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Race and Racism in the Collective Memory of the Law: The Case of Roger B. Taney and *Dred Scott v. Sandford*

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In 1877 a bust by Augustus Saint-Gaudens of Roger B. Taney, the fifth Chief Justice of the United States Supreme Court, was placed in the Court's Chamber. In the one hundred and fifty years since, the bust has moved several times, finally resting in the Robing Room adjacent to the Capitol's Old Supreme Court Chamber. The bust remains outside the Old Supreme Court Chamber while the busts of John Jay, John Rutledge, Oliver Ellsworth, and John Marshall reside within. Its absence from the communal presence of the other former chief Justices' busts serves as a physical example of the uncertain, changing, and negative memory of the man it commemorates. Taney, considered by his contemporaries a man of great intellectual prowess, has become one of the most vilified persons in United States history due to his authorship of the infamous *Dred Scott v. Sandford* (1857) decision.

The collective memories of the man and the decision have become a topos of evidence used by journalists and academics. A search for Roger B. Taney in major United States newspapers reveals fifty-nine mentions of Taney in thirty years. A search of major law reviews reveals that Taney is mentioned nineteen times in the past six months, sixty-two times in the last two years, one hundred seventy times in the last five years, and three hundred six times in the past ten years. A similar search in major newspapers reveals two hundred and ninety-four mentions of *Dred Scott* within the past thirty years. A search in major law reviews is even more astounding. Within the past six months, *Dred Scott* is cited one hundred twenty-four times; within the past two years, four hundred thirty times; and within the last five years, over one thousand times. These memorial representations frame Taney as evil and *Dred Scott* as a mistake.

At its most simplistic, collective memory is the shared representation of history held by a group or groups of people.[1] The collective memory of Taney and *Dred Scott* are the memories shared by well-educated and interested parties; namely, educators, politicians, judges, reporters, editors and other "keepers of American knowledge" who interpret history to localize racism in the past rather than in the institutions of the present. This construction of collective memory does not mean to suggest that its memories are uncontested or that they are created by a single rhetor, group of rhetors, or text.[2] Historian Peter Novick claims that "Collective memory simplifies; sees events from a single, committed perspective; is impatient with ambiguities of any

[1] See Barbie Zelizer, *Covering the Body: The Kennedy Assassination, the Media, and the Shaping of Collective Memory* (Chicago: University of Chicago Press, 1992); Marouf Hasian, Jr. and Robert E. Frank, "Rhetoric, History, and Collective Memory: Decoding the Goldhagen Debates," *Western Journal of Communication* 63 (1999): 95-114; and Theodore O. Prosise, "The Collective Memory of the Atomic Bombings Misrecognized as Objective History: The Case of the Public Opposition to the National Air and Space Museum's Atom Bomb Exhibit," *Western Journal of Communication* 62 (1998): 316-347.

[2] Hasian and Frank, "Rhetoric, History, and Collective Memory," 102.

kind; reduced events to mythic archetypes."[3] It allows for the creation of collective memory to serve "strategic purposes"[4] as the collective "selectively choose[s] what to remember and what to forget."[5]

An analysis of the collective memory of Taney and *Dred Scott* demonstrates that collective memory can insulate governmental institutions from charges of racism. In other words, White privilege guides our national remembering and forgetting. In our constitutional democracy, we are told that the Rule of Law governs us and that the scales of justice are "blind." Yet the research of Critical Race Theory scholars demonstrates that the law is not, nor has it ever been, race neutral.[6] Critical Race Theory acknowledges the prevalence of racism in American society, rejects the notion of the neutrality of the law, and identifies earlier racist practices as the cause of current inequalities.[7] From the understanding of African Americans as "property" in the Constitution to the current lack of enforcement of civil rights legislation, Whites are given preference over Blacks and systemic racism is perpetuated.[8]

Recently, *Communication Law Review* devoted a special issue to the study of communication and Critical Race Theory in various contexts.[9] These essays perform

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[3] Peter Novick, *The Holocaust in American Life* (Boston: First Mariner Books, 1999), 4.

[4] Stephen H. Browne, "Remembering Crispus Attucks: Race, Rhetoric, and the Politics of Commemoration." *Quarterly Journal of Speech* 85 (1999): 169-187, 169. See also Bruce E. Gronbeck, "The Rhetorics of the Past: History, Argument, and Collective Memory," in Ed. Kathleen J. Turner, *Doing Rhetorical History: Concepts and Cases* (Tuscaloosa: University of Alabama Press): 47-60 and Pierre Nora, "Between Memory and History: *Les Lieux de Memoire*," *Representations* 26 (1989): 7-25.

[5] Marouf Hasian, Jr. and Cheree A. Carlson. "Revisionism and Collective Memory: The Struggle for Meaning in the Amistad Affair," *Communication Monographs* 67 (2000): 42-54, 42.

[6] See Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (New York: Oxford University Press, 2004), Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (San Francisco: Harper Press, 1989); Derrick Bell, *The Constitutional Contradiction* (Atlanta: Anderson Press, 1997); Kimberle Crenshaw, ed. *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995), Richard Delgado, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995); and Richard Delgado and Jean Stefanic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

[7] See Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993).

[8] See the works of Derrick Bell.

[9] Rossing uses critical rhetoric and CRT to illuminate how a special segment of comedian Stephen Colbert's program works rhetorically by playing upon coded understandings of race. See Jonathan P. Rossing, "Critical Intersections and Comic Possibilities: Extending Racialized Critical Rhetoric Scholarship," *Communication Law Review* (10): 10-27. Young examines the ways in which the judicial system discursively negotiates its authority by denying a discrete minority group self-sovereignty rights. See Kelly M. Young, "The Ghost of Moby-Dick and the Rhetorical Haunting of the Ninth Court's *Anderson v. Evans* Decision," *Communication Law Review* 10 (2010): 28-53. Harris and Weber's article deconstructs a film in order to demonstrate how racial barriers instilled by privilege, power, and imperialism could possibly be eradicated through a visual medium. See Tina M. Harris and Kirsten Weber, "Reversal of Privilege: Deconstructing Imperialism, Racism, and Power in the Film White Man's Burden," *Communication Law Review* 10 (2010): 54-74.

important work as they consider the ways in which White privilege persists and the law is not colorblind. Of interest to this essay, Kelly Young contends that current communication and law scholarship does not well "acknowledge the force and role of rhetoric in producing, reproducing and masking the courts' legitimacy."[10] One means by which collective memory advances the legitimacy, the control, and the privilege of the courts and the legal system is through the remembering of racism. In an effort to come to terms with the past, racism increasingly has become located in individual actions rather than systematic features.

Informed by Nakayama's and Krizek's work on Whiteness,[11] scholars have moved beyond Whiteness as an uninterrogated space to understand different ways in which Whiteness manifests in contemporary society.[12] David Goldburg contends that the United States as a nation-state can only be understood through the lens of a racial state, created by the denial of and resistance to racial issues.[13] Howard Winant finds that, following the Civil Rights era, racism has been located in individual actions rather than in systematic features.[14] Existing scholarship within memory studies has been devoted to the commemoration of individuals, organizations, and events; the analysis of discourse on race; and performances of the past.

The purpose of this essay is to examine the ways in which collective memory functions rhetorically to direct blame at an individual rather than at a system. The separation of the man and the decision from their historical past performs important rhetorical work within the United States system. Rather than recognize and reconcile racism as a systematic feature of United States society and institutions, racism is localized in a person who produced a decision. The vilifications of Taney and *Dred Scott* in public discourse effectively dissociates the problems of racism from the institutions of United States jurisprudence and ignores the complex historical context that led to a decision that marked Blacks as property rather than as human beings.

