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Laura Kyte

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*Laura Kyte**

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* Fellow, Utah Attorney General's Office, Litigation Division (the content of this Note does not necessarily reflect the views of the Attorney General or of the Office of the Attorney General); J. Reuben Clark Law School, J.D. 2021; Utah Valley University, B.A. History 2018. Many thanks to Professors Michalyn Steele and Justin Collings from BYU Law and Dr. Michael Goode from UVU for their direction and input, and to the BYU Law Review editors for the polish.

INTRODUCTION

On August 10, 1988, President Ronald Reagan stood in the Old Executive Office Building in front of members of Congress and America to offer an apology.[1] Reagan was signing the Civil Liberties Act of 1988,[2] which acknowledged the harm that was done to Japanese Americans through their internment during World War II and granted reparations for the injustice inflicted. Perhaps more importantly, it also issued an official apology from the United States government.[3] Reagan proclaimed that the most important part of the bill was not the $20,000 that would be available to Japanese Americans who had been detained, but rather "honor."[4] "For here we admit a wrong; here we reaffirm our commitment as a nation to equal justice under the law."[5] Reagan realized the harm inflicted on Japanese Americans was more than just economic.

Reagan did not define what he meant by "honor," and he was unclear as to whom the honor was directed, but it appears that his underlying belief was that an official government apology had the power to input something necessary to restoration that could not come in the form of economic payment. Reagan did not articulate whether the apology would bestow honor upon Japanese Americans through the recognition that the United States had violated their human dignity by implementing racist ideas that negatively impacted an entire race of people. Nor did he articulate whether the apology would restore honor upon the United States through the recognition that the United States committed a severe wrong, or whether it was now taking responsibility for the harm it caused and was attempting to correct it. Perhaps the apology was working towards both of those ends.

Slavery and its legacy—the racist ideas and racist policies that were used to uphold the systematic institution of bondage and oppression—have inflicted greater harm upon African Americans

1. President Ronald Reagan, President of the United States of America, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1988), https://www.reaganlibrary.gov/research/speeches/081088d.

2. Civil Liberties Act of 1988, Pub. L. No. 100-383, https://www.congress.gov/bill/100th-congress/house-bill/442.

3. *Id.*

4. Reagan, *supra* note 1.

5. *Id.*

in the United States than World War II internment did upon Japanese Americans.[6] The harm caused by slavery has a much longer history, deeply interwoven in the founding of the United States, and even predating it, creating the defining context of race by which other racial oppressions are then overlaid.[7] This legacy has certainly inflicted a variety of economic harms that persist to the present day.[8] But the legacy of slavery has also inflicted non-economic harms in the form of racist ideas and perspectives that continue to permeate American memory.[9] The Supreme Court

6. This is not to minimize the harmful effect of Japanese American internment. The harm inflicted on Japanese Americans was severe and reprehensible. "[A]fter the bombing of Pearl Harbor, 120,000 persons of Japanese ancestry living in the United States were forcibly removed from their homes and placed in makeshift internment camps. This action was taken without trial, without jury. It was based solely on race . . . ." Reagan, *supra* note 1. *See also* ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000).

7. *See generally* DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD (2006) [hereinafter INHUMAN BONDAGE] (recounting the history of slavery in a global context); NICHOLAS GUYATT, BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION (2016) (discussing the ideological roots of "separate but equal" and how both black and Native Americans were implicated); JOHN WOOD SWEET, BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730–1830 (2003) (exploring the relationship between culture, racial identity, and postcolonial politics); STEPHANIE E. SMALLWOOD, SALTWATER SLAVERY: A MIDDLE PASSAGE FROM AFRICA TO AMERICAN DIASPORA (2007) (a transatlantic view, explaining the commoditization of African people and the cultural justifications for the process).

8. *See, e.g.*, MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 10 (2017) ("The stark wealth distortion caused by slavery and the longevity of its effects cannot be overestimated."). *See generally* DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION (2017) (exploring the economic value of enslaved people through each phase of life); ANA LUCIA ARAUJO, REPARATIONS FOR SLAVERY AND THE SLAVE TRADE: A TRANSNATIONAL AND COMPARATIVE HISTORY (2017) (a narrative history of claims for reparations for slavery); SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016) (arguing that slavery was central to the development and growth of American capitalism between the Revolution and the Civil War).

9. *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016) (a narrative account exploring the development of racist thought from the colonial era to the present day); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (tracing the evolution of racism from explicit in the Jim Crow era to covert in the era of mass incarceration); TA-NEHISI COATES, WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY (2017) (a collection of essays exploring the lingering effects of American slavery even after the election of America's first black president).

has been implicit in creating and perpetuating those racist ideas that led to a false historical memory. The Court has written racist opinions that have colored the historical narrative of African Americans in a way that encouraged racist beliefs to continue and fed the appetite of white supremacy.[10] *Dred Scott v. Sandford* is the most obvious and far-reaching example.[11]

The Supreme Court should have a mechanism through which it can issue an official apology for damaging opinions and the Court should start with the *Dred Scott* case. Most erroneous opinions have the opportunity to be corrected through a subsequent opinion, so an official apology is not necessary for those cases. But the opportunity to admit a wrong and make corrections rarely comes when an opinion is overruled through a constitutional amendment. An amendment acts as a new starting point for the Court, minimizing the previous erroneous opinion and whatever effect on individuals that it might have had. An apology would provide one avenue towards a greater reckoning of the Court's effect on the role of African Americans in U.S. society. As Alfred Brophy suggests, an apology would "honor the memory of those who were enslaved[,]" show an "understand[ing] that the sins of our country's past burden us still today[,]" and "would help correct the ignorance of many Americans about our past."[12]

This Note addresses some of the framework under which an apology would fit and why the Court should start with the *Dred Scott* case. Part I addresses why the Court's communication about *Dred Scott* thus far has not appropriately addressed the errors the opinion contains. Part II explains how an apology is an appropriate remedy under a corrective justice framework—this includes analyzing *Dred Scott* through the lens of historical injustice and how this is understood within a broader historical context. Part III places an apology for *Dred Scott* within an

10. *See infra* Part I.

11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

12. Alfred L. Brophy, *Considering Reparations for* Dred Scott, *in* THE *DRED SCOTT* CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 177, 186 (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey eds., 2010) [hereinafter Brophy, *Considering Reparations*].

anti-racist theoretical framework. And Part IV explains how the Court can set limits on when it would issue an apology.

I. THE SUPREME COURT HAS FAILED TO ADEQUATELY ADDRESS THE ERRORS OF *DRED SCOTT*

In 1857, the Supreme Court of the United States issued the infamous *Dred Scott* decision, in which the Court invalidated the Missouri Compromise and found that Scott was a slave and, therefore, not a citizen.[13] More broadly, *Dred Scott* is understood as holding that "the Constitution did not recognize [any] black Americans as citizens of the United States or their own State."[14] *Dred Scott* was superseded by the Fourteenth Amendment in 1868. While it is clear the Court rejects the "deplorable" holding of *Dred Scott*,[15] the Court has not clearly communicated, nor corrected, what was wrong with the *Dred Scott* opinion. This is not to say that the Court has made no efforts to confront the problems with *Dred Scott*, nor to say that the Court has done nothing to grapple with its history of racism. For example, in *Regents of University of California v. Bakke*, Justice Marshall addressed the Court's role in propagating the idea that slaves were property through *Dred Scott*.[16] Furthermore, Justice Marshall summarized the Court's history of upholding racial oppression and discrimination against black Americans, and the legacy thereof.[17] He asserted that "it must be remembered that, during most of the past 200 years, the Constitution as interpreted by th[e] Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro."[18] Justice Marshall seemed to know that a romanticized version of history does more damage than good. In order to uphold the legitimacy of the Court in the eyes of *all* Americans and to repair remanences of distrust, the Court should come to a full reckoning with *Dred Scott*.

13. *Dred Scott*, 60 U.S. at 453–54.
14. McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring).
15. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2352 (2021) (Kagan, J., dissenting).
16. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 389–90 (1978) (Marshall, J., concurring).
17. *Id.* at 387–96.
18. *Id.* at 387.

