ESSAYS

ROGER TANEY: INTERSECTIONAL RACIST IN AN AGE OF RACIST DIFFERENTIATION

Michael Haggerty[*] *& Gregory P. Downs*[**]

INTRODUCTION

In his article Dred Scott *and Asian Americans*, Gabriel J. Chin creatively and persuasively reads the well-known, much-reviled opinion by Chief Justice Roger Taney in *Dred Scott v. Sandford* through Taney's little-known opinion in *United States v. Dow* to argue that Dred Scott "should be regarded as pertinent to all people of color, not only African Americans."[1] Through Professor Chin's incisive reading of *Dow*, Taney emerges as deeply engaged not just in the specific question of African Americans' rights but in a broader project of defining a "Christian white person" as part of a "master" race.[2]

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* Michael Haggerty is a PhD candidate in the Department of History at the University of California, Davis. He has been the recipient of numerous fellowships, including the Leo J. Hershkowitz Fellowship at the New York Historical Society and the Russell J. and Dorothy S. Bilinski Educational Foundation Dissertation Writing Fellowship at the University of California, Davis. He received his bachelor's degree in history from the College of Wooster and his master's degree in American history from Miami University (Ohio).

** Gregory P. Downs is Professor of History at the University of California, Davis. He is the author of three monographs on the Civil War Era, most recently *The Second American Revolution: The Civil War-Era Struggle over Cuba and the Rebirth of the American Republic* (University of North Carolina Press, 2019). With Kate Masur of Northwestern, he helped lead historians' lobbying for the first-ever National Park site devoted to Reconstruction, co-wrote the first-ever theme study on Reconstruction for the National Park Service, and now co-edits the *Journal of the Civil War Era*.

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

2 United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840) (No. 14,990).

Taney established historical and legal justifications for excluding non-white Christians from membership in the United States political community, those people with rights that others are required to respect. Chin's argument raises broad questions about the history and historiography of Asian exclusion, the impact of the Civil War and Reconstruction on constitutional and political history, and Taney's reputation in the early twentieth century, among many other issues.

What most interests us are two other, related points: first, Taney's vision of an interconnected history of the rights of "Christian white" people; second, Chin's argument that Taney "is entitled to attention" as

> an historian, and as a legal realist describing the law as it actually was . . . . not only before, but for at least a century after the Civil War. Taney's work makes clear that like African Americans, Asians, Native Americans and other non-whites had no rights the law was bound to respect.[3]

In this Essay we primarily address those two points: first, Taney as a proponent and defender of interconnected, even intersectional, racial ideologies; and second, Taney's representativeness as an historian and as a legal realist describing law and politics as they were. In Professor Chin's first claim, about the interconnected nature of Taney's racial thought, we find a fascinating insight into the construction of a predominantly Democratic vision of the white race that helped shape not only Taney's jurisprudence, but also his party's efforts to develop a constructed identity politics. Professor Chin's focus on the Naturalization Act of 1790 is a powerful rejoinder to many early U.S. historical narratives that examine race making solely with regard to people already in what became the United States. Taney's arguments about a white Christian master race in turn help center non-whiteness, not just Blackness or indigeneity, in early U.S. history with profound consequences. These are major claims and major contributions.[4]

But we are not completely convinced by Professor Chin's claims about Taney as a reliable historian or as a legal realist. In the second half of the essay, we suggest that Taney's position should be read as one among a series of contextual, contested positions that emerged in the second quarter of the nineteenth century. Politicians and activists deployed this intersectional racism against political opponents who used other forms of exclusionist but particularist racial categorizations, what we call racist differentiation, as well

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3 Chin, Dred Scott, *supra* note 1, at 675.

4 In capitalizing Black but not white, we follow the reasoning of the *Columbia Journalism Review* and several scholarly publishers in our field. Mike Laws, *Why We Capitalize "Black" (and Not "White")*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/9E8R-B2EU].

as against a growing, even threatening, effort to construct potentially, if imperfectly, anti-racist arguments about citizenship and belonging by Black activists and some white allies. Setting Taney's opinions briefly within historical practices of context, sequence, conflict, and contingency, we hope to capture the power and also relative distinctiveness of Taney's efforts to develop an interconnected, perhaps intersectional, racism. We don't argue that Taney was wrong and that another single position on race and early U.S. history was right. Taney's intersectional racism constitutes one crucial, and under-appreciated strand of early American history with important ramifications for national narratives. But a history of the period must also be attentive to ideas and people Taney pretended to ignore but actually argued against: the more recently documented efforts of Black activists in the early national period, including in his own Maryland, as well as Taney's political opponents who defended other forms of exclusionist legal and political thinking.

INTERSECTIONALISM AND THE IRONIES OF ROGER TANEY

Before proceeding into the argument, we should explain our use of the language of intersectionality. We mean the term ironically in two respects, one centered on Taney's attentions to race, another on his inattention to gender. Developed from the broader Critical Race Theory scholarship that Professor Johnson analyzes in his response, intersectionalism emerged in the work of Kimberlé Crenshaw. Crenshaw's work centered the world of Black women and the scholarship of Black feminism to illustrate, in broad terms, that race and gender were not distinct identities, experienced in isolation, but instead intertwined, intersecting, and often interdependent identities. Thus, race could not be untangled without reference to gender, nor gender without reference to race, nor could people be reduced to a single identity that purportedly explained their interests and experiences; they had to be understood at the intersection of several, sometimes mutually constructing identities. This raises one immediate irony with Taney's racial theorizing, one that will be explored more coherently in other articles: the complete silence on Taney's views of gender, at least as portrayed in Professor Chin's article and in much of the scholarship on *Dred Scott*. Taney in this respect represents an anti-intersectionalist viewpoint in that gender disappears

entirely from the portrayal of race, even though race was constructed, by definition in the United States, through women's bodies.[5]

In another respect, Taney's connections are familiar to those who have followed the trajectory of intersectionality from Crenshaw's initial arguments to the more wide-ranging uses in academia, activism, and pop culture today. Often, the term is used now to refer to the ways that seemingly distinct types of exclusions are constructed within and upon each other; thus intersectional theory (and intersectional slogans) help build a collective project for excluded people by helping them articulate the ideology that they contest against. This raises the second irony in characterizing Taney's position as intersectional: his intentions differed dramatically from contemporary users of the term. Crenshaw and contemporary users construct allyships and arguments to undo intersectional racisms and sexisms.

