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## Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty

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## ATONING FOR *DRED SCOTT* AND *PLESSY* WHILE SUBSTANTIALLY ABOLISHING THE DEATH PENALTY

Scott W. Howe\*

*Abstract:* Has the Supreme Court adequately atoned for Dred Scott and Plessy? A Court majority has never confessed and apologized for the horrors associated with those decisions. And the horrors are so great that Dred Scott and Plessy have become the anti-canon of constitutional law. Given the extraordinary circumstances surrounding the Court's historical complicity in the brutal campaign against African Americans, this Article contends that the Court could appropriately do more to atone.

The Article asserts that the Court could profitably pursue atonement while abolishing capital punishment for aggravated murder. The Article shows why substantial abolition of the capital sanction would constitute a relevant response to the Court's past complicity in the long, violent campaign for white supremacy. The Article also explains why substantial abolition, with a confession and apology, would involve little social cost and could send a valuable message.

As for how our racial history could help justify substantial abolition in the language of the Constitution, the Article proposes an approach suggested by decisions in which the Court has combined two or more clauses to justify an outcome that neither clause would authorize on its own. In the death-penalty context, the Court could aggregate the prohibition on cruel and unusual punishments and the command of equal protection. Under that approach, the Court need not find a national consensus against death-penalty systems, nor must it find purposeful discrimination. The Court could rely, instead, on the inability to refute that those systems are remnants of the judicially authorized pursuit of white supremacy. The nature of that conclusion would also distinguish death from other punishments and thereby solve some problems that the Court has identified with abolition using a single-clause methodology.

The arguments for vigorous Supreme Court atonement and for limiting the death penalty connect, although they stand apart. The Court could look for a better context than the death penalty to apologize for Dred Scott and Plessy, but a better context is hard to fathom. Likewise, the Court could justify, without apology, restricting the penalty based on our judicially sanctioned quest for white supremacy, but an apology for Dred Scott and Plessy would add a healing message. The actions are synergistic. The Court could achieve something special through the mutually-reinforcing symbolism that could come with simultaneous restriction of the death sanction and robust atonement for Dred Scott and Plessy.

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## INTRODUCTION

From early in the nineteenth century through well into the twentieth, the United States Supreme Court issued a series of opinions that undermined the efforts of African Americans to secure their physical protection, their dignity, and their progress.<sup>1</sup> The Court decisions enabled the violent degradation of black persons<sup>2</sup> and branded them as deeply inferior in a racial hierarchy favoring white supremacy.<sup>3</sup> Primary examples include *Dred Scott v. Sanford*<sup>4</sup> and *Plessy v. Ferguson*,<sup>5</sup> which are widely viewed by historians and Supreme Court scholars as topping the list of the worst Supreme Court decisions ever rendered.<sup>6</sup> *Dred Scott* and *Plessy* are so widely reviled that they constitute the core of constitutional law's anti-canon, along with *Lochner v. New York*<sup>7</sup> and,

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1. See, e.g., LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903, at 195–99* (2001) (discussing the complicity of the Supreme Court in the violent subjugation of black persons in the decades after the Civil War); F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 57–59 (2013) (discussing the negative effects of the Supreme Court's decision in *Dred Scott* for even free black persons in the United States at the time); RICHARD KLUGER, *SIMPLE JUSTICE* 55–83 (1975) (discussing the Supreme Court's participation in the subjugation of black persons from *Dred Scott* through *Plessy*, and concluding that “[b]y the close of the nineteenth century, . . . the Supreme Court had nullified nearly every vestige of the federal protection that had been cast like a comforting cloak over the Negro upon his release from bondage”); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 53–54 (1955) (noting decisions of the Supreme Court between 1873 and 1898 that expressed a “weakening of resistance to racism”).

2. See, e.g., GOLDSTONE, *supra* note 1, at 197 (asserting that Supreme Court decisions in the late 19<sup>th</sup> century “proclaimed that the government of the United States” was “now firmly of the belief that the southern part of the Union could again confine the black man to chattel status”); Walter F. Pratt, *Plessy v. Ferguson*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 739 (Kermit L. Hall ed., 2nd ed. 2005) (asserting that the “enduring effect” of the majority opinion “was to place the Court’s imprimatur on a considerably expanded field in which segregation was justified”); KLUGER, *supra* note 1, at 68 (asserting that, in part because the Supreme Court in the twenty years after the Civil War had “twisted” the meaning of the Fourteenth Amendment, it “should have surprised no one” when black men “began to be lynched”).

3. See, e.g., HIGGINBOTHAM, *supra* note 1, at 58 (“The ruling in *Dred Scott* affirmed that blacks, even free ones, were perceived to be both different from whites and inferior to whites.”); *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (asserting that the segregation law upheld by the majority was “a brand of servitude and degradation”). See also Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 426 (1960) (asserting that the “court that refused to see inequality in” segregation in the South, as the Supreme Court did in *Plessy*, could only be acting “based on self-induced blindness, on flagrant contradiction of known fact”).

4. 60 U.S. (19 How.) 393 (1857).

5. 163 U.S. 537 (1896).

6. See David G. Savage, *How Did They Get It So Wrong?*, *ABA J.* (Jan. 1, 2009), [http://www.abajournal.com/magazine/article/how\\_did\\_they\\_get\\_it\\_so\\_wrong](http://www.abajournal.com/magazine/article/how_did_they_get_it_so_wrong) [<https://perma.cc/E6M7-GWD8>].

7. 198 U.S. 45 (1905).

perhaps, *Korematsu v. United States*<sup>8</sup> at the perimeter.<sup>9</sup> They are almost universally condemned today among law professors, lawyers, and judges as beyond the pale.<sup>10</sup>

Given the extraordinary horrors associated with those decisions, this Article asks whether the Court has made adequate efforts to atone for them. The Court has never formally apologized for *Dred Scott* or for *Plessy*, although it began undermining *Plessy* at least by the time of *Brown v. Board of Education*,<sup>11</sup> a case that falls, along with decisions such as *Marbury v. Madison*,<sup>12</sup> at the core of constitutional law's canon.<sup>13</sup> Also, while the Court has taken steps in more modern times to try to protect racial minorities somewhat from harmful, racial discrimination, it has avoided explanations that would fully expose its own complicity in the long reign of white brutality.<sup>14</sup>

Finding those efforts inadequate, this Article contends that the Court should do more to pursue redemption. The Article argues for: (1) a

8. 323 U.S. 214 (1944).

9. See, e.g., Akhil Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76, 84 (2011) [hereinafter Amar, *Plessy v. Ferguson*] (asserting that “three court opinions occupy the lowest circle of constitutional hell,” which is the “anti-canon”; *Dred Scott*, *Plessy*, and *Lochner*; but suggesting that *Korematsu* may also qualify); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 76 (2007) (asserting that *Dred Scott* is “the key example” in the “anti-canon” of constitutional law); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 383 (2011) (asserting that *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* are the “anticanon” of American constitutional law, but noting that *Korematsu* is debatable); Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 DUKE L. J. 243, 256–57 (1998) (asserting that the majority opinion in *Dred Scott* is “surely anti-canonical” and that the majority opinion in *Plessy* is also “anti-canonical”).

10. See Amar, *Plessy v. Ferguson*, *supra* note 9, at 77 (asserting that anti-canon cases exemplify “unwritten constitutionalism run amok”); Primus, *supra* note 9, at 254 n.41 (describing anti-canon constitutional texts as ones that we regard as “repulsive” and that have been rejected by canonical ones). See also Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse Than Dred Scott (But Is Likely to Stay Out of the “Anticanon”)*, 125 HARV. L. REV. F. 23, 23 (2012) (“To embrace any of these cases as commendable, whether in the classroom, at the podium, or in a legal opinion, would be to reveal that one simply does not know ‘how to think’ as a modern constitutional lawyer. . .”).

11. 387 U.S. 483 (1954). See also CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 109 (2016) (describing the *Brown* opinion, as in several death penalty cases, as having presented “a woefully incomplete picture of the underlying practice” of enforced segregation).

12. 5 U.S. (1 Cranch) 137 (1803).

13. See, e.g., Amar, *Plessy v. Ferguson*, *supra* note 9, at 76 (describing *Marbury* and *Brown* as part of “a constitutional canon”); Greene, *supra* note 9, at 381 (describing *Brown* as “a classic example” of a case belonging to “the constitutional canon”); Primus, *supra* note 9, at 257 (asserting that “*Brown* is a canonical decision”).

14. For an example, see *infra* text at notes 270–277.

majority opinion containing a transparent confession of the Court's historical errors; (2) a description of the associated harms to African Americans; (3) institutional apology; and (4) some further action to underscore the Court's sincerity.<sup>15</sup> The Article urges that there remains social value in seeking that sort of judicial expiation even after all of the Court's past efforts to abandon *Dred Scott* and *Plessy*.<sup>16</sup> Institutional purgation could help underscore the humanity of African Americans and confirm that the Court embraces their continuing quest for equality. That course could also encourage greater racial reconciliation<sup>17</sup> by helping to "revitalize the public discourse on racial equality"<sup>18</sup> and, ultimately, by promoting "a national reckoning that would lead to spiritual renewal."<sup>19</sup>

How could the Court begin to atone in such dramatic fashion so many years after *Brown*? This Article advocates that the Court use as its vehicle the abolition of capital punishment for aggravated murder. Leading scholars have frequently contended that the modern use of the death penalty links to the long era of violent degradation of African Americans.<sup>20</sup> The Article explores that idea and concludes that there are

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15. See, e.g., MICHAEL E. DYSON, TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA 100–05, 197 (2017) (calling for a true "owning up" for "the weight of white transgressions," including *Dred Scott* and *Plessy*, with sincere apology).

16. The Court's failure openly to acknowledge and apologize still stains the social consciousness of many citizens who are well-informed about the Court's history. See, e.g., JAMES H. CONE, THE CROSS AND THE LYNCHING TREE 38, 165–66 (2017) (lamenting the "1896 Supreme Court doctrine of 'separate but equal,'" and concluding that American must confront its history of white supremacy with repentance); *id.* (calling for acknowledgment of the errors and for an apology); see also HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 254 (2019) (asserting that "we in hindsight cannot help but be dismayed at the reversals signified by [among other acts] . . . the Supreme Court's overturning of the Civil Rights Act of 1875"); GOLDSTONE, *supra* note 1, at 195–99, 203 (characterizing the Court's nineteenth-century decisions affecting the civil rights of black persons, including *Dred Scott* and *Plessy*, as a "Charade of Justice").

