paramount reason was to amend the Constitution so as to overrule explicitly the *Dred Scott* decision.").

In 1999, in *Saenz v. Roe*, the Supreme Court again recognized that the Fourteenth Amendment overruled Dred Scott's exclusion of African Americans from the privileges and immunities of national citizenship.[35] Justice Stevens wrote that "The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship."[36] Yet the Reconstruction-era Supreme Court narrowly interpreted the privileges and immunities clause and has refused to rebuild a privileges and immunities clause jurisprudence since then. In short, we need a more expansive view of the protections of citizenship.[37] And perhaps one way of overcoming the final legacy of *Dred Scott*, these many years, is a reconstructed interpretation of the Fourteenth Amendment's privileges and immunities clause.[38] That is not so much reparations for *Dred Scott*–for the Reconstruction Congress already tried to overturn it. It would, however,

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[35] 526 U.S. 489, 502 n.15 (1999) (citing CONG. GLOBE, 39th Cong., 1st Sess., 1033-1034 (1866) (statement of Rep. Bingham)).

[36] *Id.* Afroyim v. Rusk, 387 U.S. 253, 263 (1967) likewise recognized that the Fourteenth Amendment was designed to overturn Dred Scott. It quoted Senator Jacob Howard, the Amendment's sponsored in the Senate:

> 'It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. * * * We desired to put this question of citizenship and the rights of citizens * * * under the civil rights bill beyond the legislative power * * *.' Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).

[37] *See, e.g.,* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999).

[38] *See, e.g.,* John Nowak, *The Gang of Five & The Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000); Norman Spaulding, *Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUMBIA L. REV.1992 (2003).

be overturning a final fragment of the doctrine from the era of slavery and Civil War.

What to Do Now: Reparations Models

Given those assessments of the continuing harms, we can turn to the perplexing question: what might be the appropriate remedy? Often reparations advocates address wholesale, society issues. Charles Ogletree and Robert Westley, two of the leading advocates of African American reparations, are interested in wide-spread, grand programs. Their models look like renewed versions of the Great Society.[39] *Dred Scott* will certainly be at the center of discussion of slavery reparations, for it provides such critical evidence of the comprehensive government involvement in slavery.[40]

One is left wondering, however, whether there is a way to bridge the gap between those grand designs and programs designed to repair for more specific past harms, like the *Dred Scott* opinion. What might the Missouri Supreme Court or the United States Supreme Court do to address their predecessors' decisions? Perhaps we can build upward from talk of *Dred Scott* to a better understanding of our history, to a truth commission, to perhaps something more. If we are interested in understanding the connections of past and present and of the changes in public attitudes that may correlate with such altered understandings, then we should look for ways of achieving those goals. Which of the "multiple strategies" of reparations, to use Eric Miller's

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[39] *See, e.g.,* Ogletree, *Repairing the Past*, *supra* note 9; Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*, 40 BOSTON COLLEGE LAW REVIEW 429-476 (1998).

[40] *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (2001).

phrasing, are most likely to be successful?[41]

Considering Truth Commissions

In this task, there are some models of repair in specific locations. The most common and popular are truth commissions. In the recent past there have been the Tulsa Riot Commission,[42] the 1898 Wilmington Race Riot Commission,[43] the California Slavery Era Insurance Disclosure Act, which led to the "Slavery Era Insurance Registry," a registry of names of slaves who were insured by companies still doing business and the slave-owners who insured them;[44] the Chicago Slavery Disclosure Era Ordinance, which has led to apologies by companies including JP Morgan Chase.[45] Native Hawaiians received an apology from the Federal government in 1993, which was subsequently used as a basis for granting relief in a case involving a trust for the education of Hawaiian children.[46]

There may be a particular need for study of the *Dred Scott* decision and its impact, for public knowledge about the era of slavery is inadequate. At a basic level, we need to address the

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[41] Eric L. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L. REV. 45 (2004).

[42] http://www.ok-history.mus.ok.us/trrc/freport.htm

[43] http://www.ah.dcr.state.nc.us/1898-wrrc/

[44] http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/x

[45] JP Morgan Chase Admits US Slavery Links, BBC News (January 21, 2005), available at: http://news.bbc.co.uk/2/hi/business/4193797.stm

See also ROY BROOKS, ATONEMENT AND FORGIVENESS 157-59 (2005) (discussing proposal for a museum of slavery).