Taney, of course, wrote with the opposite intention in *Dow* and *Dred Scott*: to construct a racism broad enough to combine Black people with other non-white people in order to exclude and oppress them more effectively. In Chin's analysis, Taney provides irresistibly useful proof of the concept of intersectionalism, a textbook example of its claims. As Taney proves the power of Critical Race Theory in Professor Johnson's essay, so too does he prove the validity of intersectionalism. If it seems ungenerous to use the important, meaningful word intersectional in this ironic fashion, we participate in what Crenshaw has acknowledged, ruefully, is the multi-faceted use of the word and its rise as a charismatic concept, and we believe that Chin's argument, read this way, may prove useful to those who argue for the intersectional history of race. Writing Taney into the long history of intertwined, intersectional racism makes visible, even self-evident, key facts about the power of intersectional racism in shaping U.S. history.[6]

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5 On intersectionality and its relationship to Black feminist thought, see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 19–40 (Routledge 2008) (1990); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–67 (1989); Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 U. CONN. L. REV. 1253, 1253–352 (2011).

6 For Crenshaw's response to the increasingly common use of intersectionality, see Kimberlé Crenshaw, *Race to the Bottom: How the Post-Racial Revolution Became a Whitewash*, BAFFLER, June 2017, at 40, https://www.jstor.org/stable/44466514?refreqid=excelsior%3A66e662f0ea2be765dae8dc9b9da79ce9&seq=1#metadata_info_tab_contents [https://perma.cc/2DHD-Q7GY].

CHIN'S ARGUMENTS

Professor Gabriel Chin places *Dred Scott v. Sandford* within the legal contexts of immigration and white supremacy. From the Naturalization Act of 1790 to the horrors of Japanese interment in the mid-twentieth century, Chin moves beyond the context of the Civil War era to consider how *Dred Scott v. Sandford* relates to a broader pattern of legal discrimination against non-white people. Historians have long interpreted the *Dred Scott* decision as a product of the legal and political debates of the antebellum era. Chief Justice Roger Taney's assertion that individuals of African descent "had no rights which the white man was bound to respect" fits neatly within the broadening political and legal divide between pro- and anti-slavery politics which drove the United States toward Civil War in the mid-nineteenth century. Professor Chin, however, asks us to look beyond the context of this conflict in extremely productive ways.[7]

As Chin shows, the court's majority opinion in *Dred Scott* specifically references the language of the Naturalization Act of 1790 as a way of legitimizing the court's denial of Black citizenship. According to the language of this act, citizenship was confined to "aliens being free white persons."[8] This reliance upon the status of foreign individuals to determine the racial limits of legal and political rights was a pattern in Taney's decision making.

Chin brilliantly excavates Taney's use of the same rationale in a U.S. Circuit Court case, *United States v. Dow*, penned seventeen years before *Dred Scott*. In both *Dow* and *Dred Scott*, Taney insisted that a white supremacist standard for naturalization was an appropriate means for determining whether or not an individual should be extended legal rights or privileges; racial distinctions made in regard to people outside the country's borders were meaningful ways to interpret their rights inside the country's borders, in Taney's formation. In the *Dow* case, Taney handed down his decision in Maryland, and relied on the region's history to justify his conclusion that Malay individuals were of an inferior race. Taney insisted that colonial officials in Maryland regarded only European nations as "civilized." Thus, as a Malay individual from Manila, Dow could not be considered a member of the white race and need not be extended legal privileges.[9]

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7 Dred Scott v. Sandford, 60 U.S. at 407.

8 *Id.* at 419–420.

9 Chin, Dred Scott, *supra* note 1, at 646; United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840).

Although Black individuals would not have been allowed to testify against a white person, Taney determined that, as a Malay individual, Dow was of a race of people who could legally be enslaved. Thus, he refused to grant Dow an exception of evidence because he was not of "the race of which the masters were composed." Ultimately, the Black sailors were allowed to testify, and Dow was convicted of a capital offense. By tracing the application of slave law to Dow's case, Chin demonstrates that Lorenzo Dow, much like Dred Scott, was a victim of Taney's intersectional approach to the law, though in Dow with the ironic impact of permitting Black testimony. If Black individuals were the overwhelming majority of enslaved people in the United States, and the only people subjected to legal chattel slavery in the republic, they were not the only people who, by Taney's formulation, could be enslaved. That broader group of the enslaveable constituted the other that helped define the white Christian person who held rights in Taney's formulation.[10]

Emphasizing the importance of the Naturalization Act counters scholarship that treats early U.S. history as shaped by slavery of African Americans and theft, displacement and warfare against Native people: twin (if not always overlapping) projects of enslavement and settler colonialism. In this narrative other non-white people emerge late and to a game whose rules have already been defined. Non-white people who are neither Black nor indigenous surface in early U.S. history as curiosities, or as geographical exceptions to be resolved through the Treaty of Guadelupe Hidalgo and subsequent state and territorial acts toward former citizens of Mexico now incorporated into the United States. In this common narrative, other non-whites arrive in full force later in the story, after the Civil War and Reconstruction. Exclusion of Asians in the 1880s in this narrative provides a model of oppression that is distinct from enslavement and segregation of Black people and the warfare and forced containment of indigenous peoples.[11]

Such a story makes the actual history of Asians in the United States illegible, as Chin, Beth Lew-Williams, Gordon Chang, and Mae Ngai have argued. The experience of Asians who stayed and the experiences of their children not only re-center Asian-American history in earlier eras but also

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10 *Dow*, 25 F. Cas. at 903.