17. See, e.g., HIGGINBOTHAM, *supra* note 1, at 220–21 (asserting the need for government to "acknowledge culpability" in the racism that continues to exist today and that "[a]wareness and contrition are important for an effective conversation" that can lead to "racial reconciliation").

18. Janine Young Kim, *Racial Emotions and the Feeling of Equality*, 87 U. COLO. L. REV. 437, 439 (2016).

19. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/EKS8-23CK>] (emphasizing decades of racist housing policy).

20. See, e.g., Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 97 (Charles J. Ogletree, Jr., & Austin Sarat, eds., 2006) ("When we think about the death penalty, we think, in part, in race-tinged pictures—of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings."); EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 64 (3d ed. 2017) [hereinafter EQUAL JUSTICE INITIATIVE'S REPORT ON LYNCHING] <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> [<https://perma.cc/N63Q-8TKF>] (noting that "regional data demonstrates that the modern death penalty in America mirrors racial

good grounds to believe that the death penalty for aggravated murder would not have survived had the long, judicially encouraged subjugation of African Americans never happened.<sup>21</sup> On that view, abolition would constitute a relevant context for the Court to confess the horrors associated with its past complicity in the violent pursuit of white hegemony. Further, the violent subjugation of African Americans deserves recognition as one of the central byproducts of the claims of black inferiority and the segregation laws that the Court endorsed in *Dred Scott* and *Plessy*.<sup>22</sup>

The Article also addresses cost-benefit questions and concludes that substantial abolition of the death penalty presents an unusually suitable opportunity for partial judicial expiation. Ending the death penalty for aggravated murder would involve little societal sacrifice.<sup>23</sup> Indeed, an important question is whether abolishing it amounts to such a small sacrifice as to appear insignificant in an effort at apology. The sanction

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violence of the past”); Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 49 (Charles J. Ogletree, Jr., & Austin Sarat, eds., 2006) (asserting that “the administration of capital punishment in the United States, like the practice of lynching, is one of the state practices by means of which the racial polity is reproduced”); BHARAT MALKANI, SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITION 1 (2018) (“[I]t is widely recognized that capital punishment in the United States of America continues to be imbued with the legacy of slavery.”); Charles J. Ogletree, Jr., *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 55, 61 (Charles J. Ogletree, Jr., & Austin Sarat, eds., 2006) (“The underlying currents involved in this sordid history—fear, white supremacy, devaluation of black life, hatred, and a desire to control—may not be exact reasons for the suspicious disparities in capital punishment today, but one cannot help but wonder whether some of the same impulses are at work.”); STEIKER & STEIKER, *supra* note 11, at 111 (“Had the Court framed its constitutional regulation of capital punishment against the backdrop of antebellum codes, lynchings, mob-dominated trials, and disparate enforcement patterns, the Court would have done a much better job of explaining *why* the American death penalty deserved the sustained attention of the American judiciary.” (emphasis in original)); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 122 (2003) (“The states and the region where lynching was dominant show clear domination of recent executions, while those states with very low historic lynching records are much less likely than average to have either a death penalty or executions late in the twentieth century.”); John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L. REV. 781, 791 (2018) (“The death penalty has long been associated with the institution of slavery and with rampant discrimination.”); Stephen Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 439 (1995) (“The death penalty is a direct descendent of lynching and other forms of racial violence and racial oppression in America.”); Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1409 (2016) (“When Southern states turned away from lynching in the twentieth century, . . . we can find examples of officials calling off would-be lynch mobs by implicitly promising capital punishment as law’s alternative route to a parallel outcome.”).

21. See *infra* notes 401–404 and accompanying text.

22. See *infra* notes 201–233 and accompanying text.

23. See *infra* notes 414–432 and accompanying text.

today is carried out so rarely and haphazardly, and so long after the crime, that it could hardly have much marginal crime-deterrent value over perpetual imprisonment.<sup>24</sup> Its marginal retributive value is also modest at best and tainted by the racial prejudice that infests it.<sup>25</sup> The penalty functions primarily as a symbol.<sup>26</sup> Yet for many who are most troubled by our racial history it is a symbol of the legacy of a barbarous pursuit of white supremacy,<sup>27</sup> which is why judicial abolition of its use in aggravated murder cases could serve as partial judicial atonement for *Dred Scott* and *Plessy*.

As for how history could help justify abolition in the language of the Constitution, the Article proposes an approach that is novel in death-penalty jurisprudence but that the Court has occasionally employed in other areas of constitutional law. This methodology involves combining clauses to justify a protection that no single clause would authorize on its own. While the Court has not commonly recognized multiple-clause rights, it has done so often enough to make the idea plausible in the death-penalty context.<sup>28</sup> Most recently, in *Obergefell v. Hodges*,<sup>29</sup> the Court noted a “synergy”<sup>30</sup> between the Equal Protection and Due Process Clauses that it said had helped justify its previous recognition of several protections and, in the case at hand, its recognition of a right to same-sex marriage.<sup>31</sup> Another example is *Boy Scouts of America v. Dale*,<sup>32</sup> in which the Court combined the First Amendment rights to free speech and to association to justify a right of “expressive association” that the Court said allowed the Boy Scouts to exclude gay men from adult membership.<sup>33</sup>

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24. See *infra* notes 425–432 and accompanying text.

25. See *infra* notes 421–423 and accompanying text.

26. See Scott W. Howe, *Capital-Sentencing Law and the New Conservative Court*, 2018 CARDOZO L. REV. DE NOVO 157, 171 (asserting that for some, it represents “white supremacy”—“a history of racial oppression and savagery” while, for others, it represents “the idea that . . . we might get what we deserve”).

27. See, e.g., CONE, *supra* note 16, at 163 (“Nothing is more racist in America’s criminal justice system than its administration of the death penalty[, which] . . . is why the term ‘legal lynching’ is still relevant today.” (footnotes omitted)); JESSE L. JACKSON, SR., JESSE L. JACKSON, JR., & BRUCE SHAPIRO, *LEGAL LYNCHING* 72 (2001) (“Yet, there is a special relationship between the death penalty and African-Americans, a relationship going back to antebellum days, when the gallows was a principle means of punishing slaves, and on through the worst years of Jim Crow.”).

28. For some instances in which the Court has employed the doctrine, see Scott W. Howe, *Constitution Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 830–44 (2018).

29. 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

30. *Id.* at 2603.

31. See *id.* at 2602–03 (concluding that the right of same-sex couples to marry “that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws”).

32. 530 U.S. 640, 644 (2000).

33. See *id.* at 648–53 (“Forcing a group to accept certain members may impair the ability of the

Regarding capital punishment, the Court could combine the equal protection command and the prohibition on cruel and unusual punishments to support abolition, although neither alone, according to the Court, can support that outcome.<sup>34</sup> Under this approach, the Court need not find that such systems reflect purposeful discrimination—as required by the equal protection clause—or that a national consensus against death-penalty systems already exists—as required by the cruel and unusual punishment prohibition. It could be enough to hold that we cannot refute that those systems are remnants of the judicially legitimized pursuit of white supremacy. Given our understanding of the illegitimacy of state efforts to enforce the racial hierarchy and of *Dred Scott* and *Plessy*, the Court would appropriately resolve doubts over whether the death penalty would still exist had those wrongs never happened, in favor of abolition.<sup>35</sup> The nature of such a conclusion would also help distinguish death from other punishments and thereby solve some problems that the Court has identified with abolition using a single-clause methodology.<sup>36</sup> This approach can justify substantial abolition of the death sanction whether or not the Court apologizes for its historical role in promoting the “color-line”<sup>37</sup> and for the associated harms. However, as part of an atonement effort, the Court could also offer a forceful apology.

The Article does not advocate complete judicial abolition of the death penalty, which avoids a separate problem based on constitutional text. The argument for abolition based on the nation’s inglorious quest for white supremacy need not apply to capital punishment for extraordinary crimes against the state, including “treason, espionage, terrorism, and drug kingpin activity.”<sup>38</sup> There is no equivalent argument that those offenses are associated with the discriminatory abuse of African Americans or the maintenance of a white-dominated, racial hierarchy.<sup>39</sup> Consistent with that view, the Article makes the case for abolition only in cases of crime

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group to express those views, and only those views, that it intends to express.”).

34. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (rejecting separate challenges to the Georgia death-sentencing system brought under the Equal Protection and Cruel and Unusual Punishments Clauses).

35. Death sentences have become increasingly uncommon since the 1990s. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (2019), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/Q3GA-ZX9D>] (revealing that annual death sentences dropped from 295 in 1998 to 42 in 2018).

36. See *infra* notes 479–481 and accompanying text.

37. W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 11 (Univ. of N.C. Press 2013) (1903).

38. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

39. For the evidence of such racialized use of the sanction in crimes against individuals, see *infra* text at notes 373–31.

against individual persons, particularly aggravated murder,<sup>40</sup> the only offense against individuals for which the Court has continued to allow the death penalty.<sup>41</sup> Because the sanction could continue to apply constitutionally to some extraordinary crimes against the state, there would be no contravention of the language in the Fifth and Fourteenth Amendments that contemplates the possibility of capital punishment in unspecified circumstances.<sup>42</sup>

The Article proceeds in five stages. Part II describes how the Supreme Court participated in the decades-long degradation and brutalization of African Americans through a series of opinions, particularly in *Dred Scott* and *Plessy*. Part III describes how the Court later failed to atone according to a standard that calls for transparent confession and apology. Part IV overcomes various possible objections to judicial atonement that allege, for example, that *Dred Scott* and *Plessy* were not wrong when rendered,<sup>43</sup> that the decisions did not materially contribute to black oppression, or that confession and apology would risk fostering unproductive illusions of white redemption and black power by acknowledging and responding to black victimization. Part V explains why, in pursuit of Supreme Court expiation, abolition of the death penalty for aggravated murder is a relevant, partial measure and, indeed, why that course would respond to the punishment's historical symbiosis with the color-line even were the Court not to apologize for *Dred Scott* and *Plessy*. Finally, Part VI explains the benefits of a dual-clause theory to reject the death penalty and pursue atonement for our history of Court-endorsed racial oppression.