[46] *See* Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141, 1154 (D. Haw. 2003), aff'd en banc 470 F.3d 827, 831, 845 (9th Cir. 2006) (citing apology).

public memory and understanding of our history, which respects the contributions of African Americans and respects and understands the suffering and disability that is the legacy of slavery and Jim Crow. We have an exceedingly long way to go in bringing understanding of basic facts of American history–like the horror that was slavery, as well as the role of slavery in impelling the South towards Civil War–to the public.

To take one example, the *New York Times* provided extensive coverage of the controversies over Sewanee: The University of the South's downplaying of its connections to the Confederacy.[47] One alumnus wrote a sixty-page manifesto to defend Sewanee's unique place, what he called its "provincialism." Among the things that he says in defense of the Confederate symbols on the campus is that slavery was a benign Christian institution:

> The Nazis had a very different relationship with the Jews than the slave owners had with their legal property, whom they fed, clothed, housed, and lovingly baptized into Christ's redeeming salvation. On the Old South plantation, the Master and his Lady and servants and the field hands constituted an interdependent family community, and when most successful, it was noted for mutual affection and shared devotion.[48]

While slavery may have been benign in some instances, this description has more to do with the "moonlight and magnolia" school than with what happened on the plantations of the old South.

These sentiments are found too commonly. James Horton reminded us in his presidential address to the Organization of American Historians that the president of Virginia's Heritage Preservation Association called "the slave plantation of the old South a place 'where master and slave loved and cared for each other and had genuine family concern.'" He concluded "this is the

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[47] Alan Finder, *In Desire to Grow, Colleges in South Battle With Roots*, NEW YORK TIMES (November 30, 2005).

[48] justicemanifesto.net at 7.

kind of reaction that most public historians who deal with these volatile history matters find all too familiar."[49]

This is the kind of historical misinformation that we're dealing with. It informs and structures how voters, legislators, and judges respond to issues of race. If one thinks that Reconstruction was an era of corrupt black politicians and Yankees, then you are unlikely to have a favorable view of the Reconstruction-era amendments or of the need for federal protection of voting rights or of the need for civil rights legislation, or of any kind of social programs, to say nothing of reparations.

In essence, what we need is a useable past–an understanding of the past. And this is what one might call "applied legal history." That is, a history of law –of court decisions, statutes, and the practices of law enforcement--that is both accurate and relevant to understanding questions we have today, giving rise to optimism that once people have facts they will think the same. We have seen some influential literature in this genre already, like C. Vann Woodward's *The Strange Career of Jim Crow*, which many credit for undermining support for Jim Crow shortly after *Brown* by disabusing us of the belief that Jim Crow was natural and had existed from the beginning of time (which for these purposes means from the end of slavery).[50]

All of this invokes important questions about how ideology relates to action. Southern interpretations of war and Reconstruction helped win the hearts and minds of Americans in the era of Jim Crow, so that by 1896 it was almost unthinkable for the United States Supreme Court

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[49] James O. Horton, *Patriot Acts: Public History in Public Service*, 92 J. AM. HIST. 801 (2005).

[50] *See* Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842-844 (1988).

to uphold even a limited right of integration. Amidst all of the talk of memory in the historical profession in recent years, there has been relatively little attention focused on the intellectual monuments left in the judicial opinions–the ways that courts attempted to channel and settle disputes and to portray the scientific and moral correctness of Jim Crow.[51]

The Supreme Court has the power to encourage such studies. Individual justices have written about history.[52] In this process of recovering an understanding of the connections of the Supreme Court and the federal government to the institution of slavery, we are aided by some really fine histories of the case already.[53]

Perhaps both the Missouri Supreme Court and the United States Supreme Court could use their institutional competence to disseminate a more accurate and complete history of *Dred Scott*. In fact, the Missouri State Archives have made significant and well-publicized strides in this direction.[54]

Considering an Apology

We are beginning to see truth commissions and apologies–but many will think them

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[51] One very nice start is Glory McLaughlin, *A Mixture of Reform and Regret: The Memory of the Civil War in the Alabama Legal Mind*, 56 ALA. L. REV. 285 (2004).