Dred Scott continues to hang like a specter over the Court's jurisprudence because the Court has not specifically addressed its racist errors. The case has been brought up in recent opinions under a negative light, but the general focus is on Constitutional principles rather than the racist ideology or racial impact. *Dred Scott* appeared as recently as April 2020, where Justice Thomas mentioned it in his concurrence.[19] According to Thomas, *Dred Scott* was an "incorrect decision[]" based on the theory of due process incorporation, yet he went no further in his reasoning that it was incorrect.[20] We are left to assume that his negative view of *Dred Scott* has more to do with the theory of due process incorporation than anything else. In *Washington v. Glucksberg,* the Court noted *Dred Scott* during its discussion of the history of the Court's authority for constitutional review of statutes.[21] The Court explained how the reasoning of *Dred Scott* fits into the historical context but never addressed the wrongs of the opinion directly. The Court only noted that "[t]he ensuing judgment of history needs no recounting here."[22] Justice Gorsuch's dissent in *Gamble v. United States* noted the dangers of strict adherence to the use of stare decisis when evaluating constitutional interpretation.[23] As an example, Gorsuch points to *Dred Scott*, along with *Plessy* and *Korematsu*, asserting that *Dred Scott* was a "grotesque error."[24] He noted that "violence" was done "to the Constitution in the name of protecting slavery and slaveowners" by holding that "the Due Process Clause prevented Congress from prohibiting slavery in the territories, though" it "did nothing of the sort."[25] However, he did not explain how the Court erroneously came to this conclusion, what the correct analysis should have been, nor did he acknowledge what damage was inflicted on black Americans through the Court's error.

Earlier in the Court's history in relation to the *Dred Scott* opinion, it is unclear whether the Court thought there was anything

19. Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring).
20. *Id.*
21. Washington v. Glucksberg, 521 U.S. 702, 755–65 (1997).
22. *Id.* at 759.
23. Gamble v. United States, 139 S. Ct. 1960, 2005–06 (2019) (Gorsuch, J., dissenting).
24. *Id.*
25. *Id.* at 2006.

wrong with the opinion that had to do with race or racism. In 1901, Justice Brown noted in *Downes v. Bidwell* that "[t]he difficulty with the *Dred Scott* case was that the court refused to make a distinction between property in general, and a wholly exceptional class of property."[26] Notice that Justice Brown's assertion implicitly accepted the racist notion of African Americans as property. Not to mention that *Dred Scott* did more than just refuse to make a distinction. There, the Court affirmatively and specifically classified the ownership of black humans as "like an ordinary article of merchandise and property . . . ."[27] The *Downes* opinion spent a relatively considerable amount of space discussing *Dred Scott* and even noted its use as authoritative.[28] Yet, the Court said nothing to critique the notion of humans as property itself, only that it was not recognized as being under a different type of ownership. The 1898 *United States v. Wong Kim Ark* case would have been a prime opportunity for the Court to say something about the racist beliefs that buttressed the *Dred Scott* opinion. Instead, the Court simply noted that the Fourteenth Amendment overruled *Dred Scott*, "establish[ing] the citizenship of free negroes, which had been denied in the opinion . . . ."[29] The Court's choice to not directly and specifically address the underlying racist ideologies in the *Dred Scott* opinion served to surreptitiously perpetuate the apparent legitimacy of those ideologies.

Occasionally, the Court has made gestures towards the racist errors of *Dred Scott* by pointing out its racist thinking. In a 2007 concurrence, Justice Thomas noted:

> Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories . . . . Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy*

26. Downes v. Bidwell, 182 U.S. 244, 275 (1901).

27. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

28. *Downes*, 182 U.S. at 271–76. "It must be admitted that this case is a strong authority in favor of the plaintiff[.]" *Id.* at 273.

29. United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898).

> are a relic of the past or that future theories will be nothing but beneficent and progressive?[30]

In Justice Powell's 1980 concurrence of *Fullilove v. Klutznick*, he noted the Court's role in perpetuating racist belief through its opinions.[31] He admitted "our own decisions played no small part in the tragic legacy of government-sanctioned discrimination."[32] Even earlier, Justice Harlan, in his 1896 dissent of *Plessy*, had called attention towards the influence that racism has over court opinions by using *Dred Scott* as an example.[33] He apparently recognized the role that racism plays in creating a schism of distrust between black Americans and institutions of power such as the Court. He notes:

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[34]

Ironically, while talking about people of Chinese descent just a short while later, he asserted that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[35] Thus, in one big judicial breath, Justice Harlan both acknowledged a problem inherent in racism while also upholding racist ideology. Yet, none of these examples went so far as to unravel what, exactly, was wrong in the *Dred Scott* decision, nor do they go so far as to specifically make corrections.

In some instances, the Court has gone so far as to memorialize the words of Justice Taney in the *Dred Scott* opinion. In 1905, Justice

30. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 780–82 (2007) (Thomas, J., concurring) (quoting *Dred Scott*, 60 U.S. at 406–07 ("[T]hey [members of the 'negro African race'] had no rights which the white man was bound to respect[.]")).

31. Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring).

32. *Id.*

33. Plessy v. Ferguson, 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

34. *Id.* at 560.

35. *Id.* at 561.

Brewer quoted Taney while asserting the "changeless nature and meaning" of the Constitution.[36] Justice Brewer did the same in recounting the birth of the United States through the creation of the Constitution.[37] Perhaps rather than fantasizing about the purity of the Constitution and the Court's relationship with it, the Court should contend with the way it has used the Constitution as a tool to perpetuate racist ideas. The Court is undeniably intertwined with the unequal treatment that has been afforded to African Americans and the words of the Court have had very real consequences for an entire race of people. The Court should directly confront this reality and redress its errors.

II. UNDER A CORRECTIVE JUSTICE FRAMEWORK, AN APOLOGY IS AN APPROPRIATE REMEDY FOR HARM INFLICTED BY THE *DRED SCOTT* OPINION

Principles of corrective justice justify the ability for the Court to be able to issue an apology and rectify past mistakes when the opportunity to do so in an opinion cannot arise. Corrective justice is a theoretical framework that is usually applied to tort or contract law.[38] It is a concept rooted in relationship because it is "the idea that liability rectifies the injustice inflicted by one person on another."[39] Central to corrective justice is a notion of equality that

36. South Carolina v. United States, 199 U.S. 437, 449 (1905) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV) ("It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of the court, and make it the mere reflex of the popular opinion or passion of the day.").

37. Kansas v. Colorado, 206 U.S. 46, 81 (1907) (quoting *Dred Scott*, 60 U.S. at 441) ("The 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. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations.").

38. *See* Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002).

39. *Id.* at 349; *see also* Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 148–70 (2008).

exists between two parties that is not based on any sort of wealth disparity.[40] Rather, equality "refer[s] to the entitlement of each of the interacting parties to have what is rightfully theirs."[41] Therefore, corrective justice seeks to restore the baseline equality to the parties.[42]

The goal of corrective justice is to rectify the wrong through a resolution that recognizes the interconnectedness between two parties. This differs from the concept of distributive justice because the distributive justice framework imposes a general societal duty based on a variety of categories including merit or need, not just equality.[43] Corrective justice provides a narrower framework that addresses the specific interaction and connection between two parties. "[T]he plaintiff is asserting that the two are *connected* as doer and sufferer of the *same injustice*."[44] The sufferer has only suffered because the doer has done something to disrupt the equality between the two parties—each playing a different role of the same injustice.[45] Thus, the remedy "responds [directly] to the injustice and [must be] correlatively structured."[46] Corrective justice requires that the remedy address the interrelationship of the parties—actual benefits received or the failure to fulfill a duty on the part of the defendant, and the deficiencies or detriments suffered by the plaintiff.[47]

Nonetheless, the injustice must be based on an established right and a duty to not violate or encroach upon that right. Whatever the rights and duties may be, they "are actualized through a set of judicial institutions that endows them with a determinate shape, makes public the mode of reasoning that accords with what is presupposed in them, and undoes the consequences of conduct inconsistent with them."[48] However, the justifications for redress offered by corrective justice are