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40. This formulation also leaves open that certain murders, such as the assassination of certain government employees or murders associated with political terrorism, could remain punishable by the death penalty.

41. In rejecting the death penalty for child-rape and other non-homicidal crimes against individuals, the *Kennedy* majority asserted that, "in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." *Kennedy*, 554 U.S. at 438.

42. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

43. See, e.g., MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 28 (2006) ("Taney's constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought."); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 9 (2004) ("*Plessy*-era race decisions were plausible interpretations of conventional legal sources: text, original intent, precedent, and custom.").

## I. THE CASE FOR JUDICIAL ATONEMENT: SUPREME COURT COMPLICITY IN THE DEGRADATION OF BLACK PERSONS

As a historical matter, the Supreme Court has treated black people horribly and even inhumanely.<sup>44</sup> From before the Civil War through well into the twentieth century, the Supreme Court largely, although not entirely, abjured from efforts to describe the Constitution as safeguarding them.<sup>45</sup> In the antebellum era, the Court sometimes unnecessarily found implied rights for slave owners and a lack of rights for blacks<sup>46</sup> in part out of an effort to appease the slaveholding interests concentrated in the South.<sup>47</sup> From that period, the most infamous of the rulings was *Dred Scott*.<sup>48</sup> In the postbellum era through the early twentieth century, the Court gave a few narrow rulings for African Americans,<sup>49</sup> but generally

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44. See *infra* notes 52–195 and accompanying text.

45. For discussion of some decisions by the Court during the 1800s that were favorable to black persons, see *infra* notes 153–162 and accompanying text.

46. See, e.g., Akhil R. Amar, *The Supreme Court 1999 Term; Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 65 (2000) [hereinafter Amar, *The Supreme Court*] (asserting that “[t]he Philadelphia Constitution was pro-slavery, but the Taney Court was far worse, and grossly dismissive of the rights of free blacks”).

47. From the end of the eighteenth century through the Civil War, the importance of slavery to the economic interests of the southern states and to the nation as a whole was tied largely to the production of cotton, which Eli Whitney’s invention of the cotton gin had greatly stimulated. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 307, 359–60 (1998); JOHN H. FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 100 (8th ed. 2001). “For most of the period before the Civil War, the United States was the source of close to 80 percent of the cotton imported by British manufacturers.” WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 10 (2013). The economic interest to the southern states but northern states as well in maintaining slavery to produce cotton was substantiated in an 1832 U.S. government document revealing “that cotton not only dominated US exports and the financial sector but also drove the expansion of northern industry.” EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 273 (2014). “By the middle of the century southern masters ruled over the wealthiest and most dynamic slave society the world had ever known.” MATTHEW KARP, *THIS VAST SOUTHERN EMPIRE: SLAVEHOLDERS AT THE HELM OF AMERICAN FOREIGN POLICY* 2 (2016). Corresponding with increasing demand for labor in the “Cotton Kingdom,” the “number of American slaves increased from 1.5 million in 1820 to nearly 4 million in 1860.” DAVID B. DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 182 (2006). By 1860, “prime field hands were selling for \$1,000 in Virginia and \$1,800 in New Orleans.” FRANKLIN & MOSS, *supra* at 134.

48. See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 93 (2010) (concurring that it was “[t]he most important decision” ever rendered by the Supreme Court and one that damned Taney to enduring fame).

49. See, e.g., KLUGER, *supra* note 1, at 64, 83 (asserting that “three jury cases added up to a gain . . . in rhetoric” for blacks, but concluding that “[b]y the close of the nineteenth century,” the Supreme Court had neutered almost all of the federal protection that the Reconstruction Amendments had conferred on blacks); Amar, *The Supreme Court*, *supra* note 46, at 70–71 (contending that, after the Civil War, the Court failed to faithfully interpret the “Constitution’s new enforcement clauses,”

ruled so as to allow their continued subjugation.<sup>50</sup> The most infamous such ruling of that era was *Plessy*.<sup>51</sup>

#### A. *The Antebellum Period: Dred Scott*

*Dred Scott* was not the only decision of the Court in the antebellum period that zealously protected the rights of slave owners,<sup>52</sup> but it was among the most extreme in promoting slavery and the most explicitly degrading toward humans of African descent.<sup>53</sup> That is perhaps why American legal and constitutional scholars commonly view it today as “almost certainly the worst judicial ruling in American constitutional history.”<sup>54</sup> The explanation for the Court’s extremism was more complicated than simply a total antipathy toward blacks. In another decision from that era, *United States v. The Amistad*,<sup>55</sup> the Court—including its several southern members<sup>56</sup>—voted to free numerous black Africans carried on a Spanish ship by Spanish slave traders in violation of Spanish laws that arrived, after an uprising, off of Long Island.<sup>57</sup> Scholars suspect that key to the ruling was that *The Amistad* did not involve demands for accommodation of important slave interests in the United States.<sup>58</sup>

Other decisions of that era that implicated the slavery concerns of southern states consistently “represented victories for those who favored sectional accommodation.”<sup>59</sup> Considered with the ruling in *The Amistad*, those outcomes suggest that a misguided quest by the Court to avoid

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and essentially disregarded much of the core meanings of the Reconstruction Amendments).

50. See, e.g., WOODWARD, *supra* note 1, at 53–54 (asserting that the Court “was engaged in a bit of reconciliation” achieved at the expense of black people).

51. See Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 181 (Michael C. Dorf ed., 2004) (noting that *Plessy* “is often denounced as a judicial travesty on par with *Dred Scott*”).

52. See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

53. See *infra* notes 120–128 and accompanying text.

54. Christopher L. Eisgruber, *The Story of Dred Scott: Originalism’s Forgotten Past*, in CONSTITUTIONAL LAW STORIES 151, 151 (Michael C. Dorf, ed., 2004). See also Walter Ehrlich, *Scott v. Sandford*, in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 761 (Kermit L. Hall, ed., 1992) (asserting that American legal and constitutional scholars “consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court”).

55. 40 U.S. (15 Pet.) 518 (1841).

56. See EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT*, 1825–61, 114 (2009).

57. See *id.*

58. See *id.*

59. *Id.*

dissolution of the Union, should slave owners and others who benefited from slavery not feel sufficiently appeased,<sup>60</sup> also operated in some way behind the stated reasons in the pro-slavery decisions.<sup>61</sup> Yet, while Chief Justice Taney's pro-slavery opinion for the Court in *Dred Scott* also may have rested in some sense on that rationale,<sup>62</sup> it remained unusually transparent among Supreme Court edicts in advocating white hegemony. None of the other pro-slavery decisions reached the extremes of Taney's explicit abasement of blacks and their lack of legal protections against white domination.<sup>63</sup>

The *Dred Scott* case concerned a slave who had originally sued his nominal white owner for his freedom in Missouri state court.<sup>64</sup> Missouri had been admitted to the Union in 1821 as a slave state under the Missouri Compromise of 1820,<sup>65</sup> through which Maine was to enter as a free state (thus maintaining the balance between slave and free states) and all land north of 36° 30' not located within Missouri was to remain forever free.<sup>66</sup> Dred Scott claimed that because a former owner had taken him to reside for a half-dozen years<sup>67</sup> in the free state of Illinois and then to Fort Snelling, in federal territory that is now Minnesota, where slavery was banned, he could not be re-enslaved when returned to Missouri.<sup>68</sup> The legal consequences seemingly would have differed if Scott had absconded to a free jurisdiction, because he would have then risked recapture and return under the Constitution's Fugitive Slave Clause<sup>69</sup> and under federal

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60. See, e.g., William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 539 (1974) (asserting, for example, that the *Prigg* decision "rested on an instrumentalist concern for national unity").

61. Industry in northern states in the decades before the Civil War was also greatly spurred by the cotton production in the South, which was, in turn, enabled by slavery. See BAPTIST, *supra* note 47, at 317.

62. See GRABER, *supra* note 43, at 13 ("In *Dred Scott*, the Supreme Court fostered sectional moderation by replacing the original Constitution's failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in the free and slave states.").

63. See, e.g., HIGGINBOTHAM, *supra* note 1, at 58 ("Dred Scott's legacy lies in the Supreme Court's determination that blacks, whether slave or free, were not citizens, and therefore were not entitled to constitutional protection.").

64. See DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 250–53 (1978).

65. See LORENZO J. GREENE, GARY R. KREMER & ANTONIO F. HOLLAND, MISSOURI'S BLACK HERITAGE 23–24 (rev. ed. 1993).

66. See *id.*; FEHRENBACHER, *supra* note 64, at 107–13.

67. See FEHRENBACHER, *supra* note 64, at 242–45.

68. See EARL M. MALTZ, *DRED SCOTT AND THE POLITICS OF SLAVERY* 63–64 (2007).

69. "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered upon claim of the party to whom such service or labour may be due." U.S. CONST., art. IV, § 2, cl. 3.

legislation.<sup>70</sup> However, the Missouri courts had “consistently held” that residence in a free jurisdiction “for even a short period” with the owner’s permission could “effectively prevent the reattachment of the status of slavery when the former slave returned to Missouri.”<sup>71</sup> That view accorded with a widely-adopted nineteenth century common-law doctrine.<sup>72</sup> Yet, despite those precedents, the Missouri Supreme Court ruled two-to-one against Scott, concluding that where—after residence in a free jurisdiction—a slave’s return to Missouri was voluntary, reattachment would apply.<sup>73</sup>

Rather than appeal directly to the United States Supreme Court, Scott’s lawyers instituted a new suit in federal court alleging common-law claims and jurisdiction based on diversity of citizenship, asserting that Scott was a citizen of Missouri and his nominal owner was a citizen of New York.<sup>74</sup> His claims in state court had rested on the common law of Missouri, not the Constitution or a federal statute.<sup>75</sup> In another case involving a slave claiming his freedom, *Strader v. Graham*,<sup>76</sup> the Supreme Court had declared itself without authority to overturn a state supreme court’s declaration as to the common law of the state.<sup>77</sup> Also, in that era,<sup>78</sup> *Swift v. Tyson*<sup>79</sup> arguably allowed federal courts resolving a diversity action based on the common law to decide independently on the governing rule.<sup>80</sup> Yet Scott lost after trial when the federal circuit judge hearing the case, Robert Wells, followed the reasoning of the Missouri Supreme Court and held that Scott remained a slave in Missouri.<sup>81</sup> Scott’s case then proceeded to the United States Supreme Court.<sup>82</sup>

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70. See Eisgruber, *supra* note 54, at 153.