11 The history of race and Latinx peoples in the United States is fascinating. For this paper we follow Chin in emphasizing Black, white, Asian, and Native narratives.

help explain the mutually constructed racisms that shaped an early 1900s segregationist national culture.[12]

Chin goes farther in opening the story of Asians in U.S. history with the 1790s act, not the 1850s narratives of the U.S. conquest of the Pacific coast and the arrival of tens of thousands of Asian migrants. Placing Lorenzo Dow within the history of Asians in North America raises important questions in U.S. history generally and Asian-American history specifically. Chin persuasively demonstrates that a strand of important legal and political thought connected the Naturalization Act to an expansive history of whiteness and of anti-whiteness. Thus the 1870 Naturalization Act that eliminated restrictions on "aliens of African nativity" and "persons of African descent," but not—despite arguments for expansion—to other non-whites, was not the beginning of a new era of exclusion but a reaffirmation of the centrality of Asian and non-white exclusion to the U.S. republic. All historians should think and teach differently as they consider the sweeping implications of this argument.[13]

RACIST DIFFERENTIATION AND ANTI-RACISM IN ANTEBELLUM U.S. HISTORY

Where we diverge from Chin, then, is not in what we see as the core elements of his argument about Taney but the place of Taney's arguments in the broader history of the United States. No one would doubt that Taney represented one important strand in U.S. politics and history. Chin's argument that some aspects of Taney's legacy lingered is important, as is the interesting evidence about Taney's long-term rhetorical influence on the many critics who found his phrasing as irresistible as they found his ideas deplorable. And we would not sign on to historians who would characterize *Dred Scott* as a basic error and seek to replace it with a different, correct version of history. Chin draws on actual connections when he shows the endurance of Taney's ideas after his death. Our goal is not to displace a

12 *See generally* Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 4 (2020) [https://ssrn.com/abstract=3738805]; BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION AND THE MAKING OF THE ALIEN IN AMERICA (2018); GORDAN H. CHANG, GHOSTS OF GOLD MOUNTAIN: THE EPIC STORY OF THE CHINESE WHO BUILT THE TRANSCONTINENTAL RAILROAD (2019); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (Princeton Univ. Press 2014) (2004).

13 Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.

bleak continuous history of Taneyism with a Whiggish history of improvement.

Our goal is to historicize Taney's arguments in two ways: one, focused on his contemporary world, one on his relationship to the United States of fifty or one hundred years later. As historians, we would say that Taney is worthy of study as a single-minded advocate for one important and widespread view of the past, but for that reason he should not be read as a historian, since he discards many basic presumptions of history writing (not just the ethical or anti-racist ones). Even in his time, scholars (and other justices) wrote sensitively about context, counter-evidence, sequence, multi-causality, and contingency in ways that Taney, as a legal advocate, did not feel inclined to respect or reproduce. Thus, his work is an exemplar of advocacy about the past that is interesting for its impact but not for its utility as history. We do not advance these distinctions to argue that history is objective or positivist. In fact, the emphases upon context, counter-evidence, multi-causality, and contingency all indicate that history practitioners have long been interested in partial, subjective views of the past in relation to the present. History is always a craft, sometimes an art, never a science in a common paraphrase of Bernard Bailyn's formulation. Still, there remain interesting differences between this non-positivist view of history and the use of the past for legal advocacy by Taney.[14]

One challenge with reading Taney as an accurate historian or legal realist lies in the opposition to his arguments, visible at the time. The *Dred Scott* dissents offer alternative readings of history. Based on his own reading of the state histories, Justice Benjamin Curtis wrote that "it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration." Justice John McLean called the question of Black people's role in society "more a matter of taste than of law." Despite Taney's claims, McLean showed that states had recognized Black people as citizens, and the United States had recognized prior subjects of Spain, France, and Mexico as citizens in treaties.[15]

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14 See generally A. Roger Ekirch, *Sometimes an Art, Never a Science, Always a Craft: A Conversation with Bernard Bailyn*, 51 WM. & MARY 625, 625–58 (1994).

15 In footnote 55, Professor Chin states that "[a]s many scholars and others have noted, Taney was a poor historian and legal analyst, at least in *Dred Scott*." *See* Chin, *supra* note 1, at 15–16. We are uncertain if Professor Chin here implies his agreement with those scholars, and if so how that reflects on Chin's other arguments, or if Professor Chin solely intends to note that others disparage Taney's history.

Although it is not straightforward to read the political affiliations of justices appointed in a period of great partisan shift, it is notable that both Curtis and McLean were associated with the Whig Party and then with the Republican Party. Their dissents were shaped in part by a developing anti-slavery constitutionalism that found its home among former Whigs and Liberty Party members who became influential in the Republican Party. This anti-slavery constitutionalism had been based in an originalist claim that the Constitution was anti-slavery, but politicians had steered away from those moorings over the early nineteenth century. Constitutional history thus needed to be righted toward a "freedom national" assumption that made slavery local, and, they hoped, transitory. This reading of revolutionary history starkly contrasted with Taney's, as did their understanding of historical change. Still, their openness to discrimination in many forms, and their focus upon slavery rather than equal rights, lays them open to Professor Chin's well-taken points about the limits of their egalitarianism and the persistence of white supremacist assumptions after emancipation, even as their alternative reading of past history exposes Taney's position as a pole among several mid-century positions.[16]

Consider the sharp contrast between Taney's support for slavery and the anti-slavery perspective of the man who succeeded him on the Supreme Court in 1864, Chief Justice Salmon Chase. Prior to his time on the Supreme Court, Chase was a rising figure within Ohio's Liberty Party and one of the most prominent anti-slavery lawyers in the country. Although Chase accepted limitations on the federal government's ability to intervene where slavery was protected by state law, he firmly believed that the Constitution acknowledged the personhood of enslaved individuals and by extension, protected the legal rights of free Black people. He spent much of his early legal career utilizing the Constitution as an anti-slavery document. In *Jones v. Van Zandt*, the case of an Ohio abolitionists who was sued for assisting escaped slaves on the Underground Railroad, Chase even argued that the Constitution's Fugitive Slave Clause acknowledged the personhood of enslaved individuals. Noting that the Clause opens with the language "No person held to service or labor," Chase insisted that "Under the [C]onstitution, all the inhabitants of the United States are, without exception, persons—persons, it may be, not free,—persons, held to service, —persons who may migrate, or be imported, but still persons . . . ." For

16 For the importance of the "freedom national" assumption, see JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865 (2013).