40. Weinrib, *supra* note 38, at 349, 354; Wyman, *supra* note 39, at 149.
41. Weinrib, *supra* note 38, at 354.
42. *Id.* at 349.
43. Wyman, *supra* note 39, at 149.
44. Weinrib, *supra* note 38, at 349 (emphasis added).
45. *Id.* at 350.
46. *Id.*
47. *Id.* at 350–51.
48. *Id.* at 354.

contingent and are limited to some extent.[49] Katrina Wyman, a professor at New York University School of Law who researches the redress of historical injustices, identifies at least three conditions that must exist in order for corrective justice theories to apply: "the existence requirement, the violation-of-protected-interest requirement, and the remediable violation requirement."[50]

A. Corrective Justice Theory Requirements

1. Existence requirement

All three conditions of the corrective justice theory are met when considered in the context of an apology for *Dred Scott*. First, theories of corrective justice have an existence requirement. This requirement demands that "a duty of repair applies only if the wrongdoer and the victim still exist."[51] The existence requirement makes sense within the framework of corrective justice because of its focus on interrelationship. It is agent-specific.[52] If one of the parties no longer exists, it would be impossible to restore the equality between them.[53] However, contemplating the existence requirement when the parties are institutions or collective agents becomes less concrete, and even more so when the remedy seeks to address a historical injustice.[54]

It is probably easier to accept the notion that the wrongdoer continues to exist over time, even when that wrongdoer is a collective agent or institution, than it is to accept the notion that the victim still exists. We implicitly understand continual existence when it comes to corporations or government entities,[55] including the Supreme Court. "[T]he law presumes that governments and corporations retain their identities over time, even when the individuals comprising them change."[56] This is also how we view

49. Wyman, *supra* note 39, at 148–49.
50. *Id.* at 150.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.* at 150–51.
55. *See id.*
56. *Id.* at 151.

each court within our judicial system. Generally, there would have to be a fundamental change in the collective agent, or in the relationship between the collective agent and the action central to the injustice, to break continued existence.[57] There has been no fundamental change in the Supreme Court as an institution to justify removing liability from the *Dred Scott* opinion. The ratification of the Fourteenth Amendment also is not sufficient to remove liability because it does not fundamentally change the relationship between the Court and the *Dred Scott* opinion. The work of the Fourteenth Amendment was exerted by the will of the people through the Legislative and Executive branches of government, not the Judiciary. The Fourteenth Amendment also does not correct all of the harms inflicted upon African Americans by the opinion. The Amendment actualized African Americans' claim to citizenship, but it did not correct the harm the Court inflicted by the erasure of history.[58] Therefore, the Court's liability remains.

Determining whether a victim continues to exist is more difficult when the victim is a collective group of people that have individually changed over time—in this case, African Americans. Of course, direct victims of a violation retain their entitlement to redress, but that does not necessarily mean that their descendants do.[59] Wyman asserts two ways to determine whether descendants can continue to claim entitlements of redress over time.[60] First, "define deceased direct victims as still existing because they have continuing interests after they die."[61] Continuing interests could include, for example, "the well-being of the remaining family members" or "knowing that their children and grandchildren had collected [restitution] that they had not been able to collect[.]"[62] Second, Wyman suggests "extend[ing] the concept of victim to define descendants of direct victims as victims of the injustice"

57. *See id.*

58. David Thomas Konig, *Constitutional Law and the Legitimation of History: The Enduring Force of Roger Taney's "opinion of the court"*, *in* THE *DRED SCOTT* CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 9, 10 (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey eds., 2010) [hereinafter Konig, *Legitimation*].

59. *See* Wyman, *supra* note 39, at 153.

60. *Id.* at 154–56.

61. *Id.* at 154.

62. *Id.*

because of the continued effect on the direct victim's immediate descendants.[63] For example, the direct victim's suffering left them "less able to support their descendants materially and emotionally," or the descendants were "deprived . . . of their inheritance rights."[64]

The existence requirement does not demand that either the original wrongdoer or original victim remain in connection through the specific injustice. Nonetheless, Wyman argues that the existence requirement necessarily imposes a time limit.[65] In her estimation, descendants would only be entitled to redress for the historical injustice for one or two generations.[66] However, Wyman's argument assumes an economic remedy. When the only method of redress is money damages, too many factors can come into play that mitigate the continued legacy of the damage the injustice caused. When the harm is not economic, the legacy of that harm can last over many generations. The impact of the harm inflicted by the *Dred Scott* opinion may have changed over time, but the harm itself has remained to the present day because it has never been corrected.

2. Violation-of-protected-interest requirement

The second requirement under the corrective justice framework is that "the wrongdoer must have violated a protected interest of the victim."[67] Because the wrongdoer and the victim must be connected through the same injustice, "if the claimant cannot point to an interest of his that has been violated by the alleged wrongdoer," the "claimant is not entitled to corrective justice."[68] In other words, "[a] victim cannot transfer his entitlement to repair to someone who was not harmed by the wrongdoer."[69] In addition, the law at the time the injustice took place is irrelevant.[70] This is because corrective justice is concerned about inherent equality

63. *Id.* at 155.
64. *Id.* at 155–56.
65. *Id.*
66. *Id.* at 154–56.
67. *Id.* at 156.
68. *Id.* at 157.
69. *Id.*
70. *Id.*

rooted in moral understandings.[71] If the law allows for an injustice to take place, then "that law would be merely another example of the injustice."[72]

While there is no exhaustive list of interests that are subject to a violation, "bodily integrity and core property rights" are the protected interests that most often "trigger a duty of repair."[73] This is likely why Wyman assumed an economic remedy is appropriate under a corrective justice framework, thereby instituting a time limit. Economic damages easily correlate with the relationship between the wrongdoer and victim when the injustice involves physical damage to property or person. However, violations of human dignity are also a violation of a protected interest.

The Court began talking about the importance of human dignity in the 1940s. In Justice Murphy's 1946 dissent from *Application of Yamashita*, he argued that recognizing human dignity was of the "utmost importance" in developing an "orderly international community."[74] A Westlaw search shows that the Court has mentioned human dignity in at least seventy-two opinions. In 2015 Justice Thomas, in his dissent from *Obergefell v. Hodges*, claimed that the idea of human dignity was imbedded in our nation's founding through the Declaration of Independence.[75] Justice Thomas embraced an idealistic version of the founding where human dignity was "innate" and could not be taken away, even through the system of slavery.[76] In Justice Thomas's view, "[t]he government cannot bestow dignity, and it cannot take it away."[77] While there may be some philosophical truth to Justice Thomas's assertion, it fails to reckon with the realities of slavery and our founding's failure to fully acknowledge the humanity of black people. Human dignity is more than a philosophical idea. The Court is a central institution to our government and its failure to confront its own

71. *See id.*
72. *Id.* at 158.
73. *Id.* at 156–57.
74. Application of Yamashita, 327 U.S. 1, 29 (1946).
75. Obergefell v. Hodges, 576 U.S. 644, 721 (2015).
76. *Id.* at 735.
77. *Id.*

role in degrading black Americans inflicts real harm. The Court violated the human dignity of black Americans through *Dred Scott* by creating a false historical narrative.

3. Remediable violation requirement

The third condition required under a corrective justice framework is "that it must be possible for the violation of the victim's protected interest to be remedied."[78] If the goal of corrective justice is to provide a remedy that restores equality, when there can be no remedy, there can be no restoration of equality.[79] Thinking of remedies only in economic terms creates doubts about the ability to provide a remedy for non-economic injustices.

The Supreme Court is the most powerful and influential judicial institution that exists in the United States because all lower courts must fall in line with their decisions. Only Congress has the power to stray from a Court opinion, and even then, legislation is not always successful under judicial review. The ideals of our judicial system and institutions are founded on notions of fairness and coherence,[80] yet the Court has sometimes fallen short of these ideals. "[C]orrective justice provides the immanent critical standpoint informing the law's effort to work itself pure."[81] Echoing the principle President Reagan articulated in 1988, by admitting a wrong, the Court can reaffirm its commitment to equal justice under the law by issuing an official apology for *Dred Scott*.

An apology for *Dred Scott* is an appropriate remedy because the Court violated the human dignity of black Americans through its words. The Court inflicted harm on black Americans by creating a false historical narrative. Under a corrective justice lens, that harm could be remedied by issuing another opinion—taking the form of an apology—that specifically addresses the erroneous history presented in *Dred Scott*.