71. MALTZ, *supra* note 56, at 212. See also Eisgruber, *supra* note 54, at 153 (noting the legal difference between a slave that absconded versus one that resided in a free jurisdiction with the owner’s permission).

72. See FEHRENBACHER, *supra* note 64, at 50–61. British precedents also favored Dred Scott’s position. See MALTZ, *supra* note 68, at 64.

73. See MALTZ, *supra* note 68, at 66–70.

74. See Eisgruber, *supra* note 54, at 155.

75. See MALTZ, *supra* note 68, at 71.

76. 51 U.S. (10 How.) 82 (1851).

77. See *id.* at 94.

78. The rule was changed in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

79. 41 U.S. (16 Pet.) 1 (1842).

80. See MALTZ, *supra* note 68, at 71.

81. See FEHRENBACHER, *supra* note 64, at 276–80.

82. See Eisgruber, *supra* note 54, at 156.

The high court ruled against Scott, seven-to-two.<sup>83</sup> The official reporter declared Chief Justice Taney's opinion as "of the Court,"<sup>84</sup> and Taney rejected Scott's appeal on multiple grounds.<sup>85</sup> Each of the other eight justices wrote separately, and there has been substantial controversy over whether a majority agreed with all of Taney's rulings.<sup>86</sup> However, a search for explicit disagreement with Taney's opinion by the other justices reveals that "none of the major rulings in Taney's opinion can be pushed aside as unauthoritative."<sup>87</sup> Indeed, the "common convention" has been to accept Taney's opinion as providing the rulings of the Court.<sup>88</sup>

Despite widespread support for slavery at the time, the Court could have ruled for Scott.<sup>89</sup> Although against the prevailing view of that era, as Michael Higginbotham notes, the Court could have concluded, "on the basis of precedent, that Scott, as a free person, had rights and privileges just like whites."<sup>90</sup> We should not forget that there were hundreds of thousands of free black persons living in the United States at that point.<sup>91</sup> And, while the original Constitution contained "no less than ten clauses" that "directly or indirectly accommodated" slavery,<sup>92</sup> none of them said anything about the rights of free black persons.<sup>93</sup>

Moreover, if the Court was not going to rule for Scott,<sup>94</sup> it could simply have affirmed the ruling of Judge Wells that the issue was one of local

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83. See FEHRENBACHER, *supra* note 64, at 322.

84. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399 (1856).

85. See FEHRENBACHER, *supra* note 64, at 323.

86. See *id.* at 324–33.

87. *Id.* at 333.

88. Eisgruber, *supra* note 54, at 157. See also FEHRENBACHER, *supra* note 64, at 334 ("As a matter of historical reality, the Court decided what Taney declared that it decided.").

89. Even apart from the ruling against Scott, several of Taney's pronouncements about slavery and the status of black persons were widely and deeply disturbing even in the antebellum era. See *infra* text at notes 95–128; see also STEPHEN R. OATES, WITH MALICE TOWARD NONE: A LIFE OF ABRAHAM LINCOLN 131–32 (1977) (noting that the decision "shocked Republicans everywhere" and that they "set about mobilizing Northern opinion against it," including by arguing that it conflicted with Democratic presidential candidate Stephen Douglas's doctrine of "popular sovereignty" regarding slavery).

90. HIGGINBOTHAM, *supra* note 1, at 59.

91. See, e.g., Erin Bradford, *Free African American Population in the U.S.: 1790–1860*, NCPEDIA (2008), [https://www.ncpedia.org/sites/default/files/census\\_stats\\_1790-1860.pdf](https://www.ncpedia.org/sites/default/files/census_stats_1790-1860.pdf) [<https://perma.cc/J6WM-EAPS>] (reporting, based on census data, a total of 476,748 free African Americans residing in the U.S. in 1860).

92. WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, 62 (1977).

93. See *id.* at 62–63 (quoting the ten clauses).

94. On this score, see GRABER, *supra* note 43, at 28–29 ("The judicial denial of black citizenship reflected

property law and that Scott remained a slave under the common law of Missouri, as determined by the Missouri Supreme Court.<sup>95</sup> On that basis, the Court could have declared that, assuming Scott could bring a suit in federal court, he could not win on the merits, because Missouri common law controlled. On that same basis, assuming the Court wanted to resolve the case on jurisdictional grounds, Taney could have said that diverse citizenship was lacking, because Scott was a slave and not a citizen in Missouri. Instead, Taney reached out “to settle issues far beyond the dictates of judicial restraint,”<sup>96</sup> and, in doing so, acted unwisely.<sup>97</sup>

Taney unnecessarily pronounced that Congress had no power to restrict slavery in the territories, such as it purported to do in the Missouri Compromise, and, for that reason, Scott had not become a free man during his time at Fort Snelling.<sup>98</sup> The reasoning given was verbose,<sup>99</sup> but concluded with the idea that a slave owner had a substantive due process right to take a slave to reside in free jurisdictions without losing ownership.<sup>100</sup> Taney “said nothing to justify use of the due-process clause as a restraint upon legislative power—that is, as a limitation upon the substance of law and not merely upon the manner of its enforcement.”<sup>101</sup> More importantly, he invoked this methodology “to produce a profoundly immoral decision.”<sup>102</sup> He ignored that the due process clause extended its “liberty” protection to every “person” in the country,<sup>103</sup> and that even

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beliefs held by the overwhelming majority of antebellum jurists in both the North and the South.”)

95. See HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* 19 (2000); see also FEHRENBACHER, *supra* note 64, at 324 (noting that seven justices agreed that the law of Missouri determined Dred Scott’s slave status when he had returned there).

96. KLUGER, *supra* note 1, at 55.

97. See, e.g., FEHRENBACHER, *supra* note 64, at 335–36; (asserting that “there has always been a . . . conviction that the Dred Scott decision was egregiously wrong or at least exceedingly unwise”); GRABER, *supra* note 43, at 56 (asserting that Taney “overreached” by claiming that “the African race never have been acknowledged as belonging to the family of nations” (internal quotation marks omitted)); Herbert Storing, *Slavery and the Moral Foundations of the American Republic*, in *TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING* 131, 134 (Joseph M. Bessette ed., 1995) (asserting that Taney’s argument that the founders viewed black persons as without rights was a “gross calumny,” because the founders generally understood that blacks were persons “endowed with unalienable rights,” and “the injustice of slavery was very generally acknowledged”).

98. See, e.g., Amar, *The Supreme Court*, *supra* note 46, at 70 (rejecting as “absurd” Taney’s view that the Constitution disallowed “federal laws excluding slavery from various federal territories”).

99. See FEHRENBACHER, *supra* note 64, at 379 (noting that Taney used nineteen pages to say something he could have said in a few sentences—that the Bill of Rights was operative in the territories).

100. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857).

101. FEHRENBACHER, *supra* note 64, at 382.

102. Eisgruber, *supra* note 54, at 180. *But, cf.*, GRABER, *supra* note 43, at 83 (“Slavery was embedded in a way of life that most Southerners and some Northerners thought intrinsically valuable and expressive of the highest constitutional aspirations.”).

103. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty or property,

slaves were “persons” according to the Constitution,<sup>104</sup> which suggested that they had competing due process rights that protected their liberty.<sup>105</sup> Acknowledging that point meant at least that slaves were not plausibly viewed merely as “property in the same sense that hogs and horses” were.<sup>106</sup> Taney was also undeterred by the unavoidable realization that declaring Congress to lack power to “exclude slavery from the territories” would outrage many in the North by undermining the Republican party’s “antiextensionist” platform and by limiting Democrat Stephen Douglas’s “‘much vaunted’ doctrine of popular sovereignty.”<sup>107</sup>

If Taney’s opinion had done no more, it would have remained incendiary in its time,<sup>108</sup> but it might not have ended up in the anti-canon of constitutional law. After all, there were other Supreme Court opinions from that era that fanatically promoted slavery interests but that never achieved *Dred Scott*’s enduring and widespread infamy.<sup>109</sup> One example, also appalling, is *Prigg v. Pennsylvania*,<sup>110</sup> in which the Court nullified the “personal liberty” laws of free states like Pennsylvania to enable slave hunters to kidnap black persons—even children who could not plausibly be slaves—from free to slave states on the mere claim that they were fugitive slaves.<sup>111</sup> In theory, upon their delivery to a slave state, free blacks erroneously seized could still

without due process of law . . .”).

104. See U.S. CONST. art. I, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to a Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

105. To avoid this point, Taney “consistently spoke of the rights of ‘citizens’ in the territories, rather than the rights of ‘persons’ there.” FEHRENBACHER, *supra* note 64, at 382.

106. ABRAHAM LINCOLN, II COLLECTED WORKS OF ABRAHAM LINCOLN 245 (Roy P. Basler ed., 1953).

Despite the violence, degradation and deprivation that slavery imposed on its victims, “it was the lasting contribution of slaves to create an artistic yield that matched their enormous gift of labor, in tobacco and cotton, to the American economy.” STERLING STUCKEY, *SLAVE CULTURE: NATIONALIST THEORY AND THE FOUNDATIONS OF BLACK AMERICA*, at xxiii (25th anniversary ed., 2013).