Chase, the fact that the Constitution expressly acknowledged persons and not slaves mattered, even if Taney was unwilling to admit it.[17]

According to Chase, if enslaved individuals were considered persons for the purposes of re-enslavement, they must also be considered persons who were entitled to due process rights under the Fifth Amendment. In the case of John Van Zandt, a group of kidnappers stopped him on a road north of Cincinnati. Seven Black individuals were taken from his wagon, transported across state lines into Kentucky and jailed without a formal process. Chase argued that unless it could be "shew[n] that no process of law, at all, is the same thing as due process of law, it must be admitted that the act which authorizes seizure without process, is repugnant to a constitution that expressly forbids it."[18] From Chase's perspective, the Fugitive Slave Act of 1793 was unconstitutional because it violated the due process rights of the Black individuals who were kidnapped under its authority. Taney and his fellow justices ultimately disagreed with Chase's argument, laying the groundwork for *Dred Scott* by insisting that the enslaved status of Black individuals was always presumed (as Dr. Finkelman has previously noted), but Chase held to his position. As the first Republican governor of Ohio, Chase advocated for the passage of personal liberty laws to protect Black Ohioans from what he viewed as unconstitutional kidnappings. In 1856, he closed the state's jails to would-be kidnappers and instituted fines for individuals who were caught attempting to detain free Black people. Although much of this work would be undone by Ohio Democrats in the wake of the *Dred Scott* decision, Chase never abandoned his belief that Black individuals were entitled to legal rights. He may have lost in court to Roger Taney, but Chase never accepted Taney's pro-slavery constitutionalism or his narrow view of U.S. citizenship. If Taney's views as Chief Justice deserve

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17 See U.S. CONST. art. IV, § 2; SALMON PORTLAND CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF *WHARTON JONES VS. JOHN VANZANDT* 82 (R.P. Donogh & Co. 1847) [hereinafter RECLAMATION OF FUGITIVES]; for the "federal consensus" surrounding the government's inability to intervene in spaces where slavery was protected by state law, see WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM, 1760–1848 16 (1977). For recountings of Salmon Chase's role in *Jones v. Van Zandt*, see JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 77-83 (1995) [hereinafter SALMON P. CHASE]; J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 52–66 (1874).

18 *Id*. at 7.

consideration for their long-term consequences, so too do his successors'. Taney framed part of what became a robust argument within U.S. life.[19]

Furthermore, if we accept Taney's decision as an accurate account of history, we are not only dismissing the anti-slavery constitutionalism of the Republican Party, we are dismissing the legal and political claims of a smaller but in many ways even more interesting nineteenth century civil rights movement. In recent years, historians have gained a greater appreciation for the legal and political perspectives of free Black individuals and their radical white allies. Many of these individuals, from Presbyterian minister Samuel Cornish to abolitionist William Yates, articulated an inclusive vision of U.S. citizenship prior to the Dred Scott decision. It was this vision of citizenship and equal rights that underwrote but also went beyond anti-slavery constitutionalism. As gradual emancipation spread across the northeastern United States, Black people (many of whom saw themselves as Americans even if Taney didn't) joined forces with white allies to secure the passage of personal liberty laws and fight the use of northern legal systems to kidnap and enslave their peers. Through legal and extra-legal protest, newspaper articles and conventions, these individuals placed claims upon the U.S legal system and demanded that they be extended the very rights and privileges that Taney sought to deny them. Accepting Taney's decision as an accurate portrayal of history requires dismissing the claims of this movement that has been excavated in different ways by Martha Jones, Leslie Alexander, Christopher Bonner, Kate Masur, Manisha Sinha, and many other scholars.[20]

The legal and political claims of Black individuals provide important context for understanding Taney's motivations in the mid-nineteenth century. They fashioned arguments Taney had to respond to, not as an

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19 See CHASE, RECLAMATION OF FUGITIVES, supra note 17, at 89; Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105–34 (2012). For a discussion of Democrats undoing the legal protections of Black Ohioans, see JOHN NIVEN, SALMON P. CHASE, *supra* note 17, at 208.

20 Historian Leslie Alexander has traced the importance of Black individuals embracing an American identity in New York City during the mid-nineteenth century. Many Black New York's assumed this identity as a form of resistance to the rise of the colonization movement in the 1820s. *See generally* LESLIE ALEXANDER, AFRICAN OR AMERICAN?: BLACK IDENTITY AND POLITICAL ACTIVISM IN NEW YORK CITY, 1784–1861 (2012); MARTHA JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); CHRISTOPHER JAMES BONNER, REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP (2020); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION (2016).

historian but as a legal advocate seeking to dismiss them from consideration. Taney's reactionary 1830s turn is often linked to his hatred of abolitionism. Thus, it is no great leap to suggest that his later arguments should be read in light not just of proto-Republican anti-slavery constitutionalism in the dissents of McLean and Curtis but also of these vibrant legal claims of equality and citizenship. Given Taney's ongoing engagement in Maryland life, it is intriguing to consider the role of people like the free Black man Samuel Jackson, whose 1850s Maryland state case Martha Jones examined. Black Marylanders who pressed the Jackson case believed "the *Dred Scott* decision offered only one answer among many to questions about race and rights," drawing upon their long struggle to assert those rights under state law.[21] While Jones argues that Jackson and people in his situation were not "citizens in an unqualified sense" under Maryland law, they were treated by the state's courts and legislature as people with a "bundle of rights," not "the people with 'no rights' that Roger Taney imaged them to be."[22] Taney's words did not reflect Black Maryland activists' views, nor did Taney's words reflect their lived experience. Perhaps Taney wrote so passionately precisely because he knew he entered a world being shaped by arguments he despised. We need not take the expansive claims of Black activists and their allies as factual statements about the nature of U.S. citizenship to understand that their views could constitute a threat as anti-slavery spread after the U.S.-Mexico War and the Fugitive Slave Act of 1850.[23]