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[10] Young, "The Ghost of Moby-Dick," 32.

[11] Thomas K. Nakayama and Robert L. Krizek, "Whiteness: A Strategic Rhetoric," *Quarterly Journal of Speech* 81 (1995): 291-309.

[12] Rosann M. Mandziuk, considers how contemporary needs influence different memory constructions of Sojouner Truth in "Commemorating Sojourner Truth: Negotiating the Politics of Race and Gender in the Spaces of Public Memory," *Western Journal of Communication* 67 (2003): 271-291. In their comparison of museums in the United States and South Africa, Deborah F. Atwater and Sandra L. Herndon find that, as members of different races, their social identities inform their response to the museums in distinctly different ways. They emphasize the importance of their different responses for the construction of cultural remembering and reconstructions of the past. Kristen Hoerl explores the ways in which the movie "Panther" provides a counter-memory to hegemonic constructions of the Black Panther Party in "Mario van Peebles's Panther and Popular Memories of the Black Panther Party," *Critical Studies in Media Communication* 24 (2007): 206-227. Kate Willink examines the ways in which Whiteness is maintained through storytelling "Domesticating Difference: Performing Memories of School Desegregation," *Text and Performance Quarterly* 27 (2007): 20-40.

[13] David Theo Goldberg, *The Racial State* (Malden, MA: Blackwell, 2002).

[14] Howard Winant, "Behind Blue Eyes: Whiteness and Contemporary U.S. Racial Politics," in *Off White: Readings on Race, Power, and Society*, ed. Michelle Fine and others (New York: Routledge, 1997), 40-53.

Both Goldburg's and Winant's work help explain this phenomena. Instead of accepting our racist heritage, we attempt to deny its historical existence. And when we cannot deny its existence, such as in the case of *Dred Scott*, we attempt to assign blame to a sacrificial lamb in an effort to purge our national guilt. Finding Taney a racist does not remove blame from the United States government, slaveholders, or other passive bystanders for allowing, maintaining, or not challenging the institution of slavery. Nevertheless, locating blame in the person of Taney concentrates attention on one person and reduces blame in the scenic periphery. As attention is focused on Taney, attention is drawn away from the system. Our inability to recognize and to name institutional and societal manifestations of racism enables the system that allowed the injustice of slavery and racist practices and ideology to persist.

I begin this essay by investigating Taney's progression from the able Justice he was known as for most of his career into the evil person responsible for the dehumanization of Blacks. Next I examine the collective understanding of the *Dred Scott* opinion as mistakenly classifying Blacks as property rather than as people. I lastly turn to a brief consideration of exceptionalism and the Supreme Court, to explain how the immediate criticism the Court received in the wake of the decision did not manifest into a lasting loss of authority and prestige.

From Able Justice to Unjust Judge: The Person of Roger B. Taney

No other jurist has been so vilified in American collective memory as former Chief Justice Roger B. Taney. In an 1865 pamphlet, an anonymous author declared: "As a Jurist, or, more properly speaking, as a Judge, in which character he will be most remembered, he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment."[15] Rather than reflecting Taney's entire legal career, this position, similar to that of many of Taney's contemporaries and present day thinkers, is a vitriolic epitaph crafted on the basis of one decision. Immediately following *Dred Scott*, Taney was criticized as racist in newspapers, vilified in letters and diary entries, and chided in poetry; at the same time, he was commemorated through a statute, a bust, and a Navy cutter. More recently, communities have striven to mediate or erase Taney's memory, renaming Roger B. Taney Middle School Thurgood Marshall Middle School, and placing a statute of Marshall near a Taney statute outside Maryland's State House. The memory of Taney was not then, nor is now, univocal. Within most modern vernacular circles he symbolizes Southern racism and hatred, the shameful mark of American slavery upheld through the Supreme Court's nationalizing influence. Yet within legal spheres, a revisionist movement commenced in the 1930s to regain the former Chief Justice's larger jurisprudential vision, an endeavor successful within juridical and legal circles.

Taney functions rhetorically as the vehicle through which racism entered into the constitutional system. Although the institution of slavery existed for hundreds of years prior to the founding, and it was common knowledge that the Constitution

[15] *The Unjust Judge: A Memorial of Roger Brooke Taney, late Chief Justice of the United States* (New York: Mansfield, 1865, 67. (a pamphlet)

allowed slavery and the injustices against Blacks to continue, the Constitution did not mention slavery overtly nor did it consider the status of African Americans as inferior persons. Slavery was a reality that was not constitutionally real. The Constitution gestured toward slavery, through various Articles that denied full personhood, ended the slave trade, and allowed fugitive slaves to be returned to their masters, but the document did not endorse the institution. The evil of slavery was known to some and accepted as part of the natural order of existence to others, but it was not constitutionally authorized until Taney identified it in his written opinion. Once he published his judicial opinion, the status of the colored person was not implied, it was sanctioned legally.

According to Taney, persons of African descent were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race."[16] Taney writes,

> They 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; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[17]

By exposing the story of the slave in a Supreme Court opinion, Taney transforms a *de facto* practice into a *de jure* decree.

In his majority opinion, Taney attempts to disassociate the legal from the political by separating the functions of the legislative and the judicial branches. Other national figures agreed with the separation of powers, and concurred that the issues brought up by the *Dred Scott* case should be decided by the courts. James Buchanan, in his 1857 Inaugural Address, proclaimed slavery in the territories to be "a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be . . ."[18] Taney considers the history of slavery, the laws of various states, lower court decisions, and the text of the Constitution in his opinion. He writes,

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[16] *Dred Scott v. Sanford*, 60 U.S. 393 (1856) at 404-405.

[17] *Dred Scott* at 407.

[18] Inauguration Addresses of the Presidents of the United States. "James Buchanan: Inaugural Address, March 4, 1857." http://www.bartleby.com/124/pres30.html (accessed March 10, 2008).

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[19]

As a jurist, Taney did not believe that his job was to create a reality of what society *should* be; he thought he needed to interpret the law as it stood. Taney did not believe it in his judicial power to grant citizenship; Congress has the power to determine citizenship and govern the territories. His is one of limited powers; the Rule of Law and the division of powers remain at the forefront of this decision. In *Dred Scott*, Taney argues that "there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed."[20] Neither the original intent nor the constitutional text supports granting persons of color citizen or personhood status.

Taney's opinion in *Dred Scott* reiterated the law. Although the Declaration of Independence holds that "all men are created equal," the Constitution of the United States differentiated between "free Persons," "persons bound to Service," "Indians," and "all other Persons" in Article I, section 2. Nowhere in the Articles of the Constitution is the term "slave" or "slavery." Although the institution of slavery existed, and other statutory law such as the Fugitive Slave Law of 1793 mentioned the term "slave," constitutional law used euphemistic language to couch the institution in language palatable to "civilized" society. Taney, as a messenger of the law, overtly considers the status of Blacks in the United States. He summarizes constitutional and statutory law as well as social attitude of the hegemonic class. Taney considers to original meaning of the documents to refute the claim that Declaration of Independence or the Constitution included African Americans. He cites colonial law as evidentiary support.

Taney endeavors to distance himself from his opinion by citing the status of the law and public opinion at the time of the founding of the nation. Taney does not exist within the text of the *Dred Scott* decision except for the third sentence of the opinion in which he states, "It [the case] has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion."[21] He delivers "its opinion"; not his, but the Court's. His opinion is written to convey the idea that he is a passive agent who has been selected by the judicial body to deliver its judgment. The separation of the man of Taney from his opinion in *Dred Scott* follows the separation between what is legal and what is political within the decision.