107. OATES, *supra* note 89, at 131–32.

108. See *id.* While *Dred Scott* immediately infuriated Republicans, “the racist and proslavery principles” that Taney relied on “had strong roots in both the Constitution and the American political tradition.” GRABER, *supra* note 43, at 76. “For Southern Jacksonian jurists during the mid-nineteenth century, [constitutional] values included both slavery and white supremacy.” *Id.*

109. See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859) (upholding a federal, fugitive slave statute under which an alleged fugitive slave who claimed mistaken identity could not testify and was subject to a juryless proceeding in which the magistrate would receive ten dollars for a ruling for the slave catcher but only five dollars for a ruling for the black person). See also Amar, *The Supreme Court*, *supra* note 46, at 70 (describing the statute in question and concluding that it was a “constitutional travesty,” although the Court in *Ableman* declared it constitutional).

110. 41 U.S. (16 Pet.) 539 (1842).

111. See Levinson, *supra* note 10, at 29–30 (explaining the effect of *Prigg*).

sue for their freedom in the courts of the slave state,<sup>112</sup> and a slave catcher could also be criminally liable there “for kidnapping a *free man*.”<sup>113</sup> Yet many blacks lacked the resources and ability to sue, and few “could rebut the presumption against freedom with appropriate documentation or witness testimony.”<sup>114</sup> As for slave hunters facing kidnapping charges, they “were rarely if ever prosecuted for pretextually seizing free blacks.”<sup>115</sup> Therefore, *Prigg* in many circumstances encouraged whites to kidnap free blacks to try to enslave them.<sup>116</sup> Sanford Levinson has concluded that *Prigg* was “worse” than *Dred Scott* regarding the immediate effect on free blacks.<sup>117</sup> Nonetheless, *Prigg* is not part of the anti-canon.<sup>118</sup> Part of the reason, perhaps, is that *Prigg* did not openly and repeatedly degrade black people by declaring them inherently and profoundly inferior.<sup>119</sup>

Unlike in *Prigg*, Taney’s *Dred Scott* opinion explicitly pronounced that all blacks who were slaves or born in the United States<sup>120</sup> were naturally subjugated to white men and unworthy of citizenship. These insults may have given the opinion its enduring infamy.<sup>121</sup> He pronounced that blacks, compared to whites, were lesser beings by so much that they were, in constitutional terms, closer to livestock.<sup>122</sup> Indeed, he wrote that blacks were “so far inferior, that they had no rights which the white man was bound to respect.”<sup>123</sup> Without data, he asserted universal agreement among civilized persons that blacks were lesser beings.<sup>124</sup> His opinion offered “twenty-one

112. See MALTZ, *supra* note 56, at 111.

113. *Id.* at 110.

114. HIGGINBOTHAM, *supra* note 1, at 54.

115. MALTZ, *supra* note 56, at 110.

116. See HIGGINBOTHAM, *supra* note 1, at 54 (asserting that “*Prigg* provided an invitation for whites to kidnap free blacks”); MALTZ, *supra* note 56, at 111 (noting that the federal statute that the Court found to preempt the Pennsylvania statute in *Prigg* “placed free blacks at risk”).

117. See Levinson, *supra* note 10, at 29–30; see also Greene, *supra* note 9, at 428 (asserting that *Prigg* “could easily be called the worst Supreme Court decision ever issued”).

118. See Greene, *supra* note 9, at 383.

119. Sanford Levinson has asked whether part of the explanation may be the status of Justice Story, *Prigg*’s author, as “probably the major legal figure of the American republic prior to the Civil War,” buttressed by Story’s role as the first Dane Professor of Law at Harvard Law School. See Levinson, *supra* note 10, at 31.

120. Technically, “Taney did not reject black citizenship per se,” because the “only persons *Dred Scott* declared permanently ineligible for citizenship were free blacks and slaves born in the United States.” GRABER, *supra* note 43, at 20.

121. See, e.g., Amar, *The Supreme Court*, *supra* note 46, at 70 (rejecting as “absurd” Taney’s “proclamation that free blacks could never be citizens”).

122. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857) (asserting that the Constitution “makes no distinction” between “the right of property of the master in a slave” and “other property owned by a citizen”).

123. *Id.* at 407.

124. See *id.* at 407–09.

references to blacks as inferior and whites as superior.”<sup>125</sup> The highest court of the United States thereby explicitly endorsed the virulently “racist doctrine”<sup>126</sup> that black people were essentially sub-human, worthy of no better than slavery.<sup>127</sup> The level of enduring harm to African Americans from those pronouncements has been incalculable.<sup>128</sup>

### B. *The Postbellum Period: Plessy*

After the Civil War, the Reconstruction Amendments to the Constitution<sup>129</sup> along with new federal legislation protecting civil rights<sup>130</sup>

125. HIGGINBOTHAM, *supra* note 1, at 59.

126. FEHRENBACHER, *supra* note 64, at 582.

127. See HIGGINBOTHAM, *supra* note 1, at 59 (asserting that the opinion conveyed that “[s]lavery was the appropriate place for such inferior beings”).

128. For argument that the 1954 decision in *Brown* “erased *Dred Scott*” by making African Americans, in the eyes of the law, “[n]o longer ‘beings of an inferior race,’” see *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966).

Consider, however, the moving account of an African American, Justice Clarence Thomas, about driving with his young wife and baby son in an old, foreign car from Yale University to Savannah, Georgia, in 1973, for summer employment after his second year of law school. See CLARENCE THOMAS, *MY GRANDFATHER’S SON* 81 (2007). “The prospect of driving through the South frightened me, with good reason,” he reported. *Id.* at 81. Indeed, as soon the couple crossed into North Carolina, they saw a billboard that read: “The United Klans of America Welcome You.” *Id.* Unfortunately, they soon had car trouble. *Id.* Thomas was “sick with worry,” presumably because he knew the law could not provide him and his family with equal protection. *Id.* After many problems and a “bad night’s sleep” in a motel that would put them up, the car failed as they pulled into a gas station in a small town in South Carolina. *Id.* at \_\_. Fortunately, the owner helped them. *Id.* He was African American. See *id.*

129. The Thirteenth, Fourteenth, and Fifteenth Amendments “were designed to give Congress broad powers to protect civil rights and civil liberties” and together “form Congress’s Reconstruction Power.” Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010). The Thirteenth Amendment was passed by Congress in January 1865 and ratified by the states in December 1865; the Fourteenth Amendment was passed by Congress in June 1866 and ratified by the states in June 1868; and the Fifteenth Amendment was passed by Congress in February 1869 and ratified by the states in February 1870. See *id.* at 1808 n.27. The Thirteenth Amendment prohibited “slavery” and “involuntary servitude,” except “as a punishment for crime whereof the party shall have been duly convicted.” U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment declared that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. It also declared, *inter alia*, that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.* The Fifteenth Amendment mandated that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. Each of these amendments contained an enforcement clause: “Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment,” the language of which in each case is “virtually identical, giving Congress the ‘power to enforce’ the provisions of the amendment ‘by appropriate legislation.’” Balkin, *supra* note 129, at 1808.

130. Congress passed numerous statutes during Reconstruction that aimed to protect black citizens.

reflected an effort to atone for the prior mistreatment of blacks, but the doctrine of the Supreme Court was less contrite.<sup>131</sup> The Court often did not live up to its purported role to “do justice, free, as far as the lot of humanity admits, from party passion or political expediency.”<sup>132</sup> Instead, the postbellum Court played a central role in the “long nightmare of disenfranchisement, segregation, and racial violence”<sup>133</sup> that followed the formal end of Reconstruction in 1877.<sup>134</sup> “Through unfriendly statutory construction or outright invalidation, the Court reined in a great many federal civil rights laws that sought to protect blacks,” although the “Constitution’s new enforcement clauses explicitly authorized” those statutes in “sweeping language.”<sup>135</sup> The Court’s interpretations of the Reconstruction Amendments themselves also effectively neutered the work of Congress to amend the Constitution to protect African Americans and their supporters.<sup>136</sup>

While, in retrospect, the most infamous judicial decision in the postbellum denial of equal protection for blacks came in 1896 in *Plessy*,<sup>137</sup> the Court’s hostility to Reconstruction rights was on display over a long

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For example, the Civil Rights Act of 1866 provided that black citizens should enjoy equal rights in various respects and provided criminal penalties against any person found guilty of depriving citizens of those stated rights due to race, color, or previous condition of servitude. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)). Likewise, the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, provided for federal supervision of state elections and aimed to protect black citizens against illegal intimidation. *See* Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871). Also, the Civil Rights Act of 1875 provided for equal enjoyment of public accommodations, including theaters, hotels, and modes of transportation, protected the rights of black citizens to serve as jurors, and gave blacks the right to sue for personal damages for violations. *See* Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

131. *See* Amar, *The Supreme Court*, *supra* note 46, at 70.

132. *Summary of Events*, 1 AM. L. REV. 572, 574 (1867).

133. FONER, *supra* note 48, at 335; *see also* GOLDSTONE, *supra* note 1, at 12 (describing the Court as a “central player” in the “descent” into “enforced segregation” and “a nation where human beings could be tortured and horribly murdered without trial”); HIGGINBOTHAM, *supra* note 1, at 71, 83 (asserting that the Court went beyond the appropriate imposition of “checks and balances” and ultimately “opened the floodgates to blatant segregation and discrimination”).

134. Harris, *supra* note 51, at 192 (describing the “formal demise of Reconstruction” that came about in 1877 to end the impasse over the presidential election of 1876).

135. Amar, *The Supreme Court*, *supra* note 46, at 70–71; *see also* Balkin, *supra* note 129, at 1861 (“Time and again, the Supreme Court hobbled Congress’s enforcement powers through specious technicalities and artificial distinctions.”).

136. *See* MEYER, *supra* note 95, at 85. *See also* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3, 74 (2019) (“The Court also ‘crippled’ the federal government’s power to enforce the Reconstruction Amendments to protect blacks from white terror, speeding the collapse of Reconstruction in the South.”).