Taney's argument was shaped by people he disagreed with, and some of them disagreed in quite different ways, not as anti-racists but as what we call differentiated racists. This strand of racism distinguished anti-Black racism from racism against other groups and deliberately separated Black people from other non-whites, sometimes on the grounds of Black people's nativity, sometimes on their religious practices, sometimes on ethnological beliefs of the racial similarities between Asians and Native peoples. While it is difficult to perceive a moment when there was more support for Black rights than for the rights of other non-white persons, such was essentially a default position of much of the Republican Party between 1868 and 1892. Many Republicans embraced anti-Chinese exclusion, anti-Catholicism, and settler colonialism but almost all of them unified in support of civil and voting rights acts targeted at Black people, even if some did so solely from self-interest.

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21 Martha S. Jones, Hughes v. Jackson: *Race and Rights Beyond* Dred Scott, 91 N.C. L. REV. 1757, 1761–62 (2013).

22 *Id.* at 1762.

23 *Id.* at 1761–62 .

One clear example of this differentiation occurred during the debate over the Naturalization Act of 1870, which carved out a special exception for Black people based upon their race, while reasserting the exclusion of other non-white peoples. Even further, the Naturalization Act's sections five and six were attacks on immigrant voting in cities over 20,000 people, motivated by Republicans' loss of New York State in the 1868 presidential election. Those sections empowered federal judges to appoint supervisors of registration and marshals to appoint special deputies to preserve order. Senator William Stewart of Nevada led Republican efforts for the Fifteenth Amendment and the 1870 Enforcement Act but denounced Charles Sumner's effort to make the Naturalization Act color-blind. Black enfranchisement was an "act of justice" since Black people were "among us. This was his native land. He was born here. He had a right to protection here. He had a right to the ballot here. He was an American and a Christian, as much so as any of the rest of the people of the country."[24] Chinese people, however, in Stewart's words were "pagans in religion, monarchists in theory." Notably Lyman Trumbull attacked these arguments as the type of racism only recently deployed against Black people. But southern radical Republican Willard Warner proposed only striking Black exclusion from the Naturalization Act. Trumbull's amendment to add Chinese people to the Naturalization Act lost nine to thirty-one; notably, Trumbull argued for the amendment by distinguishing deserving Black Americans from undeserving Africans on the continent and in other countries. The yoking of Black protection with other forms of exclusion shaped the nearly simultaneous 1870 Enforcement Act. Over the next two decades, Republicans worked to sustain Black voting in the south and hinder immigrant voting.[25]

The period after the Civil War produced numerous examples of people who rejected Taney's opinion in Dred Scott but might well have accepted Taney's opinion in Dow if they knew about it, precisely because they distinguished between Black people and other non-whites. This reflected a growing anti-Chinese racism among Republicans, especially but not solely in western regions. In Fourteenth and Fifteenth Amendment debates, Republicans repeatedly expressed frustration that the amendments were not written solely to affect African Americans, often in wide ranging

24 XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS 1860–1910 74 (Univ. Ga. Press 2012) (1997) (quoting CONG. GLOBE, 41st Cong., 2d Sess. 5152 (1870), https://memory.loc.gov/ammem/amlaw/lwcglink.html [https://perma.cc/7K46-AUVH]).

25 XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS 1860–1910 67–86 (Univ. Ga. Press 2012) (1997).

ethnographical claims about the distinctions between "the white race and the black race and the yellow race and the red race." In the Fifteenth Amendment debates, Congressman Frederick Frelinghuysen said, "I am not in favor of giving the rights of citizenship or the right of suffrage to either pagans or heathen. I believe that the history of this country, and its laws as well as the spirit of the people, declare just as clearly that this is a Christian as a free country." California Republicans like Horace Page led other western Republicans into an embrace of anti-Chinese sentiment rooted not in an intersectional but a differentiated racism even as they participated, sometimes reluctantly, in 1880s Republican defenses of Black civil rights. This juxtaposition of hostility toward Asians and defense of Black rights was no regional exception in Republicanism, even if it was more pronounced in the west. About Justice John Marshall Harlan's decisions in Wong Kim Ark and Plessy, Professor Chin writes that "Remarkably, then, decades after the Fourteenth Amendment became law, a justice noted for his dedication to civil rights could conclude that Asians born in the United States were not citizens." In the context of nineteenth century Republican ideology, there is nothing particularly surprising about Harlan's orientation, even though we grant that it would be remarkable today. Harlan was undoubtedly a racist, but did he see race in precisely the same ways that contemporary racists did? The categories of white and non-white have their analytic uses and also their contextual and analytic limits.[26]

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[26] Joshua Paddison, *Race, Religion, and Naturalization: How the West Shaped Citizenship Debates in the Reconstruction Congress*, *in* CIVIL WAR WESTS: TESTING THE LIMITS OF THE UNITED STATES 181–201, 189 (Adam Arenson & Andrew R. Graybill eds., 2015); Stacey L. Smith, *Emancipating Peons, Excluding Coolies: Reconstruction Coercion in the American West*, *in* THE WORLD THE CIVIL WAR MADE 61–89 (Gregory P. Downs & Kate Masur eds., 2015).