Taney's attempt to frame the opinion as a result of the United State's cultural and legal history fails primarily because the decision did not have a clear majority—

[19] *Dred Scott* at 405.
[20] *Dred Scott* at 411.
[21] *Dred Scott* at 400.

every justice wrote his own opinion, concurring and disagreeing on different points. Historically, however, the Chief Justice's opinion has been regarded as the Court's holding.[22] The existence of multiple opinions opens a space for alternative arguments and alternative perspectives. Taney's account of history, law, and culture becomes *his* account of history, law, and culture, not the Court's. The lack of a clear majority opinion weakens his distancing of himself from the opinion as the public observes that other interpretations of the law are possible.

Yet even if the people had perceived Taney's opinion as the Court's opinion, the public nevertheless rejected the opinion as the *public* will, imparting upon the people themselves plausible deniability. The public acts as Adam in the Garden of Eden, proclaiming, "The justice, that you appointed, he gave us this decision and forced us to declare the man of African descent not a person." As Eve is portrayed as the vehicle through which sin entered into all of humanity, Taney is depicted as the means through which the denial of personhood to African Americans entered into the governmental system. Also following the story of the Garden, following Taney's opinion humankind knows good and evil. The eyes of the nation were opened; the institution of slavery and its unjust treatment of persons of color were understood as evil. Unlike the Garden narrative, the people were not driven out of their paradise. Nor did the people acknowledge the existence of evil within their community. Within the Garden, persons of African descent were not identified as persons; they were creatures over which Adam and Eve were given dominion. They were named "slave" and "inferior" but not truly acknowledged or seen. The hegemonic forces at work were pervasive, so widespread that the ideology at work was invisible, until Taney named it in his opinion.

Nathan Aaseng's *Great Justices of the Supreme Court* identifies Taney's career as a jurist with such legal and intellectual giants as John Marshall, John Harlan, Oliver Wendell Holmes, Louis Brandeis, Charles Evans Hughes, Hugo Black, and Earl Warren. Yet even Aaseng acknowledges *Dred Scott*'s negative effect upon Taney's legacy: "Unfortunately, the aging Taney destroyed his hard-won reputation with a single disastrous opinion."[23] This decision led to Taney's personal and professional chastisement by the public, politicians, press, and pulpits.[24] Criticism following the decision mostly stemmed from Northern abolitionists and their publications. Yet censure also found its way into verse as poets voiced their disapproval. In "The Progress of Liberty," James Madison Bell penned,

> While Taney, with curses on his grave,
> Has gone to stand that Judge before,
> At wholse dread bar the poorest slave

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[22] See John S. Vishneski, "What the Court Decided in *Dred Scott v. Sandford*," *The American Journal of Legal History* 32 (1988): 373-390.

[23] Nathan Aaseng, *Great Justices of the Supreme Court* (Minneapolis, Minn.: The Oliver Press, Inc., 1992), 39.

[24] For a through discussion of public censure and discussion of Taney and the decision, see Vincent C. Hopkins, *Dred Scott's Case* (New York: Atheneum, 1967), particularly his "War of Words" chapter, pages 156-180. See also Charles Warren, *The Supreme Court in United States History*(Boston: Little, Brown and Company, 1932), 300-319.

Is judged a man, and he—no more.

And in "I thank ye, my frien's, for the warmth o' your greetin'," James Russell Lowell supposed,

I expect 'fore this,
'thout no gret of a row,
Jeff D. would ha' ben where A. Lincoln is now,
With Taney to say 't wuz all legle an' fair.

Lowell again attacked Taney in "I hed it on my min' las' time, when I write ye started,"

Jeff don't stan' dilly-dallyin',
afore he takes a fort, (With no one in,)
to git the leave o' the nex' Soopreme Court . . .
Whereas ole Abe 'ud sink afore he 'd let a darkie boost him,
Ef Taney should n't come along an' hed n't interdooced him.

As these examples suggest, Taney stands as the sole person responsible for *Dred Scott*. Taney is to be judged as less than a man, would support the secession of (or national political domination by) the South, and forced the issues of slavery to the national forefront, following these poets' arguments.

According to the simplified construction of Taney as a racist who produced a racist decision, racist ideology, therefore, is housed within the body of one man and not within the nation's institutions. Collective memory most frequently remembers *Dred Scott* as Taney's decision. Commentary on the decision focuses upon Taney's judicial philosophy, which led to the decision or what the opinion actually decided.[25] It little matters that the contradiction between Taney's personal beliefs and his judicial opinions can be explained by the separation between the judicial and the political. Taney advocated states rights within the federal system and in this instance such a belief manifests itself in opposition to equality.

As the person who named the hegemonic ideology at work in the United States institution of slavery, Taney stands accountable to all who seek to attack the institution. He identified the forces at work, but did not alter them. Although he did not challenge the ideology at work, he nevertheless modified the legal landscape, shifting slavery from an accepted practice to an authorized one. He is held responsible because he initiated the judicial review of legislation, for the first time since its inception in *Marbury v. Madison* (1803) fifty years earlier.

Public opinion of Taney has little improved. A December 22, 1995 editorial in *The Baltimore Sun* declared that Taney's *Dred Scott* decision "will always make him a villain in the eyes of most African Americans."[26] Even young children at the former Taney Middle School consider him a "racist judge" and looked forward to destroying

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[25] Alfred L. Brophy, "Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford," *Columbia Law Review* 90 (1990): 192-225;

John S. Vishneski III, "What the Court decided in Dred Scott v. Sandford," *The American Journal of Legal History* 32 (1988): 373-390;

[26] Editorial, "You can't ignore history; On the plantation: Removing an exhibit on slave life doesn't remove slavery from history," *The Baltimore Sun,* 22 Decmber 1995, 18A

articles of clothing bearing Taney's name.[27] Bell was not the only person to speak poorly of Taney's legacy. Over one hundred years later Wiley A. Hall, in *The Baltimore Sun*, recounts,

> At Mount Vernon Square, a pigeon is perched on the forehead of Roger Brooke Taney's statue, cooing with contentment. One can only hope that somewhere—possibly down there where it is hot, down there where the sun never shines—Taney's spirit is aware of the indignity.[28]

Each of these communicative acts exemplifies the vilification of Taney. They charge the person of Taney as a racist, but do not acknowledge that Taney personally opposed slavery (he thought slavery "evil"). Taney emancipated his own slaves thirty years prior to his death in 1864, long before he wrote the *Dred Scott* opinion and the advent of the Civil War. Furthermore, he provided a pension to those freedmen who were too old to work once emancipated.[29] Revisionist historians have made efforts to rehabilitate the legacy of Taney in collective memory; efforts which have failed in contemporary collective memory.[30] Moreover, collective memory's ability to demonize Taney grounds itself not on the basis of his entire career, but on the basis of one decision: Taney's *Dred Scott* opinion. Without *Dred Scott*, collective memory could not point to Taney as a devil figure and *Dred Scott* as the mistake for which it has come to be known.