137. *See* Greene, *supra* note 9, at 396 (explaining based on empirical evidence that *Plessy* alone among such cases falls “within the anticanon”).

period that began much earlier.<sup>138</sup> In 1872, in *Blyew v. United States*,<sup>139</sup> the Court narrowly construed the *Civil Rights Act of 1866* so as not to strike down a Kentucky statute that forbade the testimony of a black person against a white person in a criminal case.<sup>140</sup> In the *Slaughter House Cases*<sup>141</sup> of 1873 and in *United States v. Reese*<sup>142</sup> and *United States v. Cruikshank*<sup>143</sup> from 1876, the Court “drastically curtailed the privileges and immunities recognized as being under federal protection”<sup>144</sup> and effectively limited, among others, the right of African Americans to vote, which supposedly “had been guaranteed by the Fifteenth Amendment.”<sup>145</sup>

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138. The Court was not always out of line with national sentiment on civil rights in the decades after the Civil War. See Michael J. Klarman, *Court, Congress, and Civil Rights, in CONGRESS AND THE CONSTITUTION* 173, 175 (Neal Devins & Keith E. Whittington eds., 2005). By the time of the formal end of Reconstruction in 1877, “northern opinion” had become “increasingly dubious about federal intervention” in the South, and “military enforcement was no longer politically practicable” to promote the legal reforms enacted during the Reconstruction decade. KLARMAN, *supra* note 43, at 10. Moreover, by that point, “virtually the entire South had been retaken—’redeemed’—by the political forces that had championed the Confederacy.” RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 41 (1997). “By 1874, the United States House of Representatives had gone Democratic.” KLUGER, *supra* note 1, at 59. Although the end of Reconstruction did not immediately halt progress toward equality for blacks, “around 1890, race relations in the South”—with the “relaxed constraints”—began a “long downward spiral.” KLARMAN, *supra* note 43, at 10–11. “From roughly 1890 to 1910, neither Congress nor the Court displayed any significant sympathy for civil rights.” Klarman, *supra* note 138, at 175.

139. 80 U.S. (13 Wall.) 581 (1872).

140. The Court held that a criminal case “affects” only the party indicted and the government. *See id.* at 591. Thus, the Court ruled, a victim and witnesses to an alleged crime who were excluded from testifying against the defendant under a Kentucky statute because they were black could not bring suit in federal court to challenge the state law under the Civil Rights Act of 1866, although the Act gave jurisdiction to federal courts over causes “affecting” persons denied their civil rights. *See id.* at 591–92.

141. 83 U.S. (16 Wall.) 36 (1873). The parties in the case were not African American, which may partially explain why the *Slaughterhouse* opinion contained rhetoric seemingly very helpful to African Americans, describing, for example, how the Fourteenth Amendment protected them. *See id.* at 67–72.

142. 92 U.S. 214 (1875).

143. 92 U.S. 542 (1875).

144. *See* WOODWARD, *supra* note 1, at 71; *see also* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 531 (1st ed. 1988) (describing *Cruikshank* as making federal “prosecution of crimes committed against blacks virtually impossible” and giving “a green light to acts of terror where local officials either could not or would not enforce the law”); Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law*, 65 J. LEGAL EDUC. 278, 281 (2015) (asserting that *Cruikshank* “cleared the way for violent restoration of a white supremacist legal order”); James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs to the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014) (noting that *Cruikshank* “first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private actions”).

145. *See* KLUGER, *supra* note 1, at 58; *see also* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2351 (2003) (“*Reese* and *Cruikshank* indisputably hindered

The Court “continued the trend”<sup>146</sup> with its decision in the *Civil Rights Cases*<sup>147</sup> of 1883 by ruling that restrictions in the Civil Rights Act of 1875 purporting to ban certain private misconduct against African Americans exceeded Congress’s authority under the Thirteenth and Fourteenth Amendments.<sup>148</sup> In another 1883 decision, *United States v. Harris*,<sup>149</sup> the Court rejected federal criminal prosecutions of private persons for lynching an African-American man, brought under provisions of the Civil Rights Act of 1871, again on grounds that the Fourteenth Amendment only authorized Congress to pass remedial legislation against state action, not action by private persons.<sup>150</sup> That same year, in *Pace v. Alabama*,<sup>151</sup> the Court also rejected an equal protection challenge to an Alabama statute that effectively branded blacks as inferior by punishing adultery “more severely when committed between a white person and a black person than when committed between two people of the same race.”<sup>152</sup>

When the Court during this era endorsed a Reconstruction right held by African Americans, the protection was also narrowly limited or largely unenforced. For example, in *Strauder v. West Virginia*,<sup>153</sup> the Court, over two dissents, ruled for an African-American criminal defendant by striking down as a violation of equal protection a state statute that explicitly excluded African Americans from juries.<sup>154</sup> Also, in *Neal v. Delaware*,<sup>155</sup> the Court ruled for an African-American, criminal defendant

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ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments.”).

146. See WOODWARD, *supra* note 1, at 53.

147. 109 U.S. 3 (1883).

148. *Id.* at 24–32 (ruling that refusal of the private owner of an inn, a public conveyance, or a place of public amusement to accommodate blacks did not impose “any badge of slavery or servitude” and, thus, could not be prohibited by Congress based on its enforcement authority under those amendments).

149. 106 U.S. 629 (1883).

150. See *id.* at 638–41.

151. 106 U.S. 583 (1883).

152. Greene, *supra* note 9, at 412.

153. 100 U.S. 303 (1879).

154. See *id.* at 306. On the same day that it decided *Strauder*, the Court decided two related cases, *Ex parte Virginia*, 100 U.S. 339 (1879), and *Virginia v. Rives*, 100 U.S. 313 (1879). In *Ex parte Virginia*, the Court upheld a federal statute that provided that no qualified person should be disqualified based on race from jury service in any state or federal court and under which a state judge was indicted for allegedly excluding black men from jury service based on race. See 100 U.S. at 348–49. However, in *Rives*, the Court rejected an appeal from a black criminal defendant who claimed a right to have at least one-third of his jury comprised of blacks. See *id.* at 322. The Court also indicated in *Rives*, that, absent explicit discrimination in jury selection, such as that mandated by a state statute, a criminal defendant had to litigate his juror-exclusion claim in state court before seeking relief in federal court. See *id.* at 321–22.

155. 103 U.S. 370 (1881).

who showed that no African American had ever been summoned for jury service in the state, although the African-American population exceeded twenty thousand by 1870 and comprised more than 17% of the state population by 1880.<sup>156</sup>

Nonetheless, the Court limited the right “to cases involving black parties,”<sup>157</sup> and the *Strauder* opinion, “intentionally or not, almost invited states” in selecting jurors “to rely on other criteria that might well have a disparate impact on African Americans.”<sup>158</sup> The Court declared that a State could limit the selection of jurors “to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.”<sup>159</sup> States used that advice “to circumvent the spirit of the ruling through property, level of education, and other juror qualification ‘standards’ whose only real goal was racial discrimination.”<sup>160</sup> When a few African Americans made it to jury pools for trials, parties could also use peremptory strikes to exclude them.<sup>161</sup> With the Court avoiding any

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156. *See id.* at 397–98.

157. Amar, *The Supreme Court*, *supra* note 46, at 71 n.148.

158. Sanford Levinson, *Why Strauder v. West Virginia is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U. L. REV. 603, 621 (2018).

*Strauder* and the companion cases offered “a gain, certainly, in rhetoric” for black persons. KLUGER, *supra* note 1, at 63–64. Language in the *Strauder* opinion, for example, acknowledged that African Americans suffered greatly from racial discrimination and that the Reconstruction Amendments aimed to protect them. *See, e.g., Strauder*, 100 U.S. at 306 (asserting that the amendments aimed to secure “to a race . . . that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”). The opinion also acknowledged the harm to blacks from the West Virginia law. *See id.* at 308 (“[P]ractically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing . . . equal justice.”).

The *Strauder* ruling itself also effectively discounted various congressional statements during promulgation of the Fourteenth Amendment asserting that the provision would protect only “civil” and not “political” rights. *See* Levinson, *supra* note 158, at 610 (noting that jury service was a “paradigm case[]” of a “political right[]” and that, during the debates in Congress, “several legislators took great care to emphasize” that the Fourteenth Amendment covered only “civil,” not “political,” rights). *Cf.* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 241 (1995) (contending that *Strauder* could have more easily rested on the Fifteenth Amendment).

For a view of the Fourteenth Amendment from that era that proclaimed it as applicable “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,” see *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (applying the Equal Protection Clause in favor of laundry owners who suffered discrimination by public officials because of their Chinese ancestry).

159. *Strauder*, 100 U.S. at 310.

160. HIGGINBOTHAM, *supra* note 1, at 73–74.

161. *See* DAVID COLE, NO EQUAL JUSTICE 116 (1999) (noting that “the Court expressly condoned race-based peremptory strikes as late as 1965”).

further steps to enable African-American jury service for the next fifty years, the practical effect of *Strauder* and *Neal* was minimal.<sup>162</sup>

The Court conspicuously abandoned the pretense of respect for the equal value of African Americans in *Plessy*, a second case forming the core of constitutional law's anti-canon.<sup>163</sup> Homer Plessy, a man with "one-eighth African blood" who appeared to be white,<sup>164</sup> had tried to board a whites-only train car in Louisiana in 1892.<sup>165</sup> In the South, "the period around 1890 marked a significant increase in the turn to legislatively mandated segregation,"<sup>166</sup> commonly called "Jim Crow" laws.<sup>167</sup> Louisiana had passed a criminal statute that year that required separate railway cars for whites and non-whites on intra-state passenger trains<sup>168</sup> and that penalized with fines and imprisonment passengers who insisted on going into cars to which they were not assigned.<sup>169</sup> In response to his prosecution, Plessy contended that the statute violated the Thirteenth and Fourteenth Amendments.<sup>170</sup> However, by a seven-to-one margin,<sup>171</sup> the

162. The Court in *Strauder* "announced a broad principle of nondiscrimination," but "left its enforcement to state courts." *Id.* at 108; see also Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1485–86 (1983) (speculating that the Court feared that pressing too hard would promote more private vigilantism against blacks). In any event, "black jurors were nowhere to be found in many jurisdictions, while the Court sitting atop the judicial pyramid did almost nothing until 1935. Amar, *The Supreme Court*, *supra* note 46, at 71–72 n.148. By propping up the façade of a race-neutral criminal justice process that "imposed official violence on blacks," the Court seemed mostly to "contribute[] to the 'normalization' and institutionalization of subordination, rendering it even more insidious and difficult to confront." COLE, *supra* note 161, at 109.