78. Wyman, *supra* note 39, at 158.
79. *See id.*
80. *See* Weinrib, *supra* note 38, at 356.
81. *Id.*

B. The Harm the Court Inflicted on Black Americans Is a Historical Injustice

The opinion of *Dred Scott* created a false version of history that erased the success of the black struggle to attain recognition of human dignity and erased the ways in which black Americans asserted their citizenship.[82] The false and distorted version of history presented by the Court in *Dred Scott* is echoed in modern racist ideas that contend that African Americans have some level of culpability in slavery and the ongoing oppression of black bodies in the United States.[83] It has not been enough that *Dred Scott* was overturned through the Fourteenth Amendment to overcome this type of belief. Nor is it enough that the Court has distanced itself from the opinion. The Court should take anti-racist measures to correct its past mistakes by creating a mechanism through which it can make an official apology and correct the history it got so terribly wrong.

Recent years have seen an increase in discussion of economic reparations as a remedy for the injustices of slavery and the legacy of Jim Crow. These plans would most heavily involve actions by the legislative and the executive branches. The Supreme Court may end up having a role in supporting reparations through subsequent litigation, yet upholding the constitutionality of reparations would most likely not directly address historical harms that have been specifically inflicted by the Court itself. The harms against African Americans have not only been economic. Through opinions like that of *Dred Scott*, the Court contributed to negative stigmas that have affected black Americans since the day of the decision. Particular to *Dred Scott*, the Court created a false history of what African Americans were experiencing at the time of the decision and how the laws of Massachusetts and Pennsylvania were acknowledging black rights and citizenship. At the same time the Court created a false historical memory, it also erased the success of African Americans in asserting their citizenship. The Court has a duty to correct its erasure of this history.

82. *See infra* Section II.C.

83. *See* Blair L.M. Kelley, *If Enslaved Americans Weren't Mentally Strong, There Wouldn't Even Be a Kanye West*, WASH. POST (May 3, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/05/03/if-enslaved-americans-werent-mentally-strong-there-wouldnt-even-be-a-kanye-west/.

The Court inflicted a historical injustice against black Americans through the false history created in *Dred Scott*. According to Katrina Wyman, historical injustices generally share

> four characteristics: (a) they were committed or sanctioned at least a generation ago; (b) they were committed or authorized by one or more collective agents, such as a government or corporation; (c) they harmed many individuals; and (d) they involved violations of fundamental human rights, often discrimination based on race, religion, or ethnicity.[84]

The Court should not be immune from redressing its historical wrongs. "[C]laims for redressing [historical injustices] typically have involved collective action directed at the legislative and executive branches of government and/or private corporations."[85] Sometimes, claims for redress are made through litigation, but defendants in those cases are rarely found liable.[86] Thus, victims of injustice are only left with political action to receive the redress they seek. However, in the case of *Dred Scott*, the Supreme Court—the judicial branch—acted as the collective agent, and currently there is no mechanism other than a holding or opinion whereby the Court can correct a past error.

Principles of corrective justice demand that the judicial branch has a way to remedy harms that it commits. Usually, this comes in the form of an opinion where the Court can overrule past erroneous holdings, correct past faulty reasoning, and identify racist or problematic language. However, as with *Dred Scott*, when there is no opportunity to correct a past opinion through a new opinion, an official apology of the Court serves as a corrective remedy.

Apologizing for and correcting the mistakes in *Dred Scott* is not only just but is also moral. The principle of corrective justice is rooted in moral grounds which "usually . . . assume[] to generate an obligation on specific individuals to repair losses that they caused to other[s]."[87] This is what President Reagan was referring to when he talked about "honor." He implicitly recognized that

84. Wyman, *supra* note 39, at 134.

85. *Id.*

86. *Id.*

87. *Id.* at 145.

there was a moral duty to apologize for past mistakes, even when those mistakes are made at an institutional level. The Court needs to recognize its moral duty to redress the injuries of *Dred Scott*. The harm created through the false historical narrative of *Dred Scott* has endured by erasing the success of the African American struggle to attain rights and assert their freedom and citizenship. Although the black citizens affected at the time of the decision in 1857 are long gone, remnants of the historical erasure remain.

C. Justice Taney's Opinion Was a False Representation of History

The clear sin of Taney's *Dred Scott* opinion was that it inflicted harm on African Americans through the creation of a false historical narrative. There is scholarly debate over different aspects of the opinion such as whether Taney got the constitutional interpretation or legal reasoning wrong.[88] Various scholars have expounded on the errors of Taney's opinion, including: "It decided issues that were not necessary to the decision of the case, . . . [i]t supposed that there might be a 'constitutional' settlement of largely political issues[,] [a]nd it substituted a Southern interpretation of the Constitution . . . in place of what people had understood as constitutional up to that point."[89] There is debate over whether the reasoning regarding constitutional doctrine was sound;[90] however, the historical narrative was certainly wrong.

The false historical narrative created in Justice Taney's opinion inflicted a specific type of harm on African Americans. According to David Thomas Konig, "the impact of rejecting a particular legal doctrine differs materially from that of rejecting a particular version of history, which ultimately poses a much greater harm in a democracy."[91] The effects of false history reach beyond the legal decision.[92] A bad legal decision "may affect only the parties to a particular case" or in the case of broader impact, such as the effect of

88. *See* Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the* Dred Scott *Case*, 37 OCCASIONAL PAPERS L. SCH. UNIV. CHI. 1 (1996); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

89. Brophy, *Considering Reparations*, *supra* note 12, at 180.

90. *See id.* at 181; GRABER, *supra* note 88.

91. Konig, *Legitimation*, *supra* note 58, at 10.

92. *Id.*

Dred Scott, the "impact can be reversed by constitutional amendment."[93] The Fourteenth Amendment, not a Supreme Court case, overruled the decision in *Dred Scott* and declared African Americans as full citizens of the United States.[94] Yet, as Konig contends, the opinion's "greater and much longer term damage lies outside the law and continues to the present day" by "corrupting our nation's historical memory and creating a false normative narrative of the American experience."[95]

The legitimacy of the Supreme Court gives the words of its opinions power to influence social thinking and when its words are wrong, steps should be taken to correct them. The Court distorted the role African Americans have played in our history, and this distortion can have a continuing effect when "fragments of doctrine" have the possibility to remain.[96] Justice Taney presented a racist version of history meant to justify the degradation and subjugation of African Americans. Taney asserted,

> 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.[97]

93. *Id.*

94. *See* U.S. CONST. amend. XIV, § 1.

95. Konig, *Legitimation*, *supra* note 58, at 10.

96. Brophy, *Considering Reparations*, *supra* note 12, at 183.

97. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Taney likely knew that his statement was incorrect,[98] but nonetheless he presented it as reasoning to support the racist belief that black Americans could not possibly be citizens.

Taney's version of African American history in Massachusetts and Pennsylvania was an erasure of black experience in those states. It is an error to place historical conceptualizations of black rights within a binary that places full citizenship on the one side and total depravity on the other. Nonetheless, long before *Dred Scott*, free and enslaved blacks were using the courts as a mechanism to claim the same rights as white citizens in the emerging republic, and white judges and political and religious leaders were recognizing those rights.

1. The black struggle for citizenship in Massachusetts

Justice Taney noted that Massachusetts enacted an anti-miscegenation law in 1705 that remained in force at the time of the Revolution in order to show "the fixed opinions concerning that race."[99] Taney cherry picked laws that he thought supported his belief that African Americans were fundamentally a degraded and inferior race. He essentially argued that anti-miscegenation laws proved that both the federal and state founders never intended to include blacks in protections provided by the federal or state constitutions.[100] In reality, any degradation blacks experienced was imposed upon them by racist ideologies and systems, not because African Americans were biologically inferior. This notion is obvious to our modern ideologies regarding race, but it was also obvious to many people at the time of Justice Taney's opinion. Black and white Americans had been rejecting racist ideologies such as Taney's and had been using the legal system to assert black rights.