We do not argue that Republican support of Black rights was always principled; often it was rooted in partisan self-interest, as most effective alliances are. Nor do we argue that Republican support was effective; Republicans did not control the House, Senate, and presidency at any point between 1875 and 1889. Both the 1873-75 and 1889-91 terms are marked by ultimately doomed but expansive civil rights efforts that unified most Republicans: the 1875 Civil Rights Act (and the even more ambitious voting rights act that passed one Congress and reauthorized martial law in several southern states) and the 1890 federal elections bill that passed the House but died in a Senate filibuster. Thus the crucial factor in the lack of follow-up legislation was the fierce, nearly unanimous opposition of Democrats. Even during maligned Hayes, Arthur, and Harrison administrations, Republicans utilized existing tools, including commissioners, marshals, U.S. Attorneys, and the Army to defend voting rights in the south. While we might judge the limits of these efforts, they are strikingly different from the party's efforts toward other non-whites or for that matter toward "white" European immigrants, put under surveillance in federal election laws directed at New York City. Republican Party platforms similarly express strikingly distinct views of the rights of Black people and of other non-whites, at once in 1884 pledging support for

To turn briefly to indigenous peoples, in the post-Civil War Era, racism against Black people and racism against indigenous people often seemed sharply differentiated, at least for Republicans. As Elliott West noted, a party that allied with Black soldiers in a war over the governance of land occupied by Native peoples was not surprisingly committed to separating Black and Native issues, even if individual members had intersectional racist beliefs. In turn, as West emphasizes, Black and Native peoples responded from different positions to Reconstruction-era government policies. In the West, African American soldiers served as segregated but nevertheless uniformed soldiers in wars against Native communities and were treated as (unequal) allies by military officials who treated Indigenous peoples as enemies. None of this either minimizes the mistreatment of Black soldiers and cadets like Henry O. Flipper, nor the existence of reform-oriented elements among Republicans on Native issues. But we see evidence of the disconnect between Black rights and Native rights in two Wisconsin U.S. senators. James R. Doolittle, originally a Republican, became a supporter of President Andrew Johnson and a bitter opponent of most Reconstruction measures to protect Black rights. On Native issues, Doolittle was partly responsible for adding "Indians not taxed" to the Fourteenth Amendment as a way to ensure the exclusion of California native peoples, but also was at times an advocate for local Ho-Chunk and other Wisconsin native peoples; Doolittle was replaced by Matthew Carpenter, a more reliable—if not always enthusiastic—supporter of Black political rights, who led the fight to extend wartime in 1870 and supported measures against the Ku Klux Klan but was notably less sympathetic toward native peoples in the Upper Midwest. Research on the Civil War Era has suggested that Republican-appointed agents in the Missouri River agencies were harsher toward Native peoples than the often pro-slavery Democrats they replaced. Like Harlan's combination of Black citizenship and Asian exclusion, none of this can be explained by Taney's

protecting voting rights in the South and to resist Chinese immigration, for example. *Republican Party Platform of 1884*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1884 [https://perma.cc/5YXF-HDPR] (last visited May 20, 2022); *Republican Party Platform of 1888*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1888 [https://perma.cc/V3DT-LZRP] (last visited May 20, 2022).

For the bizarre case of the struggle for Senate control in 1881, see *The Great Senate Deadlock of 1881*, U.S. SENATE HIST. OFF., https://www.senate.gov/artandhistory/history/common/briefing/Senate_Deadlock_1881.htm [https://perma.cc/AZ39-NY73] (last visited May 20, 2022).

intersectional racism, but it all makes sense with an eye toward Republican patterns of racist differentiation.[27]

Turning to frequent Republican opposition to immigration, we confront a broader question of who did they believe constituted the category of white people. Chin argues that Taney's opinion is correct in part because there was "no systematic denial of citizenship, deportation, deprivation of property, disenfranchisement, or other degradation of White people, based on race alone, because they were White people." This elides a scholarly debate about the extent to which Catholic and Jewish Europeans were considered white. We ourselves do not hold with the scholars who emphasize a hard division between whites and other allegedly non-white Europeans. On the other hand, Chin's argument about the rights that white people have must wrestle with the question of who was white. The racial lists in Morton's catalogue of skulls collected in mid-century Philadelphia presents a bewildering roster of races, some of which would no longer be considered distinct by contemporary cultural constructions, others of which are grouped together in unfamiliar ways in a "Caucasian" race that includes differentiated Teutons, Celts, Pelasgic, Indostanic, Semitic, and Nilotic families, both grouped together and distinguished from each other. None of this is particularly unusual in the ethnographic writing of the era. We are in the past; they did things differently there.[28]

Without embracing the argument that Irish or Italians or Jews had to become white over time, one can see another form of differentiated exclusionism in Protestant Republicans who embraced historic discrimination against non-Protestants, including Republicans who supported Black rights specifically based on their embrace of Protestantism. For some Republicans, as Joshua Paddison argues, Black people's capacity lay specifically in their Protestantism, while "heathens" and—to some—Catholics lacked the capacity for self-governance democracy demanded. Therefore, Paddison argues, Reconstruction revealed "a different kind of

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27 Stephen Kantrowitz, *White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment*, 10 J. Civ. War Era 29–53 (2020); *Ryan Hall, Chaos and Conquest: The Civil War and Indigenous Crisis on the Upper Missouri, 1861–1865*, 12 J. Civ. War Era (forthcoming June 2022); ELLIOTT WEST, THE LAST INDIAN WAR: THE NEZ PERCE STORY xxi–ii (2009); Elliott West, *Reconstructing Race*, 34 W. Hist. Q. 6, 6–26 (2003); Stephen Kantrowitz, *"Not Quite Constitutionalized": The Meanings of "Civilization" and the Limits of Native American Citizenship*, *in* THE WORLD THE CIVIL WAR MADE 90–120 (Gregory P. Downs & Kate Masur eds., 2015).