From Property to a "Mistake": *Dred Scott v. Sandford*

The *Dred Scott* case arose after Scott, a male slave (who may have been known as "Sam") was sold after the death of his owner, Peter Blow, To Dr. John Emerson in St. Louis in 1833. When Emerson died in 1844, he left his property to his wife (held in trust for his daughter), his will naming his brother-in-law, John Sanford as an executor of his will. Although Mrs. Emerson held no desire for slaves, she could not sell the Scotts because of the conditions of her husband's will. Mrs. Emerson subsequently abandoned the Scotts and moved from Missouri to Massachusetts; the Scotts remained in Missouri. In 1846, Dred and Harriet Scott filed suits for their freedom, on the grounds that their residence in Illinois and the Wisconsin Territory, both "free soil" lands, negated their status as slaves. Missouri law, at the time the Scotts filed, supported a "once free, always free" doctrine. If a master took a slave into the Missouri territory, therefore, that slave was henceforward free. Yet when the case was decided in 1857, the court claimed to be bound by the Supreme Court's precedent in *Strader v. Graham* (1851), in which Taney's dicta asserted that states' rights meant that if

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[27] Lisa Leff, "P.G. County Replaces Taney with Marshall, Middle School Sheds Pro-Slavery Name," *The Washington Post*, 5 March 1993, D.

[28] Wiley A. Hall, "Why a Black History Month? Look at Taney." *The Baltimore sun*, 22 February 1994, 2A.

[29] See James F. Simons, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers* (New York: Simon & Schuster, 2006).

[30] See, for example, Walker Lewis, *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* (Boston: Houghton Mifflin Company, 1965) and Carl Brent Swisher, *Roger B. Taney* (New York: The Macmillan Company, 1935).

they were in Kentucky (they were not; they were in Canada), then they were still slaves. Next defeated in the federal district court, Dred Scott filed an appeal with the Supreme Court in December of 1854. Oral arguments were heard in February of 1856, yet the Court failed to make a decision and voted to rehear arguments in December, conveniently after the next presidential election. Little notice was paid to the case prior to the presidential election, yet post-election public attention increased as people become aware that the Court was hearing a case on the decisive issues of slavery in the territories.[31]

For more than two hours on March 6, 1857 Chief Justice Roger B. Taney read the Court's holding in *Dred Scott v. Sandford*, effectively preserving Scott's slave status. In the decision, Taney set forth three general claims: Blacks could not be United States citizens, Congress does not have the power to regulate slavery in the territories, and Scott's stay in Illinois did not free him—Scott remained a slave under Missouri law.

Dred Scott had the effect of further polarizing the slavery issue.[32] The decision created a crisis of constitutional authority because politicians and the public alike challenged the justices' decision-making ability and the Supreme Court's institutional validity. In the late 1800s, newspapers published full text copies of the judicial opinions, political speeches, and correspondence of interest. Newspapers such as the St. Louis *Leader* and the New York *Journal of Commerce* printed the decisions as soon as they could. Other papers offered political commentary, such as the New York *Tribune*, which gave the five majority justices the moniker "the High Priests of Slavery."[33] The Washington *Daily Union* called for a settlement of the slavery issue and the New Hampshire *Patriot and Gazette* highlighted the political vulnerability the decision created for the Republican Party.[34] Ministers followed the press, with northern clergy attacking the decision and questioning the decision's effect upon northern communities. Politicians also followed suit. Most notably, Abraham Lincoln invoked the decision and the slavery issue throughout the Lincoln-Douglas debates, and criticized the Court in his First Inaugural.[35] Obviously the Supreme Court had not settled the issue of slavery—in the territories or in the nation. The lack of a clear majority meant that *Dred Scott*'s holding was not easily accessible to the majority of people—then or now—and facilitated the decision's classification as a "mistake."

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[31] See *Dred Scott*.

[32] See, for example, Walter Ehrlich's *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Conn.: Greenwood Press, 1979), pages 179-185. Ehrlich ends his book with the epitaph on Scott's gravestone: "Dred Scott subject of the decision of the Supreme Court of the United States in 1857 which denied citizenship to the negro, voided the Missouri Compromise Act, became one of the events that resulted in Civil War." Ehrlich, *They Have No Rights*, 184 & 185.

[33] The New York *Tribune*, March 17, 1857.

[34] The Washington *Daily Union*, March 11, 12, 19, and April 7, 1857; the *New Hampshire Patriot and Gazette*, March 18, 1857.

[35] See *The Complete Lincoln-Douglas Debates of 1858*, Ed. Paul M. Angle (Chicago: The University of Chicago Press, 1958).

Over time *Dred Scott* has come to be regarded as a "mistake." Supreme Court historian Bernard Schwartz writes, "we can say that *Dred Scott* was not so much a judicial crime as a judicial blunder—a blunder that resulted from the Taney Court's failure to follow the doctrine of judicial self-restrain that was one of Taney's great contributions to our law."[36] Historical biographer Charles W. Smith, Jr. agrees "it was unnecessary for the Court to deal with all the questions that were discussed."[37] Other critics of the opinion have used stronger language. Chief Justice Charles Hughes called it a "public calamity," Alexander Bickel a "ghastly error," and Robert Bork the "worst" judicial decision of the 1800s.[38]

Characterized as a "mistake," *Dred Scott* has become a mantra for persons opposed to modern judicial decisions. Most frequently, pro-life advocates cite *Roe v. Wade* (1973) as the current *Dred Scott*. A June 1, 1988 *Newsday* article proclaimed, "Just as the Supreme Court erred in its infamous *Dred Scott* decision of 1857, effectively declaring Blacks to be property and not human beings, so also did the Supreme Court err in *Roe v. Wade* in effectively and absurdly declaring that an unborn child was not human."[39] This analogy has been used by the political Right as well as public advocates. In a speech to the New York City Nights of Malta, former President Reagan declared that the *Roe* decision should proceed "the way of *Dred Scott*."[40]

Yet *Roe* is not the only decision, or social issue, deemed "this century's version of the *Dred Scott* decision."[41] Racial quotas, copyright infringement, prayer in schools, Haitian refugees, sodomy laws, paternity suits, the death penalty, and baseball all have engendered cases that incite commentary that invoked Taney's *Dred Scott* opinion.[42] Only abortion critics base their arguments on *Dred Scott*'s reasoning—the

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[36] Schwartz, *A History of the Supreme Court*, 106.

[37] Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill: The university of North Carolina Press, 1936), 176.

[38] Charles Evan Hughes, *The Supreme Court of the United States* (New York: Columbia University Press, 1928); Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970); and Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990).

[39] Grace Ardito, "There's No Need for DA Denis Dillon to Quit," *Newsday*, 1 June 1988, Nassau and Suffolk Edition.

[40] As cited in "Evidence Fails to Show Psychological Harm From Abortions; History Misreads Again," *The New York Times*, 29 January 1989, Late City Final Edition.

[41] Editorial, "Pro-Choicers Give Logic Short Shrift," *St. Lois Post-Dispatch*, 23 January 1989, Five Star Edition.

[42] Roger Parloff, "Bakke to the Future-Powell's artful fudge deserves more respect," *The American Lawyer*, February 2002; Lee Dembart, *The New York Times*, 9 May 1982, Late City Final Edition; Reginald Stuart, "Haitians Challenge a Decision that Denies Rights to Aliens," *The New York Times*, 27 April 1984, Late City Final Edition; Larry Rohter, "Friend and For See Homosexual Defeat," *The New York Times*, 1 July 1986, Late City Final Edition; Hugo Adam Bedau, "Someday McClesky Will Be Death Penalty's Dred Scott," 1 May 1987, Home Edition; Jim Murray, "Conspiracy? Maybe, But It Makes Sense." *Los Angeles Times*, 12 February 1987, Home Edition; Editorial, Baby M Verdict Neglected the Mother's Role," *The New York Times*, 20 April 1987, Late City Final Edition.

question of "personhood." Commentaries on each of the rest of the cases base their proclamations on *Dred Scott*'s public memory as a "mistake."[43]

Yet what is a "mistake"? And what does it *mean* that *Dred Scott* was a "mistake"? The *Oxford English Dictionary* describes the noun form of "mistake" as "A misconception or misapprehension of the meaning of something; *hence*, an error or fault in thought or action." At first glance, *Dred Scott's* classification falls within this purview of an error in legal decision-making. Yet the decision has been, in the language of Holocaust historian Peter Novick, simplified, singularized, and reduced. What specifically, about the case was a "mistake"? The Court's jurisdiction to decide the case? Taney's reasoning? And if Taney's reasoning, what point or part? That African Americans are a lower form of life? That states cannot determine national citizenship? That former slaves can never be qualified as citizens? That Congress does not have the power to regulate slavery in the territories? All of the above? Importantly, although not surprisingly, the lay public never claims that the justices "mistakenly" decided one thing or the other—the decision simply was a "mistake." Declaring *Dred Scott* a mistake works as a synecdoche, a "container for the contained."[44] Meaning, the decision allows the American populace to house slavery largely within the container of one judicial decision, thus giving the public a site of controversy, a place to which to attribute blame.