In 1780, while the Revolutionary War was still being fought, Massachusetts abandoned its colonial charter and ratified a new state constitution, written by John Adams, Samuel Adams, and James Bowdoin.[101] The language used in the constitution was a reflection of

98. Konig, *Legitimation*, *supra* note 58, at 12–13.

99. *Dred Scott*, 60 U.S. at 409.

100. *Id.*

101. CHRISTOPHER CAMERON, TO PLEAD OUR OWN CAUSE: AFRICAN AMERICANS IN MASSACHUSETTS AND THE MAKING OF THE ANTISLAVERY MOVEMENT 70 (2014).

revolutionary ideals, but it also provided an opportunity for abolitionists. The first article states, "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[102] For those agitating against the system of slavery, this translated into a legal avenue towards freedom.[103]

Unlike some of the surrounding northern states that were adopting gradual emancipation laws, the new Massachusetts state legislature failed to create an explicit law regarding slavery, which left it up to the courts to interpret the meaning of the 1780 constitution.[104] Ironically, this ambiguity allowed both free and enslaved African Americans in Massachusetts to continue exploiting the legal system in order to test the boundaries of revolutionary rhetoric, argue for their inclusion in the body politic as full citizens of Massachusetts, and establish ownership of their natural rights but also make broader and more explicit attacks on slavery as an institution.

In North America during the American Revolution, slaves themselves were driving the resistance to slavery, and the ambiguity of Massachusetts law regarding slavery influenced the forms of resistance that African Americans adopted. As Christopher Leslie Brown contends, for the majority of the country, those in power were mostly concerned with preserving slavery, or at least protecting the interests of slave owners.[105] Before Massachusetts adopted the 1780 constitution, a 1778 draft recognized slavery and explicitly denied black suffrage.[106] Public criticism over the morality of slavery included calls for emancipation; however, the ratified version of the state constitution

102. MASS. CONST., pt. I, art. I, *amended by* MASS. CONST., arts. of amend., art. CVI (This is the original version. It was amended in the 1970s to change the word "men" to "people.").

103. CAMERON, *supra* note 101.

104. Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24, 45–46 (2002).

105. Christopher Leslie Brown, *The Problems of Slavery*, *in* THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION 427, 428–29 (Edward G. Gray & Jane Kamensky eds., 2013).

106. MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION 68 (2016).

failed to address slavery directly. A change in consciousness may have been growing, but not enough to provide meaningful solutions to the problem of slavery. The greatest threat to the institution was not the influence of Revolutionary language on notions of freedom, but rather, enslaved people as they engaged in various forms of resistance.[107]

One avenue of black resistance was in the form of legal petitions.[108] While their white neighbors used the legal system to maintain their rights, African Americans had the burden of establishing their right to freedom. These cases were filed by both individuals and by groups, but either way they posed a threat to the system of slavery.[109] Early in the Revolutionary Era, individual petitions had the power to set legal precedent, but also to communicate meaningfully to the African American population at large. Three petitions from Massachusetts during the Revolutionary Era serve as examples of the ways in which black Americans were asserting their citizenship while white Americans were recognizing those rights: Belinda, Brom and Bett, and Quock Walker.

a. Belinda. In February of 1783, just months before the signing of the Treaty of Paris that officially ended the American Revolutionary War, a manumitted slave named Belinda filed a petition with the Massachusetts General Court, the highest court in the state, requesting to be paid an allowance out of the proceeds from the confiscated estate of her loyalist former master, Isaac Royall.[110] Her case for restitution was based on the plunder of her humanity—through the injustice and trauma of her kidnapping by slave traders in Africa, the suppression of her natural rights through enslavement, and the denial of access to the material

107. *See* Brown, *supra* note 105; SINHA, *supra* note 106, at 66, 68.

108. Harvard has digitized thousands of these petitions and makes them available here: https://caps.gov.harvard.edu/digital-archive-anti-slavery-and-anti-segregation-petitions.

109. SHARON M. HARRIS, EXECUTING RACE: EARLY AMERICAN WOMEN'S NARRATIVES OF RACE, SOCIETY, AND THE LAW 71 (2005).

110. *Petition of Belinda an African,* Massachusetts Anti-Slavery and Anti-Segregation Petitions, SCI/series 45X, v.239-Revolution Resolves, 11–14 (1793) (Harvard University Collection Development Department, Massachusetts Archives, Boston, Massachusetts), https://iiif.lib.harvard.edu/manifests/view/drs:50257769$4i [hereinafter *Petition of Belinda*].

rewards of her own labor.[111] Her argument culminates by describing how, in her present old age and after faithful years of work, despite gaining her freedom, she is left with nothing else.[112] Powerfully, her petition relates how she "by the Laws of the Land, is denied the enjoyment of one morsel of that immense wealth, apart whereof hath been accumulated by her own industry, and the whole augmented by her servitude."[113]

Belinda employed rhetorical tactics in her petition that are intended to keep the judges' focus on her humanity and to prevent turning their attention towards factors that could be used as justification to minimize the injustices African Americans suffered under slavery.[114] By presenting herself as a human on equal footing as her white neighbors, she could claim ownership of the same rights and citizenship. Surprisingly, the legislature granted her a pension of fifteen pounds and twelve schillings per year, to be paid out of the proceeds of Isaac Royall's estate, "for reasons set forth in said Belinda's petition."[115] This is significant because the legislature recognized the trauma Belinda experienced through the mechanism of the slave trade. In contradiction to Justice Taney's version of history in *Dred Scott*, the legislature implied that the notion of natural rights applied to blacks as well as whites, and therefore, a slave had the right to the product of his or her own labor, even while slavery was still a legal system. The reward from the legislature affirmed Belinda's humanity and her claim to citizenship.

b. Brom and Bett. From 1781 to 1783 a series of concurrently running cases, involving two different sets of people, were brought before the Massachusetts courts. On May 28, 1781, former slaves Brom and Bett, also known as "Mumbet" or Elizabeth Freeman, were

111. *See id.*

112. *Id.*

113. *Id.*

114. For example, her petition asserts that the land where she came from "would have yielded her the most compleat [sic] felicity, had not her mind received early impressions of the cruelty of men[.]" *Id.* It also uses phrases such as "her infant footsteps" and "with each hand in that of a tender Parent." *Id.*

115. *Id.*

issued a pluries writ of replevin against John Ashley and his son.[116] A writ of replevin is essentially a court order to return stolen property.[117] "Pluries" meant that at least two previous writs had been issued and the property had not been successfully returned.[118] In this case, the property in question was Brom and Bett themselves. They had petitioned the court claiming that their bodies had been unlawfully taken.[119] Ashley refused their release, claiming that Brom and Bett were his slaves.[120]

On August 21, 1781, the case came before the Massachusetts Inferior Court of Common Pleas. Ashley asked for a dismissal, claiming that Brom and Bett were his slaves at the time of the original writ.[121] Again, Brom and Bett asserted their freedom.[122] On August 25, 1781, the jury, made up of white men, found "that the sd [sic] Brom & Bett are not, nor were they at the time of ye purchase of the original writ the legal Negro Servants of the sd [sic] John Ashley during life" and Ashley was required to pay thirty shillings in damages.[123] The five judges of the court, also white men, agreed with the jury's ruling and added on "the Costs of this Suit, Taxed at five pounds fourteen Shillings & four pence like Money."[124]

c. Quock Walker. In the same year as the Brom and Bett cases, the Inferior Court of Common Pleas also heard two civil cases regarding former slave Quock Walker. Nine-month-old Walker was purchased, along with his parents, by James Caldwell.[125] After

116. Arthur Zilversmit, *Quok Walker,* Mumbet*, and the Abolition of Slavery in Massachusetts*, 25 WM. & MARY Q. 614, 620 (1968).

117. *Replevin*, BLACK'S LAW DICTIONARY (11th ed. 2019).

118. *Pluries*, BLACK'S LAW DICTIONARY (11th ed. 2019).

119. Zilversmit, *supra* note 116.

120. *Id.*

121. *Id.*

122. *Id.* at 620–21.

123. Mumbet *Case, Court Decision, August 1781*, *in* AM I NOT A MAN AND A BROTHER: THE ANTISLAVERY CRUSADE OF REVOLUTIONARY AMERICA, 1688–1788, at 468, 469–470 (Roger Bruns ed., 1977) [hereinafter Mumbet *Case*].