28 Samuel George Morton, *Catalogue of the Skulls of Man and the Inferior Animals in* THE COLLECTION OF SAMUEL GEORGE MORTON viii (Merrihew & Thompson eds., 1849); *see generally* MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1999).

limit to the Republican plan. Considering the postbellum Republicans' insistence that 'the negro's hour' had come, historians should have an expansive view of all whose hour had not yet arrived." This religiously exclusivist vision helped shape the crafting of the Fifteenth Amendment, when legislators, especially western Republicans, refused to add religion to the groups of categories that could not be the basis for denial of the right to vote.[29]

Explicit religious discrimination had a long history in the colonies. Exclusions of Catholics from office holding or voting expanded during the late colonial period that Taney purported to examine. Many were overturned in revolutionary constitutions, but some remained. North Carolina's 1776 state constitution stated "that no person, who shall deny the being of God or the truth of the Protestant religion . . . . shall be capable of holding any office or place of trust or profit in the civil department within this State." Later amendments of the state constitution in 1835 permitted Catholics but not atheists and non-Christians to hold office; a different, less specific religious test against people who "shall deny the being of the Almighty God" remains in the state constitution, though it is not enforced, and such religious exclusions were later invalidated by the Supreme Court in *Torcaso v. Watkins*. Religious-based exclusions of Catholics from office holding endured in some northeastern states: in New York (via an oath) until 1806, in New Hampshire until 1877. Popular anti-Catholicism spread widely in the 1840s and 1850s as Irish and German immigration rose, not only in infamous attacks on monasteries and nunneries but also in the American Party's anti-immigrant platform, and the writings of Samuel Morse and Lyman Beecher. Although the Republican Party formally resisted anti-Catholicism and selected Abraham Lincoln in part for his opposition to anti-immigrant movements, many Republicans had been involved with Know Nothing organizing and considered the Catholic Church and the slaveowners (along with Mormons) emblems of tyrannical power that impeded democracy.[30]

Here we might see another motivation for Roger Taney to claim a unified identity for white Christians. Taney, the first Roman Catholic appointed to

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29 JOSHUA PADDISON, AMERICAN HEATHENS: RELIGION, RACE, AND RECONSTRUCTION IN CALIFORNIA 5–6 (2012).

30 Seth Barrett Tillman, *A Religious Test in America?: The 1809 Motion to Vacate Jacob Henry's North Carolina State Legislative Seat—A Re-Evaluation of the Primary Sources*, 98 N.C. HIST. REV. 1, 1–41 (2021); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: A CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 6–7, 20, 83, 102, 328–29 (2000).

the Supreme Court, was born into a Maryland Catholic slaveowning class with deep roots in the colony but a perilous hold on rights. While Maryland's colonial history is associated with unusual status for Catholics under the Calvert family, Catholic tolerance came under assault as early as the English Civil War and began to be stripped away during the Glorious Revolution. Catholics were barred from holding office in 1689, forbidden to practice law in 1692, and forbidden from converting Protestant subjects in 1698. Special taxes against "Papish" Irish immigrants were passed in 1699, 1704, and 1717. The first three royal governors were all ordered to tolerate all religions "except Papists." After a royal governor's closing of a prominent Catholic church in 1704, services were conducted exclusively in private homes. In 1715 the assembly stripped away parental rights of Protestant widows who remarried Catholic men and barred Catholics from office holding, and in 1718 disfranchised Catholics. In 1744 the Governor's Council barred Catholics from the militia and from holding public weapons, and the lower house of the assembly repeatedly passed even more stringent anti-Catholic laws that were blocked by the upper house. This was the world that shaped Taney's parents. Taney's father was sent to France and Belgium for a religious education that was illegal in Maryland. Just as Taney was born in 1777, prominent Catholic revolutionary Charles Carroll helped legitimize Catholic politics. It is no wonder that Taney looked back for a 1717 law testimonial law that did not differentiate between white Christian Marylanders, instead of to other laws from that era that sharply distinguished between Catholic and Protestant white Marylanders when he constructed his legal advocacy of white rights. While married to a Protestant, Taney remained a practicing Catholic throughout his life and, unlike his wife, was buried in a Catholic graveyard. Taney's Catholicism helped shape the public response to *Dred Scott*, with anti-Catholic editors arguing that the decision's errors were an alleged Catholic desire to bow to authority, while some Catholic editors argued that the decision's uncertain fit with doctrine suggested the opposite, that Catholics could distinguish between their commitments to Rome and to the Constitution.[31]

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31 Scott D. Gerber, *Law and Catholicism in Colonial Maryland*, 103 CATH. HIST. REV. 465, 465–90 (2017); Gerald P. Fogarty, *Property and Religious Liberty in Colonial Maryland Catholic Thought*, 72 CATH. HIST. REV. 582, 593 (1986); Patrick W. Carey, *Political Atheism:* Dred Scott*, Roger Brooke Taney, and Orestes A. Brownson*, 88 CATH. HIST. REV. 207, 207–229 (2002); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 219–254 (2013); *"Star Spangled Banner," Key and Chief Justice Taney—Did Taney Make a Pre-Nuptial Agreement with His Wife?*, 8 AM. CATH. HIST. RESEARCHES 87–90 (1912).

The ecumenical white Christian identity that slowly developed in Maryland and other states became central to the Democratic Party's emerging racial vision as it cemented an alliance of expansionist slaveowners and northern working people, eventually including vast numbers of Catholic immigrants from Ireland. Taney's racism, one that centered whites versus non-whites, was meaningful in a party that sought to bring together Catholics and Protestants, U.S.-born voters and recent immigrants, against a Whig Party identified with a long-resident Protestant population. Democrats needed an ecumenical white identity politics, and Taney espoused a Democratic vision, and perhaps even a Democratic vision shaped by his own experience as a Maryland Catholic.

In this context, we might consider a question that sits behind Professor Chin's paper: What rights did white men have that white men were bound to respect? The first answer, and one that that Professor Chin discusses early on but does not dwell upon, lies in enslavability and actual legal enslavement. This argument, while powerful, implies a shift with the Reconstruction Amendments that sits uneasily with Professor Chin's broader argument. The answer Professor Chin emphasizes is that they had the right not to be discriminated against *as white men*. While true, it is unclear exactly what this adds up to, given that white men were discriminated against based on religion or class and other factors; in the postbellum United States, when chattel slavery was no longer legal, what protection did their whiteness provide?