163. See *Plessy v. Ferguson*, 163 U.S. 537, 549–52 (1896).

164. *Id.* at 541.

165. See Harris, *supra* note 51, at 204–05.

166. Cheryl I. Harris, *In the Shadow of Plessy*, 7 J. CONST. L. 867, 886 (2005)

167. WOODWARD, *supra* note 1, at 7.

168. The Supreme Court previously had ruled, under the Commerce Clause, in Article I, Section 8 of the Constitution, that states could not impose regulations on common carriers that imposed a direct burden on interstate commerce. See *Hall v. DeCuir*, 95 U.S. 485 (1878) (striking down a Louisiana Reconstruction law that mandated racial integration of passengers on common carrier traveling interstate).

169. *Plessy*, 163 U.S. at 540–41.

170. See *id.* at 541–42.

171. Justice David Brewer did not hear arguments or participate in the decision. See *id.* at 552. Because of the death of his daughter, he left Washington, D.C., to go to his home in Kansas on the day of the argument. See J. Gordon Hylton, *The Justice Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315 (1991).

The lone dissenter, Justice John Marshall Harlan, see *Plessy*, 163 U.S. at 552, was the son of a Kentucky slave-owner, and, according to a compelling, historical article, may have had a black half-brother for whom he held affection, causing him vicariously to experience, as he put it, see *id.* at 562, the segregation law's "brand of servitude and degradation." See James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159, 234–36 (1993).

Supreme Court upheld the law's enforced separation of the races.<sup>172</sup> The decision marked the beginning of a half-century in which the Court allowed states explicitly to command extensive segregation of African Americans.<sup>173</sup>

Critics would be right to point out that *Plessy* was not the end of the Court's decisions authorizing states' subjugation of African Americans. Two years later, in *Williams v. Mississippi*,<sup>174</sup> the Court upheld a Mississippi scheme to effectively disenfranchise African Americans by imposing, among other obstacles to voting, payment of a poll tax and passage of a literacy test under which local officials would decide who was literate.<sup>175</sup> The following year, in *Cumming v. Richmond County Board of Education*,<sup>176</sup> a unanimous Court, through Justice Harlan, upheld a local school board's decision—purportedly based on resource scarcity—to fund high school services for whites but not for African Americans.<sup>177</sup> In the 1903 case of *Giles v. Harris*,<sup>178</sup> Justice Holmes declared “political rights” unenforceable through equitable relief under the Reconstruction Amendments<sup>179</sup> and declined to overturn provisions in Alabama's constitution and statutes that effectively disenfranchised African Americans.<sup>180</sup> Five years later, in *Berea College v. Kentucky*,<sup>181</sup> the Court surrendered further to state efforts to force whites to shun African Americans by upholding a Kentucky law that prohibited the teaching of white and African-American students at the same time and place, even by a private college incorporated in the state.<sup>182</sup>

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172. See *Plessy*, 163 U.S. at 539.

173. See HIGGINBOTHAM, *supra* note 1, at 87 (noting that for fifty years after 1900, “Jim Crow laws proliferated in America”); *id.* at 115 (noting that *Plessy* “resulted in decades of blatant segregation of blacks in public settings”).

174. 170 U.S. 213 (1898).

175. See *id.* at 220–25.

176. 175 U.S. 528 (1899).

177. See *id.* at 545 (asserting that “the education of people in schools maintained by state taxation is a matter belonging to the respective [s]tates” and federal authority should rarely interfere).

178. 189 U.S. 475 (1903).

179. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 298 (2000) (“notwithstanding the Fourteenth and Fifteenth Amendments, *Giles* carves out from them the category of ‘political rights’ and holds such rights unenforceable”).

180. See *Giles*, 189 U.S. at 488. Justice Holmes did allow that violation of such rights could be the subject of a suit for money damages. See *id.* at 485. Two decades later, in *Nixon v. Herndon*, 273 U.S. 536 (1927), Justice Holmes also wrote the opinion for the Court allowing a suit for money damages against the Texas Judges of Elections for denying a qualified African American man the opportunity to vote in a state primary election based on a state statute barring blacks from participation. See *id.* at 540–41.

181. 211 U.S. 45 (1908).

182. See *id.* at 56–58.

While *Plessy* was not the last of the Court's decisions that greatly injured African Americans, the Court's conduct in that case earned its special infamy.<sup>183</sup> In addition to endorsing extensive, de jure segregation, the *Plessy* opinion used white supremacist language to deride African Americans as social beings.<sup>184</sup> The degradation came with the effort to explain why segregation on the railways would not deny African Americans of property, in the form of social status, under the Fourteenth Amendment.<sup>185</sup> The Court said that African Americans were "inferior . . . socially,"<sup>186</sup> and, thus, the African American forced to sit with African Americans suffered no injury: "if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."<sup>187</sup> Underscoring its disrespect for African Americans, the Court noted that there could be a denial of property to a white man if he were forced to sit in the non-whites car: "[i]f he be a white man, and assigned to a colored coach, he may have his action for damages against the company."<sup>188</sup> The differing outcomes, again, found explanation in the endorsement of white supremacy. African Americans purportedly were destined to remain lesser social beings as part of the natural order: "[i]f one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."<sup>189</sup>

The *Plessy* opinion compounded the insult that African Americans were natively "inferior" by simultaneously denying "that the enforced separation of the two races stamp[ed] the colored race with a badge of inferiority."<sup>190</sup> According to the Court, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>191</sup> But, if segregation was not a stamp of inferiority, why had the Court itself asserted that "colored" people were "inferior?" And why would a white man forced to sit in a railway car with African Americans have a cause of action, according to the Court, for denigration of his status? The discordant assertions suggested not simply

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183. See, e.g., GATES, *supra* note 16, at 34 (calling *Plessy* "the most notorious example of the Supreme Court restricting civil rights").

184. *Plessy v. Ferguson*, 163 U.S. 537, 549–52 (1896).

185. See *id.* at 548–49.

186. *Id.* at 552.

187. *Id.* at 549; see also WOODWARD, *supra* note 1, at 93 (explaining why the Jim Crow laws implied that all African Americans were inferior to all whites).

188. *Plessy*, 163 U.S. at 549.

189. *Id.* at 552; see also *id.* at 551 (asserting the absence of "natural affinities" between the races).

190. *Id.* at 551.

191. *Id.*

“self-induced blindness”<sup>192</sup> but judicial dishonesty about the social meaning of the Louisiana law.<sup>193</sup> “Segregation in the South [came] down in apostolic succession from slavery and the *Dred Scott* case,” and was “set up and continued for the very purpose of keeping” African Americans “in an inferior station.”<sup>194</sup> It was “an instrument of subordination . . . to any honest observer.”<sup>195</sup> The Court appeared to be bald-faced lying. And, if the Court was lying on that score, wasn’t the message that it would also prevaricate when states provided lesser benefits or protections to the segregated African Americans?

The harm of *Plessy* for African Americans was incalculable,<sup>196</sup> as the decision enabled states to publicly denigrate them through pervasive demands of separation<sup>197</sup> and to give them lesser accommodations and services.<sup>198</sup> Indeed, for decades, “government programs and societal practices openly excluded African Americans from economic and educational opportunities.”<sup>199</sup> The message of inferiority fueled by *Plessy* also negatively affected the perception of many African Americans

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192. See Black, *supra* note 3, at 426; *id.* at 422 n.8 (asserting in regard to the Court’s claim that any “badge of inferiority” was only in the minds of black people: “[t]he curves of callousness and stupidity intersect at their respective maxima”).

193. Why, also, was it permitted, as Justice Harlan noted in dissent, see *Plessy*, 163 U.S. at 553 (Harlan, J., dissenting), for a white person to have an African-American nanny in the whites-only car, unless it was because the “social meaning” of her presence as a “subordinate” was clear? See Amar, *Plessy v. Ferguson*, *supra* note 9, at 85.

194. See Black, *supra* note 3, at 424.

195. Amar, *The Supreme Court*, *supra* note 46, at 65.

196. See, e.g., FRANKLIN & MOSS, *supra* note 47, at 471 (“The effect of this whole experience upon African Americans cannot be fully measured or even appreciated.”). See also HIGGINBOTHAM, *supra* note 1, at 85–116 (detailing the many ways in which legally legitimized segregation harmed African Americans).

197. “By linking racial separation on trains with that in education,” the *Plessy* decision also placed “the Court’s imprimatur on a considerably expanded field in which segregation was justified.” Pratt, *supra* note 2, at 739. And after *Plessy*, pervasive, judicially-endorsed segregation in the South “became in very short time a reality.” WOODWARD, *supra* note 1, at 84.

198. The Court later began to reject states’ schemes to provide lesser benefits to blacks. In *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the victim, Lloyd Gaines, challenged his denial by the University of Missouri to its whites-only law school and its failure to provide a law school for African Americans. The Court affirmed *Plessy* to the extent of not requiring Missouri to admit Gaines to its law school but also ruled that the state must fund a law school for African Americans that was similar to the one provided for whites rather than merely paying for African Americans to attend an out-of-state law school to which they might gain admission. See *id.* at 351. However, Gaines never realized the benefit. “On March 19, 1939, several months after the decision, but prior to his enrollment in law school, Gaines suddenly disappeared—one afternoon, Gaines left the fraternity house where he resided to buy some stamps, and he was never seen again.” HIGGINBOTHAM, *supra* note 1, at 112 (footnotes omitted). “Many believe that Gaines paid the ultimate sacrifice, giving his life to bridge the racial divide.” *Id.*

199. HIGGINBOTHAM, *supra* note 1, at 115.

regarding their own self-worth, and that kind of psychic damage could begin early in childhood.<sup>200</sup> Perhaps most appalling, the judicially approved segregation supported by the Court's official reiteration that African Americans were inferior encouraged their violent treatment at the hands of white persons.<sup>201</sup> *Plessy* was, in effect, permission from the Court for white people to be virulent racists, which helped "fear, jealousy, proscription, hatred, and fanaticism"<sup>202</sup> by whites toward African Americans to reach largely unrestrained expression.<sup>203</sup>

Decades later, Gunnar Myrdal, a Swedish sociologist—and, later, Nobel Prize winning economist—famously chronicled<sup>204</sup> the horror of private violence and governmental indifference (and more) that had befallen many African Americans in *Plessy*'s Jim Crow South.<sup>205</sup> Racial violence against African Americans, acquiesced in or promoted by government, was also widespread in northern states, particularly to prevent residential integration.<sup>206</sup> Yet the pervasive and brutal nature of racial violence was especially noteworthy in the former slave states.