Other legal decisions cite *Dred Scott*, yet consider neither its holding nor its reasoning. Rather, criticism collapses the man and the decision. When brought to task, Taney's most frequently criticized statement is: "they [Blacks, whether slaves or not] had no rights which the white man was bound to respect,"[45] a *prima facie* racist comment. To exemplify how this was taken, a July 6, 2000 newspaper report about the Klu Klux Klan reports, "Taney, a Marylander from Frederick, wrote the Dred Scott decision in 1857 that held that blacks had no rights that whites need recognize."[46] This statement grants Taney, not the Supreme Court or the decision, agency. The decision, by extension, reflects the racist views of one man. Consider, for example, contemporary satirist Ishmael Reed's rendition of Scrooge, using Taney as "the ghost from Christmas past": "Scott had courage, but I made the wrong decision. A decision etched forever in the annals of law, and I am condemned to wander around the American hell discarded by history like the Spruce Goose, my name spoken in disgust."[47] Agency focuses upon *Dred Scott*'s key players—Scott, who bought the case and Taney, its author. The decision is "etched" in the "annals of law," yet does not reflect the Rule of Law jurisprudence. More importantly, Reed's

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[43] Importantly, most of the references occurred within a five-year time span, during former President Reagan's tenure. I do not intend to argue either that public rhetoric or presidential rhetoric influenced one or the other; rather, my point is that the "conservative turn" of the 1980s produced a general environment in which such a construction of *Dred Scott* as a "mistake" found political currency.

[44] Burke, *A Grammar of Motives*, 507.

[45] Taney, *Dred Scott v. Sandford*, 60 U.S. 939 (1856), 407.

[46] Editorial, "Tale of Two States: Maryland's approach seems even wiser in the wake of South Carolina's trials," *The Baltimore Sun*, 6 July 2000, 18A.

[47] Ishmael Reed, *The Terrible Threes* (New York: Macmillan Publishing Company, 1989), 114.

interpretation frames the decision not only as a mistake, but has Taney voicing the fact that he himself "made the wrong decision." Although Reed transfers the Taney narrative beyond external blame (critics chastising Taney) to Taney's accepting personal agency ("I made the wrong decision"), the story has force because he employs current collective memory of Taney and the decision.

Even when apologists explain the statement, emphasis remains upon Taney. "The unfortunate lines about free blacks having no rights that the white man was bound to respect," Helen Gallagher Taney explains, "referred to what the Framers of the Constitution believed, not Justice Taney's personal ethic."[48] This may be the case, but maintaining Taney's agency vilifies Taney and maintains *Dred Scott*'s simplified and shallow construction.

Consider, on the other hand, the variety and specificity of newspaper critiques contemporaneous to *Dred Scott*. The April 18, 1857 *Provincial Freeman* implored,

> We beg the intelligent reader to consider for five minutes the character of the decision of the Supreme Court; how it ignores all history; how it sets all law at defiance; how it outrages common sense; how it scorns human pretence; how it tramples upon the plainest principles of the Christian religion; how it laughs at liberty; how it scoffs at democracy; and how it scouts all Northern pretension to freedom of though, or freedom of act, or freedom of conscience.[49]

Four years later *The Christian Recorder* argued, "Reason and science both give lie to the Dred Scott decision."[50] Moreover, when comparing American slavery to Roman slavery, the same newspaper declared, "No Roman court ever made a decision so casting a man out of the state, and out of the pale of humanity, as the Dred Scott."[51]

A politically charged nation struggling with the existence and questionable future of slavery fostered discourse—in the nation's Northern regions—criticizing the racial and unjust continued existence of forced human servitude. At the same time, the Supreme Court's ruling nationalized and institutionalized the construction of African Americans as property, negating Congress' ability to alter such a social construction. The last fifty years, however, has found the United States in a situation different from that of one hundred and fifty years prior. Racism continues to be a problem, but outright human bondage does not.[52] Consequently, the rhetorical demands of persons seeking to employ *Dred Scott* shifted. Affirmative Action, quotas, "reverse discrimination," and racial profiling necessitate constructing *Dred Scott* as a "mistake"—a past error that should not be repeated—rather than a question of

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[48] Editorial, "Roger B. Taney-In Historical Perspective," *The Washington Post*, 26 March 1993, A24. Helen Gallagher Taney is an indirect descendent of Taney's.

[49] "The Proof of the Pudding," *Provincial Freeman*, 18 April 1856. Item #39780 at http://srch.accessible.com.accessible/text/freedom/00000397/0039780.htm

[50] H.M. Turner, "For the Christian Recorder," *The Christian Recorder*, 14 December 1861. Item #44215 at http://srch.accessible.com/accessible/text/freedom/00000442/00044215.htm

[51] Taylor Lewis, "Roman and Modern Slavery," *The Christian Recorder*, 28 September 1861. Item #43439 at http://srch.accessible.com/accessible/text/freedom/00000434/00043439.htm

[52] The works of Derrick Bell, Richard Delgado, Kimberle Crenshaw, Mari Matsuda, Patricia Williams, and A. Leon Higgenbotham, amongst many others, attest to this claim.

constitutional interpretation, states' rights, congressional power, or citizenship. Once such a shift has been made, therefore, one can slippery slope into viewing other legal questions similarly.

Dred Scott's collective memory is not limited, however, to its classification as a mistake; public memory also holds that *Dred Scott* hastened the Civil War. Historian Don E. Fehrenbacher writes,

> The principal reason for the prominence of the decision in American historical writing is the belief that it became a major causal link between the general forces of national disruption and the final crisis of the Union in 1860-61. Scholars have tended to be emphatic in affirming the connection but vague about its mechanics. The Dred Scott case, we are told, "helped precipitate" or "did much to precipitate" or "helped to bring about" the Civil War. But there is never much explanation of just how Taney's courtroom edict produced, or helped produce, disunion and armed conflict.[53]

In an article entitled "Roger B. Taney and the Sectional Crisis," Fehrenbacher succinctly states, "It [*Dred Scott*] encouraged southern belligerence by providing the basis for a legal self-righteousness to match the moral self-righteousness of the North . . . The decision, in short, had at least a shaping effect upon the final crisis and may also have influenced its timing."[54] Most commentary, however, is not as nuanced as Fehrenbacher's award winning work. An editorial from *The Baltimore Sun* simply reports, "this decision is regarded today as one of the main catalysts of the Civil War."[55] Again, public discourse little notes, and public memory little remembers, the complexity of the years preceding the Civil War. The already extant sectional crisis, the election of Abraham Lincoln, with the corresponding increase in Republican Party power, and the Lecompton controversy (over the proposed proslavery Kansas constitution) are absent from modern lay discourse. This silence simplifies *Dred Scott*'s memory by disentangling it from its contextually bounded constraints.