[52] *See*, *e.g.*, WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004); WILLIAM H. REHNQUIST, CIVIL LIBERTY AND THE CIVIL WAR (1997); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); WILLIAM H. REHNQUIST, THE SUPREME COURT: A HISTORY (2001). Similarly, Justice Ruth Bader Ginsburg wrote the foreword to *Malvina Shanklin Harlan, Some Memories of a Long Life, 1854-1911* (Linda Przybyszewski ed., 2003).

[53] *See, e.g.,* ALLEN, *supra* note 20; FEHRENBACHER, *supra* note 16; PAUL FINKELMAN, DRED SCOTT: A BRIEF HISTORY WITH DOCUMENTS (1997); GRABER, *supra* note 21; VanderVelde & Subramanian, *supra* note 11.

[54] http://www.sos.mo.gov/archives/resources/dredscott.asp

cheap. I once thought that apologies purchased absolution too inexpensively. Given how difficult apologies are to obtain, they seem to have some significant meaning and that may suggest their worth. That leads, naturally, to a discussion of the case for apologies. There has already been acknowledgment of error. Yet, the opinion still sits on the shelf of every minimally equipped law library in the country. To some extent, we are fortunate for that, for it is not subject to erasure.

As the successors to the courts that issued the Dred Scott decision, both the Missouri and United States Supreme Courts might consider an apology. It is sometimes hard to know what an apology will accomplish.[55] The same arguments in favor of apologies more generally–like the apologies issued in 2007 by the Virginia, Maryland, and North Carolina legislatures for slavery–apply here. The Supreme Courts are the successors to those courts that issued the *Dred Scott* opinions, so there is a fairly direct connection between past and present. An apology could be part of recovering a more accurate and complete history (this is part of the truth commission process discussed above) and part of including people who have previously been excluded. In the case of *Dred Scott*, where the opinion so completely excluded African Americans from citizenship, perhaps the need for apology is greater than in other instances. And perhaps an apology holds out particular promise in this case because of the Supreme Court's role as one of our country's most revered institutions and because it serves as a moral leader. In offering an apology, the courts would honor the memory of those who were enslaved. They would also

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[55] *See, e.g.,* James Cobb, *Truth and Consequences: Official Slavery Apologies Are Bad for Blacks*, THE NEW REPUBLIC (April 9, 2007), available at: http://www.tnr.com/doc.mhtml?i=w070409&s=cobb040907

Michael J. Thompson, *Apologizing For Past Sins A Big Mistake*, AUBURN PLAINSMAN (April 26, 2004), available at: http://www.amren.com/news/news04/04/27/slaveryapology.html

acknowledge to Missouri and United States citizens that they understand that the sins of our country's past burden us still today. And they would help correct the ignorance of many Americans about our past.

I thought of the importance of such monuments to the era of Jim Crow recently when I was working with a student in the Tuscaloosa County Courthouse. We were there to register a deed for a client and I pointed out the marriage records that are in the records room (separated into white and negro). She quite innocently asked, "what if you are both?" What an pleasure to know that we are far enough from the world of segregation that a law student's first reaction is, "wow, there are people who fit both categories. What do they do?" Not get married, of course, in the era until anti-miscegenation laws were struck down. But I think those books are an important reminder of the days of segregation and how close we are to them and I am pleasantly surprised to see them so prominently displayed in the courthouse, now that I am over the surprise of seeing them there.

The *Dred Scott* opinion is an important reminder of the bad old days, in which the United States government was a central part (and beneficiary) of the slave system. It is a reminder that the wealthy and well-educated told each other that slavery was moral and that African Americans were inferior. It might be quite easy to erase that memory and the role of the courts in this role. It is easy to forget that slavery existed because the laws of the colonies and then states permitted it and supported it.

Towards a New Reconstruction

While those symbolic and cultural actions may be attainable, there remains the question about something more tangible: a reconstruction of legal doctrine surrounding the privileges and

immunities clause, for instance, as well as wholesale legislative action along the lines of the Great Society. Because *Dred Scott* stands as a monument to the institution of slavery, it may lie at the center of broader discussion of slavery, Jim Crow, and reparations.