124. *Id.*; *see also* Zilversmit, *supra* note 116, at 621.

125. Robert M. Spector, *The Quock Walker Cases (1781–83) – Slavery, Its Abolition, and Negro Citizenship in Early Massachusetts*, 53 J. OF NEGRO HIST. 12, 12 (1968); SINHA, *supra* note 106.

Caldwell's death, Walker was passed on to Mrs. Caldwell.[126] Caldwell had promised to manumit Walker at the age of twenty-five and Mrs. Caldwell had promised freedom at age twenty-one.[127] However, when Mrs. Caldwell married Nathaniel Jennison, Jennison assumed Walker to be his property, desired to keep him enslaved, and refused to manumit him.[128] Walker fled from Jennison and went to work for John and Seth Caldwell, brothers of his former owner.[129] Jennison forcibly seized Walker, severely beat him, and locked him in a barn for several hours after bringing him back to the Jennison home.[130]

The first case heard by the court was *Jennison v. Caldwell*, in which Jennison was seeking damages for the use of his slave without permission. Jennison produced a bill of sale as proof that Walker was his slave and the court ruled that the Caldwells pay damages to Jennison for expropriating Walker's labor.[131] However, Walker had also sued Jennison for damages, claiming he was a free man and not the legal slave of Jennison.[132] *Walker v. Jennison* followed *Jennison v. Caldwell* and incorporated arguments based on moral grounds, bringing the practice of slavery into question, as well as the promises of manumission.[133] In this case, the court ruled in favor of Walker, awarding damages and deciding that he was a free man and not the slave of Jennison.[134]

Both of these cases were appealed, although Jennison defaulted on his appeal, and it never went to court.[135] On the other hand, the Superior Court of Judicature heard the Caldwell appeal in

126. Spector, *supra* note 125; SINHA, *supra* note 106; CAMERON, *supra* note 101, at 76.

127. Spector, *supra* note 125; SINHA, *supra* note 106; CAMERON, *supra* note 101, at 76.

128. Spector, *supra* note 125; SINHA, *supra* note 106.

129. Spector, *supra* note 125; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

130. Spector, *supra* note 125; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

131. Spector, *supra* note 125, at 12–13; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

132. Spector, *supra* note 125, at 13; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

133. Spector, *supra* note 125, at 13–14; SINHA, *supra* note 106, at 68–69; Zilversmit, *supra* note 116, at 614–15.

134. Spector, *supra* note 125, at 13–14; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

135. CAMERON, *supra* note 101, at 76.

September of 1781.[136] Rather than rehashing the factual details of the incident, the Caldwells' attorney made broad claims regarding the practice of slavery itself.[137] He employed religious arguments against slavery, stating that the practice was against the law of God.[138] He also appealed to the language of the 1780 Massachusetts Constitution, claiming it applied to African Americans as well as white citizens.[139] The court reversed the lower court's decision in *Jennison v. Caldwell*, affirming Quock Walker's freedom and his right to work for whomever he chose.[140]

During these civil cases in 1781, the details of the violence that Jennison had inflicted on Walker led the court to indict Jennison with criminal assault.[141] However, the criminal case did not appear before the Supreme Judicial Court until April of 1783,[142] two months after Belinda's petition appeared before the Massachusetts General Court. In *Commonwealth v. Jennison*, the prosecuting attorney focused his arguments on the promises of manumission that were made to Walker; therefore, Jennison had assaulted a free man. Yet what makes this case of particular interest regarding the status of slavery in Massachusetts are not the arguments of the attorneys, but rather Chief Justice Cushing's remarks to the jury. Cushing explicitly addressed not only Walker's individual status regarding freedom but also slavery in general. Echoing the sentiments of the *Somerset* decision,[143] Cushing stated that although

136. *Id.* at 76–77.

137. Spector, *supra* note 125, at 14–15; SINHA, *supra* note 106, at 68–69; Zilversmit, *supra* note 116, at 615; CAMERON, *supra* note 101, at 77.

138. Spector, *supra* note 125, at 14–15; SINHA, *supra* note 106, at 68–69; Zilversmit, *supra* note 116, at 615.

139. Spector, *supra* note 125, at 14–15; SINHA, *supra* note 106, at 68–69; Zilversmit, *supra* note 116, at 615; CAMERON, *supra* note 101, at 77.

140. Spector, *supra* note 125, at 14–15; SINHA, *supra* note 106, at 68–69; Zilversmit, *supra* note 116, at 615.

141. Spector, *supra* note 125, at 13–14; SINHA, *supra* note 106; Zilversmit, *supra* note 116, at 614.

142. CAMERON, *supra* note 101, at 77.

143. The *Somerset* decision in England in 1772 exemplifies, in an Atlantic context, the broad influence individual petitions could have. James Somerset sued his master, Charles Stuart, for freedom after being brought from Virginia to England. Somerset's abolitionist attorney argued that colonial slaves were made free if brought from the colonies to England. Lord Chief Justice William Murray, Earl of Mansfield, ruled in favor of Somerset because

slavery "has been heretofore countenanced by the Province Laws formerly . . . nowhere is it expressly enacted or established."[144] He asserted that slavery was a practice adopted in the colonies from the example set by European nations "for the benefit of trade and wealth."[145] But now, he claimed, there is a growing consciousness against slavery, stating, "[A] different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty."[146] He noted that this is "without regard to color, complexion, or shape of noses."[147] In stark contrast to Justice Taney's version of Massachusetts history, Justice Cushing also affirmed the notion that slavery was inconsistent with the new state constitution and that, at least in Massachusetts, "there can be no such thing as perpetual servitude of a rational creature."[148]

Historians categorize the Brom and Bett and Quock Walker cases as freedom petitions. Generally, freedom petitions are understood to mean that an enslaved person appealed to the court in order to become free. The slave's status moved from unfree to free at the moment of the court decision. Yet, in each of these cases, the plaintiffs saw themselves as *already being free* at the time of the incident in question, and the court decision affirmed this perspective on their status. Viewing them as freedom suits takes on the perspective of the white masters and assumes a natural state of unfreedom. Black skin had developed meaning for both blacks and whites regarding their rights. To white citizens, such as Ashley and Jennison, black skin symbolized the right to own another human as property. To African American citizens, black skin represented

there was no "positive law" that legitimized the system of slavery in England. The decision applied narrowly to Somerset, but African Americans broadly interpreted it as abolishing slavery in Britain. ALAN TAYLOR, THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772–1832, at 19–23 (2013); INHUMAN BONDAGE, *supra* note 7, at 388 n.10.

144. *Commonwealth v. Jennison, Chief Justice William Cushing to the Jury, 1783*, *in* AM I NOT A MAN AND A BROTHER: THE ANTISLAVERY CRUSADE OF REVOLUTIONARY AMERICA, 1688–1788, at 474, 474–75 (Roger Bruns ed., 1977).

145. *Id.* at 475.

146. *Id.*

147. *Id.*

148. *Id.*; SINHA, *supra* note 106, at 68–69; *see also* Spector, *supra* note 125, at 16; Zilversmit, *supra* note 116, at 615.

their lack of the right to their own bodies, labor, identity, and belonging. Through the use of these petitions, coupled with their request for damages, Brom, Bett, and Walker were rejecting this interpretation of blackness, claiming their right to their own bodies and humanity, and inserting themselves into the body politic as citizens of Massachusetts. From the perspective of the former slaves involved in these petitions, they were owed damages because their rights, of which they *already* had ownership, had been infringed upon. They were agitating for what was already theirs.

2. The black struggle for citizenship in Pennsylvania

Black Americans in Pennsylvania experienced different challenges than those in Massachusetts. As former British colonies were developing their new systems of governance as emerging states in the Revolutionary era, the state of Pennsylvania became the model for northern states that chose to address the problem of slavery through gradual emancipation. In 1780, Pennsylvania passed the Gradual Abolition Act, which did not grant immediate freedom to any slave.[149] Rather, the Act declared that any child born to a slave would be held as an indentured servant until twenty-eight years old, at which time they would become free.[150] The law went into effect on March 1, 1780, and all children born before that date were condemned to slavery for life.[151] This was a way to appease both abolitionists and white masters in Pennsylvania. It provided a path towards the end of slavery while also prolonging it. Indeed, complete abolition did not come to fruition in Pennsylvania until 1847, just ten years before *Dred Scott*.[152]

The possibility of a law explicitly addressing slavery in Pennsylvania increased white anxieties over the vulnerability of the institution of slavery, and therefore, the language used in the Act

149. *See An Act for the Gradual Abolition of Slavery*, *in* AM I NOT A MAN AND A BROTHER: THE ANTISLAVERY CRUSADE OF REVOLUTIONARY AMERICA, 1688–1788, at 445, 446–50 (Roger Bruns ed., 1977) [hereinafter *An Act*].