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[53] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American law and Politics* (New York: Oxford Univserity Press, 1978), 561-562. Fehrenbacher's cites the quoted sections as follows: Bernard Schwartz, *The Reins of Power: A Constitutional History of the United States* (New York, 1963), 86; Carl B. Swisher, "Dred Scott Case," in James Truslow Adams and R.V. Coleman, eds., *Dictionary of American History*, 2nd ed. (5 vols.; New York, 1946), II, 168; Robert K. Car, *The Supreme Court and Judicial Review* (New York, 1948), 208. Robert H. Jackson, in *The Struggle for Judicial Supremacy* (New York, 1941), 327, wrote that hope for a peaceful settlement "vanished when the Supreme Court held that the Constitution would allow no compromise about the existence of slavery in the territories." Leo Pfeffer, in *This Honorable Court* (Boston, 1965), 158, declared: "If war was no inevitable, the decision made it so." See also Bruce Catton, *The American Heritage Picture History of the Civil War* (2 vols.; New York, 1960), I, 40; R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (New York, 1968), 139.

[54] Don E. Fehrenbacher, "Roger B. Taney and the Sectional Crisis," 43 *The Journal of Southern History* 4 (November 1977), 564

[55] Editorial, "The Real Roger B. Taney," *The Baltimore Sun*, 11 March 1994, 14A.

Dred Scott was consistent with constitutional doctrine and legal precedent at the time.[56] The political and legal milieu prior to the Civil War considered slaves property. The original document of the Constitution counted slaves as three-fifths of a person for representation purposes; slaves were not granted citizenship rights, including due process under the law. Article IV of the Constitution held that "persons held to serve or labor" in one state remained in such captivity in another state.[57] The Fugitive Slave Act of 1793 denied freed slaves constitutional rights. Later Congress adopted the Fugitive Slave Act of 1850 as part of the Compromise of 1850. The act of 1850 established special commissioners in the states to enforce the law, denied slaves due process, and did not allow escaped slaves to testify on their own behalf. In *Groves v. Slaughter* (1841) the Court upheld a contract allowing for the sale of a slave under the Interstate Commerce Clause.[58] And in *Prigg v. Pennsylvania* (1842) the Supreme Court held that Article IV of the Constitution and the Fugitive Slave Act, both national laws, trumped a state law prohibiting the removal of a slave from the state (an anti-kidnapping statute).[59] Persons of color were considered another class of persons and not granted citizenship rights or ensured equal protection and due process before the law until the Fourteenth Amendment. The Thirteenth Amendment ended slavery; the Fourteenth Amendment granted citizenship rights to all persons; the Fifteenth Amendment gave all men the right to vote.

The history of the nation can be framed through the lens of slavery. From the first boat arriving at Jamestown in 1619 until after the end of the Civil War, slavery—whether through servitude or the institution of slavery—presented a point of struggle to the union of the United States. Yet few scholarly works place the decision within the legal, political, economic, and cultural milieu of the time; most studies of *Dred Scott* focus on the life of Scott, the case and its opinions (primarily Taney's majority opinion and Curtis' dissenting opinion), and the discourse generated in the immediate aftermath in support and condemnation of the opinion. Fehrenbacher's *The Dred Scott Case* develops the most vivid account of the history of slavery in the United States, the struggle to maintain the stability of the union as the nation expanded westward, and

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[56] Many scholars cede this point. Edwin S. Corwin determines that *Dred Scott* was consistent with legal reasoning at the time, although it nevertheless serves as "a gross abuse of trust by the body that rendered it." Edwin S. Corwin, "The Dred Scott Decision in Light of Contemporary Legal Doctrine," *The American Historical Review* 17 (1911): 52-69. See also Morris M. Cohn, "The Dred Scott Case in Light of Later Events," *The Virginia Law Register* 18 (1912): 401-409.

[57] The Clause states: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due."

[58] *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841). Although not speaking for the majority of the Court, Justice Baldwin argued that slaves were property, or to be considered articles of commerce under the Clause.

[59] *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). It should be noted that Taney's opinion in this case previews his reasoning in the *Dred Scott* decision; abiding by the Comity Clause (as the Privileges and Immunities Clause was known during his time) states should recognize the laws of other states (in a pro-slavery sense; free states should allow the laws of the slave states to carry over onto their territory).

the creation of laws in an attempt to maintain political stability.[60] From the creation of the nation the tension between the ideological grounds upon which the United States was created (equality, liberty, and justice for all) and the reality of the system of slavery.[61] The various legal struggles mentioned above trace the tension between the expansion of the nation and the stability of the union over the issue of slavery. Although the word "slave" did not enter into the constitutional text until the adoption of the Thirteenth Amendment in 1865, a subject classification of people did exist in the Constitution as Article I, section 2 recognizes "free persons" "all other persons." The Article states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

Other scholars have joined Fehrenbacher in his effort to fill the historical gap regarding the legal, political, and economic context, which led to the *Dred Scott* decision. Thomas Morris examines the abolitionist movement and the laws, which were enacted in order to advance natural law theory.[62] Similarly, Robert Cover considers what he terms the "moral-formal conflict," or the conflict "between the law as it is and the law as it ought to be."[63] Cover concludes that judicial decision-making prior to *Dred Scott* did not allow judges to use their conscience; rather, judges employed formalism, or followed legal rules. Paul Finkelman examines the problems of comity that slave travel brought upon the nation, when laws of different states were in conflict with one another.[64] Finkelman's work problematizes the issue of slavery by questioning which legal principle it should be governed by: the common law, the Supremacy Clause, the Full Faiths and Credit Clause, Privileges and Immunities Clause, the Interstate Commerce Clause, or under states' rights. Leon Litwack

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[60] Walter Erlich's *The Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Conn.: Greenwood Press, 1979) considers the life and case of the Scotts in detail. Stanley Kutler's edited volume, *The Dred Scott Decision: Law or Politics*, argues that the case was a synthesis between "principle and expediency," and provides an edited volume of the opinions, the resulting speeches and newspaper accounts of the case, and commentary on the case by constitutional scholars. *The Dred Scott Decision: Law or Politics?*, Ed. Stanley I. Kutler (New York: Houghton Mifflin Company, 1967), ix.

[61] Paul Kinkelman's *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N.Y.: M.E. Sharpe, 2001) examines the constitutional convention debates which led to the compromise over slavery by the founders in the Constitution. He then turns to political developments as the nation matured, focusing on the ideologies of the founders (Jefferson in particular), examining the different ways in which leaders in the early republic sought to maintain the institution of slavery.

[62] Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780-1861* (Baltimore, M.D.: The Johns Hopkins University Press, 1974).

[63] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975): 29.

[64] In his book, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, The University of North Carolina Press, 1981), Finkelman examines different scenarios in which slaveholders transported slaves from slave states into free states. He recognizes four types of travelers: transient, visitor, sojourner, and resident.

elucidates the discrimination persons of color experienced in the North prior to the Civil War.[65] Andrew Fede uses various case studies to conclude that a discussion of slave rights does not make sense within the legal context of the time; slaves had no rights.[66] Jenny Wahl claims that the institution of slavery was maintained through the implementation of efficient legal rules regulating slaves as property, including laws governing the representations of slaves at the time of sale and laws to protect slaves and to prevent slaves from fleeing.[67] A. Leon Higginbotham argues that the United States legal process has been used to perpetuate Black inferiority and White supremacy for centuries.[68]

Cover's argument about the "moral-formal" conflict best explains how Taney, an opponent of slavery who had freed his own slaves years before, produced a decision that upheld the institution of slavery and refused citizenship to freedmen. While his explanation best explains the decision, *Dred Scott* nevertheless was decided within the legal, political, and economic context highlighted by the scholarly literature above. Slaves did not have rights, legislation was passed in order to protect their economic potentiality and to hinder their escape. Although the abolitionist movement existed prior to the founding of the nation, the movement did not gain momentum until the early part of the nineteenth century. The courts, including Taney's opinion in *Dred Scott*, did not follow the moral consciousness of the abolitionists; legal decisions regarding slavery adjudicated based upon legal rules that existed at the time, maintaining the institution of slavery rather than advancing the principles of liberty, equality, and justice deemed a natural right of all persons.