The range of exclusions goes far beyond Chin's statement that "individual white persons and families also suffered accident, misfortune, and unfair treatment at the hands of the government."[32] In fact, vast numbers of white Southerners were disfranchised in the southern states. In Virginia, voting for governor stayed above 200,000 in every general election between 1881 and 1893, peaking at 284,000 in 1889; but after late century disfranchisement, total voting in 1913 fell to 72,000, even though the population had grown by 400,000 people between 1890 and 1910. J. Morgan Kousser estimated that twenty-five percent of white Virginians were disfranchised in this period; that pales beside the sixty percent of white Louisianans that Kousser estimates were disfranchised by measures that disfranchised even more Black men.[33] This was a marked change from the world of Roger Taney, when universal white enfranchisement was

32 Chin, Dred Scott, *supra* note 1, at 673.

33 J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 49, 60, 70–1 (1974).

necessarily tied to near-universal Black disfranchisement; consider the 1821 New York constitution and the 1838 Pennsylvania constitution. In Jim Crow, the directions reversed; white disfranchisement was necessary (at least in theory) to achieve Black disfranchisement. This may be a sorry distinction to make, in terms of our understanding of injustice and U.S. history, but it reminds us of the importance of historical context. While scholarly interpretations differ, many consider white disfranchisement to be an important goal of the economic elites who wrested control of southern state Democratic parties and feared poorer white alliances with Readjusters, Populists, Fusionists, and other critics of the economic order. In northern cities, before and after the war, the consolidating bourgeoisie that Sven Beckert studied campaigned against voting rights for poorer whites, winning prohibitions against non-citizen voting and laws that discouraged voting by people illiterate in English. The leading historian of voting rights argues that the Fifteenth Amendment "led southern Democrats to resurrect class, rather than racial, obstacles to voting, a resurrection that was altogether compatible with the conservative views and interests of many of the landed, patrician whites who were the prime movers of disfranchisement."[34] Class disappears entirely from Professor Chin's telling, even though class shaped a great deal of the exclusions and retractions of the period.[35]

It is true that these white men lost the vote for reasons other than their whiteness, but what precisely does that tell us about the question of what rights white men had as white men, other than the confidence that their exclusion, when it came, would come upon some basis other than their race? After the Reconstruction Amendments, Black Americans were disfranchised by racially neutral acts as well, raising questions about whether the categorical distinction that Chin makes between Black and white exclusions holds true, at least for voting rights post-1870. Chin's categorical distinction may, however, be far more descriptive of explicitly discriminatory laws against Asians, Native peoples, and others. It is important to note that our argument about voting rights has less power in other areas of discrimination, with more explicitly racist laws.

In our invocation of the post-Civil War break between racially specific and racially neutral legislation directed against Black people, we raise a final point of context and contingency. To what degree does Taney explain antebellum U.S. history and to what degree does he explain the broad sweep

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34 KEYSSAR, *supra* note 30, at 90.

35 Sven Beckert, *Democracy and Its Discontents: Contesting Suffrage Rights in Gilded Age New York*, 174 PAST & PRESENT 116, 116–57 (2002); KEYSSAR, *supra* note 30, at 113.

of U.S. history? As Chin extends his reading beyond Taney's death, Chin's paper persuasively captures the endurance of racism and, more surprisingly, of Taney's reputation. Some historical narratives undoubtedly convey too sharp a break in the post-Civil War United States, as if the past had been erased. Others undoubtedly suggest too clear a connection between the Reconstruction Amendments and the work they were put to after World War II, as if the half century of Jim Crow were an exception, as if the post-World War II Supreme Court was not behaving creatively in its own right. To the degree that Chin's paper undermines those simplistic narratives, we agree.

Where we diverge is on the meaning and extent of Reconstruction. While it is easy to overstate Reconstruction's significance or its representativeness, the specificity of the events of emancipation and Reconstruction matter a great deal. The claim that Reconstruction did not make impossible Jim Crow is true but not revealing. A legal realist can accept the thinness of all constitutional guarantees and parchment barriers. That Reconstruction could not foreclose a different generation's defeat says much less than it first seems, once we consider the ways that other constitutional guarantees have crumbled in the face of opposition, as well as the rights that have not yet crumbled but may soon. No guarantee can survive the standard of irrevocability.

Reconstruction dramatically transformed the lives not only of enslaved African Americans but also of free Black people in terms of family formation, property acquisition, communal institution building, political power, educational attainment, and control over leisure, broadly defined. This absolute change in conditions, tied to the transformation of status, is true even though it is also true that disparities between Black and white people remained and remain profound. Arguments about continuities across emancipation run aground on the simple facts of what slavery was and what it meant to be considered property under the law, not to mention how slave property created forms of national political power that could not be quite replicated under emancipation. The elimination of chattel property rights in human beings fundamentally transformed U.S. history, even as it did not create a solution to other, important problems of discrimination and disparity.

At a broad level, Reconstruction perhaps concluded in the 1890s as a new regime of disfranchisement and segregation, constructed on prior practices, expanded over the south and, to different degrees, the nation. The confluence of congressional defeat, Supreme Court failure, Anglo-American intellectual embraces of new scientific racism, corporate creation of spaces to

be segregated at railroad stations, Democratic fears of Populist and Fusionist alliances between white and Black southerners, urban reformers' fears of the voting power of new waves of immigrants, the spread of governance strategies developed in the west then the Philippines and Puerto Rico, and new northern political coalitions helped usher in a new moment of modernist segregation. This segregation proceeded differently not only because the world was different but also because the Constitution was different. The facially neutral language of disfranchisement is at once farcical and meaningful, farcical in the way that it thinly disguised what was obviously racially motivated legislation, meaningful in the way that it also permitted and even encouraged retraction of rights for white people under the guise of retraction of rights for Black people.

Chin's paper successfully breaks the Black-white binary in U.S. history, and it is reasonable to suggest that we have defensively argued in favor of both our discipline and our own areas of study, which emphasize the denials of rights and power to Black people. Our very defensiveness may be sincere evidence of the power of Chin's work to draw nineteenth century scholars focused on Black-white or white-indigenous relations to a consideration of early Asian history in the US and to early racial formations that did not solely turn on a Black-white-Native trinity. If Professor Chin's conclusions are not by themselves sufficient as a history of the period, they are a necessary directive to conduct the kind of research that would allow for a fuller multi-racial history of law and practice, a history we urgently need, a history that his scholarship makes possible.