150. *Id.*

151. *Id.* at 447.

152. *See* GARY B. NASH, FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720–1840, at 61–63 (1988); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 87–88 (1975) [hereinafter PROBLEM OF SLAVERY].

sought to alleviate those fears.[153] The tension between revolutionary ideology and the benefits of racial hierarchy is expressed within the Abolition Act itself. The first section of the Act draws on a common trope of the white Revolutionary perspective that the "arms and tyranny of Great Britain were exerted to reduce us" to the position of slaves to the Empire.[154] However, the Act is also forthcoming in noting that Pennsylvania is willing only "to extend a portion of that freedom to others, which hath been extended to us[.]"[155] Yet the framers of the Act also elide the complicity of whites in the creation of racial difference by stating, "It is not for us to enquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion."[156] In this way, white citizens of Pennsylvania could protect their moral superiority while at the same time prolong slavery in the state and keep African Americans from full and equal access to citizenship.

Gradual emancipation was also a way to quell white anxieties over the loss of wealth and costs associated with manumission. Allowing children to remain enslaved until they were twenty-eight meant masters were able to recapture the costs associated with raising them, effectively transferring the financial burden of emancipation to slaves themselves rather than their white masters.[157]

Many slave-owning Pennsylvanians resisted compliance with the new law in an attempt to protect their wealth vested in slavery. The new law required masters to register all slaves by November 1, 1780, otherwise they would be freed.[158] Some ignored the registration, claiming ignorance.[159] Others sold their slaves south, or took children and pregnant mothers into slave states to ensure they could remain in bondage for life.[160] Nonetheless, the future of slavery in Pennsylvania

153. *See generally* NASH, *supra* note 152 (explaining the circumstances that led up to the Act and how they influenced the abolition of slavery in Pennsylvania).

154. *An Act*, *supra* note 149.

155. *Id.*

156. *Id.*

157. *See* NASH, *supra* note 152, at 61–63; BEVERLY C. TOMEK, COLONIZATION AND ITS DISCONTENTS: EMANCIPATION, EMIGRATION, AND ANTISLAVERY IN ANTEBELLUM PENNSYLVANIA 27 (2011); PROBLEM OF SLAVERY, *supra* note 152, at 86–92.

158. *An Act*, *supra* note 149.

159. NASH, *supra* note 152, at 63, 91–92, 108.

160. *Id.*

was clear—it would end, and it would become much more difficult to keep African Americans from accessing the same rights of citizenship that white Americans enjoyed.

In *Dred Scott*, Justice Taney never mentioned that the passage of the Act signaled to Pennsylvanians that black Americans had been deprived of inherent rights. "The language of the law had condemned slavery, admitting that it deprived African Americans of 'common blessings that they were by nature entitled to.'"[161] While Pennsylvania did not abolish slavery and grant complete rights of citizenship in an abrupt sweep, legislators did directly address the subject and word of Pennsylvania's efforts spread.[162] In response to the resistance of slave owners, the Pennsylvania Abolition Society (PAS) began litigating cases for black Americans asserting their freedom.[163] In the year 1784 alone, PAS litigated twenty-two cases, including one against future president, George Washington.[164] Washington served as the defendant slaveholder's lawyer and essentially argued that "slaves were content to be living in a perpetual bondage that was passed to all their children."[165] But the trial court disagreed and Washington lost the case. In Pennsylvania, as in Massachusetts, black Americans took advantage of the legal system to assert their rights to citizenship.

However, Justice Taney erased this history in his opinion. Rather than highlighting the successful black struggle for human dignity in the emerging nation, Taney upheld his version of history as a singular truth. While he admitted "[i]t is difficult at this day to realize the state of public opinion in relation to that unfortunate race," Taney also asserted that "the public history of every European nation displays it in a manner too plain to be mistaken."[166] Justice Taney was wrong. The Court needs to take measures to restore the history that the *Dred Scott* opinion stole.

161. GARY B. NASH, THE UNKNOWN AMERICAN REVOLUTION: THE UNRULY BIRTH OF DEMOCRACY AND THE STRUGGLE TO CREATE AMERICA 326 (2005).

162. *Id.* at 326–27.

163. *Id.* at 412.

164. *Id.* at 412–13.

165. *Id.* at 413.

166. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Under a corrective justice framework, Justice Taney's erasure of public recognition of black rights and citizenship is a specific harm that the Court should remedy. The harm remains because the Court has never directly and specifically corrected the false representation of history in *Dred Scott*. The false historical narrative presented in *Dred Scott* is a continuing violation of the inherent human dignity of black Americans. Furthermore, the Court is able to remedy the violation by specifically addressing and correcting the historical errors.

III. THE COURT NEEDS TO DIRECTLY CONFRONT THE HARM CREATED AND PERPETUATED THROUGH THE RACIST POLICIES OF ITS PAST BY DEVELOPING ANTI-RACIST POLICIES IN THE PRESENT

There is no doubt that the holding of *Dred Scott,* and the reasoning behind it, was fueled by racist ideology. It is much more difficult to determine exactly how the legacy of the *Dred Scott* opinion remains an influence today. Nevertheless, the very nature of the Court inherently subjects it to heightened responsibility for the harm it inflicts. If the Court's role was "merely adopting what others had wrought, they would be a part of a larger system. If, however, the Court went beyond that, and became an advance advocate for pro[-racist] thought, then it has additional culpability."[167] By not specifically addressing the errors of *Dred Scott*, the Court has, perhaps inadvertently, put forth and perpetuated racist ideas. Therefore, the Court has the responsibility to create anti-racist policies that directly confront its racist past. Having a mechanism by which to issue an apology would provide a way for the Court to address its culpability, attempt to restore equity, and "work itself pure" of racist ideology.

In order to understand what it would mean for the Court to create an anti-racist policy, it is imperative to understand what racism is. Ibram X. Kendi notes that in order to overcome the racial inequalities that still exist in the United States, we must begin with defining our terms.[168] "If we don't do the basic work of defining the kind of people we want to be in language that is stable and

167. Brophy, *Considering Reparations*, *supra* note 12, at 180.

168. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 17 (2019).

consistent, we can't work toward stable, consistent goals."[169] Kendi defines racism as "a marriage of racist policies and racist ideas that produces and normalizes racial inequities."[170] This definition of racism requires that there be some sort of force that is able to create racist policies and ideas in the first place—what Kendi calls "racist power."[171] The Supreme Court is an institution that holds this kind of power. The Court engages in the creation of many policies, not all of them racist of course, that are married to various ideas, even if those ideas do not originate from the Court itself. The policies the Court creates influence not only the law, but the way society thinks about the law and the people affected by the law. *Dred Scott* specifically and distinctly identified an entire group of people, no matter where they were born or what their status regarding bondage was, as "not citizens." The Court specifically set aside black individuals as "others"—not citizens, but not necessarily belonging anywhere else. This racially driven degradation upheld racist ideas from the past and also fed future racist ideas that furthered racial inequity. The *Dred Scott* opinion at least normalized and perpetuated racial inequities, even if the opinion did not create them.

The term "racist" has become fraught with misunderstanding, which makes it difficult to understand what it means to be "anti-racist." The word racist has become pejorative rather than descriptive, which in itself is the work of racism.[172] But it does not have to be a pejorative term. "[T]he only way to undo racism is to consistently identify and describe it—and then dismantle it."[173] Directly confronting the Court's racist past is the first step towards dismantling racism and the inequities that still exist because of the racist policies that the Court has historically upheld. The Court can use the mechanism of an official apology to specifically identify and describe its past errors. When it comes to the racist ideas and effects of *Dred Scott*, an apology may even be more effective than an overruling opinion would have been. An apology would allow the Court more space and time to focus on the exact errors of *Dred Scott*.