The rhetorical and political move from a complex situational environment to the heightened proximity of the *Dred Scott* decision and the Civil War again simplifies and reduces *Dred Scott*'s collective memory to that of a mistake. Eliminating the situational and legal constraints upon the Supreme Court allows space to operationalize the decision as a "mistake." Considering the decision within its full historical context necessitates, as Fehrenbacher's work demonstrates, hundreds of pages, rather than the hundreds of words a newspaper account allows. Such reduction also enables critics to relates *Dred Scott* from its contextual moorings and apply it to other legal quandaries—from abortion to sodomy and from copyright infringement to school prayer. Within collective memory, blame is focused on the author of the

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[65] Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago: University of Chicago Press, 1965).

[66] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (New York: Garland Publishing, Inc., 1992).

[67] Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (New York: Cambridge University Press, 1998).

[68] A. Leon Higgenbotham, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (New York: Oxford University Press, 1996). Higgenbotham's entire work is devoted to the examination of four stages which he claims developed and perpetuated the notion of Black inferiority: 1619-1662 (the system assumed inferiority without giving a rationale for inferiority), 1662-1830s (defined and enforced inferiority); 1830s-1865 (defended and protected the institution of slavery; this period includes the *Dred Scott* opinion), and 1865-present (attempts, but fails, to end inferiority; this period includes the Reconstruction Amendments and *Brown v. Board of Education*).

opinion, the opinion is simplified, and the institution is freed from moral responsibility for the disenfranchised status of African Americans.

The Supreme Court's Exceptionalism

Immediately following the *Dred Scott* decision, the Court's institutional prestige suffered. No other action by the Court, historian Bernard Schwartz tells us, could "have tarnished its reputation to the extent that the action decision did."[69] Even more importantly, however, Kermit Hall opines that the court could have led the nation safely through divisive times rather than enhance national discord. Hall writes that *Dred Scott* "undermined the prestige of the Court just at the time when the stabilizing influence of a respected national judiciary might have provided the sound guidance desperately needed."[70] In addition to congressional criticism, newly inaugurated Abraham Lincoln declared (in Taney's presence),

> The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[71]

Lincoln's criticism verbalized past national fears of a centralized, undemocratic judiciary that Alexander Hamilton, in *The Federalist Papers*, sought to assuage.[72]

The time period following the *Dred Scott* decision brought about many changes both to the Supreme Court and to the nation. Two justices resigned (Curtis in 1858, and Campbell in 1861 to join the Confederacy), two justices died (Daniel in 1860 and McLean in 1861), and three justices emphasized their pro-Union sentiments. "Taney alone remained unrepentant and unredeemed," Fehrenbacher declares.[73] The Civil War divided the nation, the Fourteenth Amendment granted Blacks citizenship, and Reconstruction began the process of reconstituting the nation as a whole. These events drew public attention away from *Dred Scott* as they took precedence within the public sphere. The intricacies of events preceding the Civil War decreased in importance as the American people faced the realities of an altered society; hence pre-war exigencies collapsed into readily identifiable, somewhat concrete examples of racist through such as Taney's opinion.

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[69] Schwartz, *A History of the Supreme Court*, 124

[70] Kermit Hall, "*Scott v. Sandford*," in *The Oxford Companion to the Supreme Court*, Kermit L. Hall, ed. (New York: Oxford University Press, 1992), 759-761

[71] Inauguration Addresses of the Presidents of the United States. "Abraham Lincoln: Inaugural Address, March 4, 1861." http://www.bartleby.com/124/pres31.html (accessed March 10, 2008).

[72] Alexander Hamilton, in the *Federalist Papers* argues that the Supreme Court, "the least dangerous" branch of government, has "neither FORCE nor WILL but merely judgment." "A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour," Number 78 by Publius [Hamilton] in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Isaac Kramnick, ed. (New York: Penguin Books, 1987), 437.

[73] Fehrenbacher, *The Dred Scott Case*, 574.

The particularized focus on Taney as the racist progenitor of *Dred Scott* and the characterization of the decision as "a mistake" performs important rhetorical work to insulate the Supreme Court as an institution from charges of racism. Collective memory focuses upon Taney writing the decision, espousing his racist beliefs and arguing that Blacks had no rights with which Whites need concern themselves. Collective memory also holds *Dred Scott* as a "mistake," not a legally binding precedent that constitutes the nature of the Supreme Court as an institution. More often than not, United States citizens have looked upon the Supreme Court more as protectors of civil liberties and freedoms than inhibitors of the same. Only in rare cases has the public questioned the Court's function in civic affairs. The Supreme Court has integrated schools, as well as protected free speech and the rights of prisoners.

A more contemporary example is the *Bush v. Gore* (2000) decision. Many critics metaphorically linked *Bush v. Gore* to *Dred Scott*. Jane Cameron writes in *The Buffalo News*, "The cold hand of the Supreme Court on the Florida ballot raises ghosts from that court's checkered past, notably its decision in Dred Scott v. Sanford [sic]." Cameron's editorial continues, "the court's unseemly political meddling undermines the authority of its office . . . Apparently the Supreme Court's partisan underpinnings have defeated any concern for its historic legacy. History will serve up its fate, just as it bestowed shame and notoriety on the Dred Scott brethren."[74] For just as *Dred Scott* is perceived as decided by seven racist, southern agrarian justices, *Bush v. Gore* similarly is believed to be decided by five partisan, Republican justices. In both *Dred Scott* and *Bush v. Gore*, however, criticism was immediate, but not long lasting.[75]

The United States, a "city on a hill," a preferred nation-state, serves as a beacon to other nations. Public address and collective memory upholds the nation and its institutions as exceptional. Historian Joyce Appleby tells us, "Exceptional does not mean different. All nations are different; and almost all national sentiments exploit those differences. Exceptionalism does more; it projects onto a nation . . . qualities that are envied because they represent deliverance from a common lot."[76] Each institution, established through the adoption of the sacred constitutional document, perpetuates the United States' exceptional position in the global scene. Consequently, the Court—defender of liberty and dispenser of justice—may make mistakes from time to time, but these mistakes do not constitute the essence of the Court. Mistakes, made by individual justices, are righted through the perpetuation of the United States' governmental system.

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[74] Jane Cameron, "Ruling Tarnishes Supreme Court," *The Buffalo News*, 23 December 2000, 7B.

[75] See James O. Goldsborough, "But the institution suffers a self-inflicted wound," *The San Diego Union-Tribune*, 14 December 2000, b-13:2, 7,7; B-7:1; Akhil Reed Amar, "Supreme Court; Should We Trust Judges?" *Los Angeles Times*, 17 December 2000, M1; Martha Ezzard, "Anonymity hides justices' shame; The President-Elect: The Supreme Court," *The Atlanta Journal and Constitution*, 17 December 2000, &G; and Leonard H. Darby, "Confidence Shaken," *Pittsburgh Post-Gazette*, 26 December 2000, A-30.