In terms of judicial doctrine, a few glimpses of what that reconstructed doctrine might look like include an enlargement of Congress' power under section five of the Fourteenth Amendment, premised on the idea that the Amendment was designed to overturn the fragments of *Dred Scott* that empowered states. For we probably ought to take *Dred Scott* as a case about federalism (not just about slavery in the territories) and the Fourteenth Amendment as a wholesale repudiation of *Dred Scott*. We might also look to a revitalization of the privileges and immunities clause, which would do much of the work now performed by the equal protection clause.

Even beyond legal doctrine, however, *Dred Scott* may then be a starting point for serious discussion of the place of the slavery at the center of American life. As we discuss the legacy of slavery and the dark years of Jim Crow that followed, *Dred Scott* may illustrate the role that slavery and white supremacy played in leading to the wealth gap that yet exists between African Americans and non-Hispanic whites and it might be the entering point for further, extended discussion of wide-ranging reparations. For *Dred Scott* serves as a focal point for discussion of the federal government's support for slavery, as well as the ubiquity of slavery in antebellum America.

Further Directions

There are yet other places to look for further investigation. There are certainly other Supreme Court decisions that deserve scrutiny; then there are other sites of intellectual support

for slavery and Jim Crow. There are two that I have a particular interest in. One is William and Mary's President, Thomas R. Dew. A more recent example of the problems with the dissemination of erroneous histories are Thomas Dixon's 1902 book *The Leopard's Spots: A Romance of the White Man's Burden* and his 1905 book *The Clansman*, which appeared about the same time that southern states were passing constitutional amendments to disfranchise black men exemplify this school. Dixon's books and D.W. Griffith's movie *Birth of a Nation*, based on *The Clansman*, are outstanding ways to see how all these diverse ideas fit together: the charges that the foolish, blundering generation brought us into Civil War; then the breakdown of the rule of law during Reconstruction; and the "redemption" of the south from those silly and corrupt Yankees and Negroes.[56] This is what we ought to call the period of "de-construction" after the Civil War.

We have seen leadership by individuals, like President Bush's speech at Goree Island in 2003. For President Bush reminded us of the very way in which we have slowly improved. Abolitionists'

> moral vision caused Americans to examine our hearts, to correct our Constitution, and to teach our children the dignity and equality of every person of every race. By a plan known only to Providence, the stolen sons and daughters of Africa helped to awaken the conscience of America. The very people traded into slavery helped to set America free.

He also acknowledged the burden of the past and the road yet ahead: "The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble

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[56] THOMAS DIXON, THE CLANSMAN (1905), available at: http://docsouth.unc.edu/dixonclan/dixon.html

America have roots in the bitter experience of other times."[57] And there have been apologies by national institutions, such as the United States Senate's apology for failure to pass an anti-lynching bill. So action by individual justices or by a court collectively may be appropriate. The road will be very, very long. Still, we can hope for that progress. It is, as Ralph Ellison wrote in *Invisible Man*, a question of understanding the past, the present, and, of course, the future–or what he called at one point, "The Rainbow of America's Future." Ellison wrote of a poster, titled: "After the Struggle: The Rainbow of America's Future":

> It was a symbolic poster of a group of heroic figures: An American Indian couple, representing the dispossessed past; a blond brother (in overalls) and a leading Irish sister, representing the dispossessed present; and Brother Tod Clifton and a young white couple (it had been felt unwise simply to show Clifton and the girl) surrounded by a group of children of mixed races, representing the future. . . .[58]

And perhaps in that way, our better understanding of history will guide the way to remaking law and overcoming our past.

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[57] Remarks by the President on Goree Island, Senegal (July 8, 2003), http://www.whitehouse.gov/news/releases/2003/07/20030708-1.html

[58] *See* RALPH ELLISON, INVISIBLE MAN 385 (1952).

Alfred L. Brophy is professor of law at the University of Alabama. He is the author of *Reconstructing the Dreamland: The Tulsa Riot of 1921* (Oxford University Press, 2002) and *Reparations Pro and Con* (Oxford University Press, 2006) and the lead co-author of *Integrating Spaces: Cases and Materials on Property and Race* (forthcoming Aspen, 2008).