169. *Id.*
170. *Id.* at 17–18.
171. *Id.* at 19.
172. *See id.* at 9.
173. *Id.*

It would also place greater emphasis on the Court's acknowledgment of its own influence in the legacy of inequity that black Americans continue to face. It would also signal to both black Americans and the judicial system that the Court is willing to examine and directly confront racism in the courts. In order for the Court to become a force toward equity and to build trust between the judicial system and black Americans, the Court should directly confront its own history and use the word "racist" as descriptive of its own conduct.

The idea that the Court's interpretation of the Constitution is, or should be, colorblind is a myth. Since the time of Justice Harlan's dissent from *Plessy*, the Court has often referred to the Constitution as colorblind.[174] Or, at least that a colorblind Constitution is an ideal that our systems of governance should strive for.[175] However, this fails to take into account the reality that race has played since the founding of our nation. The colorblind ideal fails to acknowledge that our nation was founded on a system that rewarded and incentivized slavery, leading to its expansion in the decades that preceded the Civil War.[176] And it ignores the struggle that black Americans have had to continuously fight in order to obtain equality. The Court's striving for an "ideal" of colorblindness inflicts another type of historical erasure. Ignoring the historical role that race has played perpetuates racism by erasing the racial context that remains as a vestige of racial hierarchy without ever directly confronting or changing the systems that built that hierarchy. Asserting colorblindness as an ideal is simply a way to avoid directly confronting racism with anti-racism. "To be a racist is to constantly redefine racist in a way that exonerates one's changing policies, ideas, and personhood."[177] By failing to see color

174. *See* Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 807 (2017) (Thomas, J., dissenting) (citing J. Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896)); Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 332 (2014) (Scalia, J., concurring); Johnson v. California, 543 U.S. 449, 513 (2005).

175. *See* Holder v. Hall, 512 U.S. 874, 905–06 (1994) (Thomas, J., concurring).

176. *See* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009).

177. KENDI, *supra* note 168, at 17.

in its interpretation of the Constitution, the Court fails to grapple with the racial inequities it has effectuated through its holdings.

Anti-racism, on the other hand, works to reverse the work of racism. It is the notion that if "[r]acism is a powerful collection of racist policies that lead to racial inequity and are substantiated by racist ideas," then "[a]ntiracism is a powerful collection of antiracist policies that lead to racial equity and are substantiated by antiracist ideas."[178] Anti-racist policies are "written and unwritten laws, rules, procedures, processes, regulations, and guidelines" used to govern "that produce[] or sustain[] racial equity."[179] The notion that the Court should directly confront and correct its *Dred Scott* opinion is an anti-racist idea. Having a mechanism by which the Court publishes an official apology for *Dred Scott* is an anti-racist policy. The reasoning and holding of *Dred Scott* were used to govern and substantiate racial inequality. Issuing an apology that corrects the errors of *Dred Scott* could be used to govern and substantiate racial equity. The Court would need to decide whether apologies would be binding or simply persuasive, but nonetheless, an apology would signal the better ideal of reaching racial equity.

IV. THE COURT CAN LIMIT HOW IT CHOOSES WHICH CASES DEMAND AN APOLOGY

The Court would not have to issue an apology for every court case that society or the Court deems was decided wrong. *Dred Scott* is a good starting place because the Court never had an opportunity to explicitly overrule and correct its mistake through a case. Since *Dred Scott* was overruled through the Reconstruction Amendments, subsequent cases that dealt with citizenship referred to the Amendments rather than directly dealing with the errors in *Dred Scott*. *Dred Scott* is one of the four cases that Jamal Greene contends make up the "anticanon"—cases that were "so wrongly decided that their errors . . . we would not willingly let die."[180] The anticanon consists of *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* because of near-universal agreement that the decisions in these cases

178. *Id.* at 20.

179. *Id.* at 18.

180. Greene, *supra* note 88, at 386–87.

are exceptionally wrong.[181] Alfred Brophy contends that the need for apology may be the greatest for *Dred Scott* because "the opinion so completely excluded African Americans from citizenship."[182]

Although there is general agreement that the *Dred Scott* decision was wrong, the Court has not made it clear why. In the last fifty years, *Dred Scott* has "been cited negatively far more frequently than positively,"[183] but it is shocking that the case would be cited positively at all. According to Greene, *Dred Scott* has been cited *positively* multiple times since the 1970s, and a "strong pattern of negative citation" did not begin until the 1960s.[184] Even though those positive citations may have been about issues other than black citizenship, it leaves some confusion as to the Court's position on *Dred Scott* because the Court has never been clear as to the errors. Issuing an apology would give the Court an avenue to explain in detail what is wrong with *Dred Scott*, as well as whatever may be right.

Ideally, the Court would correct for past mistakes through an opinion, but when no such opportunity can present itself, issuing a formal apology is an appropriate remedy. Apologies play a similar role in international law. While apologies are formally recognized as a remedy, their "formal role is generally exceptional and subordinate or auxiliary to the role of other remedies . . . ."[185] The U.N. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts were adopted in 2001 and define the role of apology in international law.[186] The Articles do not define the substantive content of international law, but rather "the general conditions" under which a State becomes "responsible for wrongful actions or omissions . . . ."[187] Once a State has violated substantive law, the

181. *Id.* at 387, 390.

182. Brophy, *Considering Reparations*, *supra* note 12, at 186.

183. Greene, *supra* note 88, at 398.

184. *Id.*

185. Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 449 (2006).

186. *Id.*

187. *Id.* at 449–50 (quoting Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, art. 37, *in* THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 74 (James Crawford ed., 2002)).

Articles call for that State to make reparation.[188] Reparation can come in various forms, but in circumstances where reparation cannot be made through restitution or compensation, the State is required to give "satisfaction."[189] "Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality."[190] An apology in the international law context, provides a mechanism through which the violating State takes responsibility for its actions and attempts to remedy the diplomatic relationship when a financial remedy is not assessable.[191]

Similar to an apology in the international law context, apologies issued by the Supreme Court should be exceptional, subordinate, or auxiliary to the appropriate remedy of correction through an opinion. Exceptional circumstances arise when a holding is overruled through an amendment, rather than through a majority opinion of the Court. In an instance like this, such as in *Dred Scott*, the Court has no opportunity to correct its errors in the previous opinion, nor to address the harm that the previous opinion may have caused. An official apology of the Court need not, and should not, create any new substantive law because amendments, legislation, and other Court opinions are better situated to do that work. Nevertheless, addressing the injury caused by the Court's erroneous opinion does a sort of diplomatic work between the Court and the American people. It is difficult, if not impossible, to determine the extent of injury caused by opinions such as *Dred Scott*, but it also is naïve to believe none were inflicted. Since it would be impossible to assess a compensatory or punitive type of remedy, an official apology from the Court is a reasonable and appropriate form of restitution.

188. *Id.* at 450.

189. *Id.*

190. *Id.* at 451 (quoting Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, art. 37, *in Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/589 (2001), *reprinted in* THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 74 (James Crawford ed., 2002)).

191. *See id.* at 452–53.

CONCLUSION

The Supreme Court cannot continue to pretend that it has no liability for modern-day racial inequities. Principles of morality and justice demand that the Court directly confront the racist policies it supported and perpetuated that led to continued inequity for black Americans. The Court denied black Americans of not only their citizenship but also their humanity by erasing the true history of black struggle and success. The theory of colorblindness has only served as an obstacle toward full and honest justice. The only way to overcome the ongoing effect of racism is for institutions like the Court, which perpetuated white supremacist ideology, to honestly grapple with the role they have played. This reckoning needs to come through the creation of anti-racist policies.

Like President Reagan's apology to Japanese Americans, the Court's apology could restore honor to the institution of the Court and restore honor to the role of black Americans within American history. While the debate over economic reparations for African Americans rages on, the Court has an opportunity to institute an anti-racist policy of its own to atone for the noneconomic damages it inflicted through the *Dred Scott* opinion. Like Reagan's apology, by admitting a wrong, the Court can reaffirm its commitment to equal justice under the law.