[76] Joyce Appleby, "Recovering America's Historic Diversity: Beyond Exceptionalism," 79 *The Journal pf American History* 2 (September 1992), 419.

The theory of American exceptionalism reinforces *Dred Scott*'s construction as a "mistake." *Dred Scott*, hastening the Civil War according to public memory, brought about a breach in the national union, fracturing the body politic. Such a break cannot be considered anything else than a "mistake," for neither the Constitution nor its institutional system support division and separation. The exceptionalism of the United States and the preferred position of its institutions, actually subjugates the people's sovereign will, which shifts over time.

Collective memory simplifies historical recollection; collective memory disassociates the realities of the legal structure from the ideals of contemporary society. Regardless of the sovereign people's conflicted state, the United States and its institutions, the agents of American exceptionalism, will prevail. Hasian and Carlson tell us that legal memories "are constantly recirculated in our legal and public spheres, inviting us to engage in ritualized practices that bring either celebration or condemnation of particular historical decisions"[77] Consequently viewed as a "mistake," *Dred Scott* merely was a small setback in the United States' pursuit of freedom, liberty, and equality. This construction allows present collective memory to explain the past in simplified terms rather than a reflection of eighteenth century ideology or the result of an imperfect governmental system. The decision is a "mistake" that the United States can leave in its controversial past.

Despite arguments to the contrary, the Supreme Court is not a colorblind institution. Critical race scholars have demonstrated that racial equality does not exist within the United States.[78] Aside from slavery, during its history the Court has upheld separate public facilities and misogyny laws. Derrick Bell criticizes legal practices for unfair housing laws, economic injustices, harassment in criminal justice, and employment discrimination. "Racial issues in law, rather than moving toward resolution, have been inundated with the fictions that contradict racial reality."[79] Racism is not a characteristic of the United States past; racism continues, enabled by legal practices of the present.

The belief in the exceptionalism of the judicial branch demonstrates that a man and an opinion cannot be protected from controversial decisions, but an institution can. Although the Supreme Court suffered immediate criticism following the decision, the criticism was not lasting in any significant fashion. The vilification of the man and the decision allow the Supreme Court largely to escape lasting criticism for the decision. Although frequently cited as the worst case in Supreme Court history, agency for the opinion is given to Taney, the person who wrote the opinion, rather than the Court as the institution, which advanced the notion that Blacks were not people. The institution has the ability to self-correct, through later judicial decisions. The holding in *Brown v. The Board of Education* redeemed the Court as an

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[77] Marouf Hasian, Jr. and A. Cheree Carlson, "Revisionism and Collective Memory: The Struggle for Meaning in the Amistad Affair," *Communication Monographs* 67 (2000): 42.

[78] See, for example, Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York: BasicBooks, 1992); Derrick Bell, *Race, Racism, and American Law*, 5th Edition (New York: Aspen Publishers, 2004); and A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (New York: Oxford University Press, 1996).

[79] Bell, *Race, Racism, and the American Law*, xx.

institution in collective memory of the Court in regards to race. Taney's legacy in collective memory, however, remains fixed by the 1857 *Dred Scott* decision.

The judicial branch promotes and protects American ideals—liberty, justice, and freedom—against the whims of particular persons and events. As I have already established, the denigration of Taney, a man who liberated his own slaves early in his adult life, as a "racist judge," and of *Dred Scott*, a decision which upheld the legal constructions of race in the mid-1800s, as a "mistake," ignore the complexities of the man and the time. The Supreme Court as an institution is distanced from the charge of racism, as the racism of the law that produced *Dred Scott* is ignored by collective memory.

Conclusion

As this case study demonstrates, collective memory advances White privilege and works at odds with the goals of Critical Race Theory. The nation is permitted to forget its collective guilt, as blame is located within the body of one man and his intellectual product. The legal opinion which conscribed a particular group of people as less than human is characterized merely as a mistake instead of being produced by a systemic problem. The judicial system that perpetuates a system of control is allowed to continue, preferencing certain groups over others, unchallenged by the people over whom it presides.

The power of collective memory to direct forgetting is indicated by how little much a part of contemporary public memory *Dred Scott* remains. In the city where Dred Scott originally filed suit, a newspaper account of the Old Courthouse's plaque commemorating the event remarks, "The point of the point of the plaque is to mark those facts on the outside of the building, for the benefit of the uniformed passerby."[80] Uninformed passersby abound. Even in educated environments not all persons are familiar with the case. When I went to pick up some books from the university library, the person checking me out, reading the titles of the works, asked, "What is Dred Scott?" Dred Scott's case seems one of interest for historians, legal scholars, and activists who seek to hold aloft *Dred Scott* as a banner of previous injustice.

The *Dred Scott* opinion is not the only time in history that the judicial branch has not protected minority groups. In her essay on the *Anderson v. Evans* (2004) decision, which considers how the Ninth Circuit has failed to protect the whaling rights of the Makah Indian Tribe, Young describes what she calls a "melancholic moment for European America," during which the nation and the legal system "are unable to accept the loss of a unified national character and an authoritative legal system."[81] Her moment, however, is not new but ongoing. Throughout the judicial system's history, the culture of the nation and the precedents of the courts have failed to protect minority rights. Examples extend beyond my analysis of *Dred Scott* or her examination of *Anderson* to include *Plessy v. Ferguson* and *Korematsu v. United States*,

[80] Tim O'Neil, "Dred Scott Case is Remembered with New Plaque," *St. Louis Post-Dispatch*, 1 December 1999, B1.

[81] Young, "The Ghost of Moby-Dick," 37.

amongst other decisions.[82] In *Plessy* the Court established the "separate but equal" doctrine and in *Korematsu* the Court upheld the legality of the internment of Japanese Americans. More frequently than not, the courts perpetuate racism through their attempts to arbitrate issues of race.

Since the judicial process is an adversarial process, in which one party challenges another party as to the legality of an action and the courts determine which entity is "the winner," it appears difficult to escape the systemic features which perpetuate White privilege and racism. William Lewis's suggestion, in his essay, "Of Innocence, Exclusion, and the Burning of Flags," that justices and academics adopt a tragic view of the law, would be one possible solution. Lewis writes,

> The tragic mythos facilitates adjudication sensitive to both meaning and power. It appreciates the agon of life in a world of pain where we hurt one another, seek to right our wrongs, yet continually confront limits on our ability to achieve any just order. The romantic mythos suggests that law either discovers or imposes social meaning; the tragic sensibility displays us all together in shared, continuing struggles for meaning. Featuring limits as well as possibilities of human action, the tragedy of the law can incorporate continual self-criticism. In saying whether actions in a particular case embody or violate our initial list of virtues, tragedy helps us to recognize the contingent senses in which our virtues really are and are not virtuous.[83]

Abandoning a romanticized understanding of the law in favor of Lewis' tragic perspective would allow a critical perspective in legal decision-making. It would reject the simplification of collective memory and allow for ambiguity and constructive criticism of our legal institutions and practices.

This essay is a first attempt to demonstrate the ways in which the authority and legitimacy of the judicial branch is maintained through shifting of blame. Although Taney should be held accountable for writing the Court's decision, and *Dred Scott* should be determined a mistake, the system that facilitated the result should be held responsible as well. Collective memory, and the public directed by such memory, needs to embrace uncertainty so that simplified versions of history are not perpetuated. Doing so will facilitate all persons being included within the collective and a memory that does justice to the society for whom it re-members.

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[82] See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[83] William Lewis, "Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law," *Southern Communication Journal* 60 (1994): 16.