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200. See, e.g., KLUGER, *supra* note 1, at 421 (quoting testimony in the *Brown* case of Professor Louisa Pinkham Holt on the often-negative effects of *legally enforced racial segregation* on the sense of self-worth and potential for achievement of the victims). See also Catherine MacKinnon, MacKinnon, J., *Concurring in the Judgment*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 143, 146–47 (Jack M. Balkin ed., 2001) (contending that the "authoritative relegation of equals to a social status of inferiority . . . is always harmful," and "the injury . . . lies not in the children's response to the state practice but in the practice itself").

201. See WOODWARD, *supra* note 1, at 93–94 (asserting that the Jim Crow laws "gave free rein and the majesty of law to mass aggressions that might otherwise have been curbed, blunted or deflected" and made Southern whites increasingly more combative and violent in their dealings with African Americans).

202. *Id.* at 51.

203. See, e.g., KLUGER, *supra* note 1, at 84 ("The toxins of racism flourished as never before throughout America during the first fifteen years of the twentieth century.").

Did the Supreme Court begin to turn the page with its anti-peonage decisions that rejected statutes rendering persons who breached employment contracts indentured servants? See *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911). For the view that those decisions represented one of the Court's "greatest achievements" as "a contribution to justice for black people," see Alexander Bickel & Benno C. Schmidt Jr., *The Judiciary and Responsible Government: 1910–1921*, 820, in 9 OLIVER WENDELL HOLMES DEVISE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1984). For the view that those decisions were ineffective in stopping peonage and of minimal importance for African Americans, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1646–48 (1986).

204. Although on a different point, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court cited Myrdal's work. See *id.* at 494 n.11.

205. See generally 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

206. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 143 (2017) ("During much of the twentieth century, police tolerance and promotion of cross-burnings, vandalism, arson, and other violent acts to maintain residential segregation was systematic and nationwide.").

Myrdal reported, “Any white man can strike or beat a Negro, steal or destroy his property, cheat him in a transaction and even take his life, without much fear of legal reprisal.”<sup>207</sup> Myrdal reported that the “minor forms of violence—cheating and striking”—were “a matter of everyday occurrence.”<sup>208</sup> African Americans in the South often depended economically upon whites and had to interact with them.<sup>209</sup> Thus, they were forced through self-abasement before whites to try “to avoid situations in which such violence [was] likely to occur.”<sup>210</sup> When African Americans invoked the displeasure of a white man, they also generally bore the humiliation of responding obsequiously to his “command[s] [and] threat[s],” hoping to avoid physical harm.<sup>211</sup> At the same time, “accidental insult, and sometimes nothing at all except the general insecurity or sadism of certain whites, [could] serve as occasion for violence.”<sup>212</sup>

While the white man in the South was generally secure in the Jim Crow era against allegations from an African American, Southern courts discriminated harshly against African Americans alleged to have mistreated or responded with violence toward a white person.<sup>213</sup> The lives of African Americans often did not matter much to white prosecutors, judges, and juries.<sup>214</sup> That is not to say that African-American defendants were always treated unfairly. If the victim was another African American, the criminal justice system might give the African-American defendant only a modest reprove. Accordingly, “[a]s long as only Negroes [were] concerned and no whites [were] disturbed, great leniency [would] be shown in most cases.”<sup>215</sup> Although “white Southerners” thought this was “evidence of the friendliness of Southern courts toward Negroes,” the “Southern Negro community [was] not at all happy about [the] double standard,” because it was “actually a form of discrimination” that left African-American communities vulnerable to crime.<sup>216</sup> Indeed, both race-of-complainant and race-of-defendant discrimination operated and at

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207. See MYRDAL, *supra* note 205, at 559.

208. *Id.*

209. *See id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See id.* at 553.

214. *See id.* at 551–53 (noting the disregard shown for the just treatment of African Americans accused of crimes against whites).

215. *Id.* at 551.

216. *Id.*

times synergistically. When an African American was alleged to have committed a crime against a white person, particularly a serious offense, there was little possibility for fair adjudication or leniency.<sup>217</sup> And, “[i]n the case of a threatened lynching, the court[s made] no pretense at justice; the Negro [had to] be condemned, and usually condemned to death, before the crowd [got] him.”<sup>218</sup>

During Jim Crow, not only the threat of lynching but lynching itself was a regular and widely-used form of violence against African-American communities and their supporters.<sup>219</sup> A lynching did not require that the African-American victim commit a crime; a slight insult or even an erroneous accusation of disrespect toward a white person could be enough.<sup>220</sup> The number of lynchings had already begun accelerating from the time of the *Civil Rights Cases*<sup>221</sup> through the early 1890s.<sup>222</sup> “By 1892, lynchings had climbed to an unofficial [annual] figure of 231, the most ever in a single year.”<sup>223</sup> While that was the annual peak in documented cases, Southern lynchings in the decades after *Plessy* became even more “a tool of racial control that terrorized and targeted African Americans.”<sup>224</sup> “The ratio of black lynching victims to white lynching victims was 4 to 1 from 1882 to 1889; increased to more than 6 to 1 between 1890 to 1900; and soared to more than 17 to 1 after 1900.”<sup>225</sup> As

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217. See *id.* at 551–53.

218. *Id.* at 553.

219. In America, lynching emerged in the Western frontier in the early 1800s as vigilante justice that did not necessarily mean killing, although by the 1830s, “lynching became synonymous with hanging.” EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 27. Although lynching was used into the late 1800s as a form of vigilante “punishment” not only for blacks but also “for whites, Mexican, Chinese, and Native Americans,” it later took on “a distinctly black/white character.” Ogletree, *supra* note 20, at 58. By the 1900s, “lynching had come almost exclusively to mean the summary execution of Southern black men.” PHILLIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 18 (2003).

The greatest crusader against lynching in the Jim Crow era was an African American woman, Ida B. Wells. See CONE, *supra* note 16, at 126–33 (recounting Wells’s campaign). For a compilation of Wells’s most important writings on the subject, see IDA B. WELLS-BARNETT, ON LYNCHINGS (Dover ed. 2014) (1892).

220. EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 29 (“African Americans frequently were lynched for non-criminal violations of social customs or racial expectations, such as speaking to white people with less respect or formality than observers believed was due.”).

221. 109 U.S. 3 (1883).

222. See KLUGER, *supra* note 1, at 68.

223. *Id.*

224. EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 27; see also STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 17 (1992) (asserting that lynching increasingly became a “routine and systematic effort to subjugate the African American minority”).

225. See EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 27.

Jim Crow hardened in place, “[t]he character of the violence also changed,” with “gruesome public spectacle lynchings” involving “prolonged torture, mutilation, dismemberment, and burning at the stake,” becoming “much more common.”<sup>226</sup> Between the end of Reconstruction and 1950, white mobs carried out approximately 4,400 documented, racial-hatred lynchings,<sup>227</sup> almost all in the former slave states in which *Plessy*-approved segregation held sway.<sup>228</sup>

## II. THE SUPREME COURT’S FAILURE TO ATONE

Has the Supreme Court adequately pursued redemption for its complicity in the reign of racial hatred that engulfed much of the United States for decades and impeded the journey of African Americans from slavery toward equality? The Court has failed decisively to pursue expiation according to the standards that this Article proposes.<sup>229</sup> The Court has played a valuable role in the movement to end de jure segregation, and it has otherwise taken numerous steps in the modern era to help shield racial minorities somewhat from unjust discriminations.<sup>230</sup> However, as a body, the Court has eschewed rationales for its rulings protecting racial minorities that fully expose the institution’s past

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226. *Id.* at 28, 50; see also MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 94 (2011) (noting that these sadistic tortures of the victim were often festive events for the white crowd in observance).

227. In *United States v. Shipp*, 214 U.S. 386 (1909), the Supreme Court expressed its irritation over a lynching that rendered moot the Court’s allowance of an appeal to review the criminal conviction and death sentence of an African-American defendant, one Ed Johnson. After the Court allowed the appeal, Shipp, the local sheriff in Chattanooga, Tennessee, who held Johnson in custody and who was aware of the Court’s action, aided and abetted a mob who took Johnson from the jail and lynched him. See *id.* at 423. The Court ordered Shipp, among others, to be tried for contempt. In the first trial in the Supreme Court’s history, Shipp was found guilty, and the Court subsequently upheld the conviction. See *id.* at 425. However, for his crime, the justices ordered Shipp to serve only ninety days in the District of Columbia jail. See Mark Curriden, *A Supreme Case of Contempt*, ABAJ. (June 2, 2009, 4:50 AM) [https://www.abajournal.com/magazine/article/a\\_supreme\\_case\\_of\\_contempt](https://www.abajournal.com/magazine/article/a_supreme_case_of_contempt) [<https://perma.cc/VVQ2-4Y4J>].

Shipp was also released early, and returning to Chattanooga by train, “was greeted with a hero’s welcome by more than 10,000 cheering supporters. Later, a monument was erected in his honor.” *Id.*

228. See EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 4 (documenting 4,084 such lynchings in twelve Southern states and more than 300 in other states).

229. See *supra* text accompanying note 15; see also DYSON, *supra* note 15, at 78–80, 197 (arguing for recognition that separate-but-equal policy produced enduring inequality for which there should be acceptance of responsibility and reparation).

230. See *infra* notes 234–287 and accompanying text. See also Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 1, 24–25 (Jack M. Balkin ed., 2001) (contending that the *Brown* decision had an important, positive influence in promoting civil rights and racial equality).

collaborations with the forces seeking to ensure perpetual, white supremacy.<sup>231</sup> And the Court, as a body, has never provided an institutional apology for its conduct in *Dred Scott* and *Plessy*.<sup>232</sup> In his dissent in *Plessy*, Justice Harlan hinted that a duty to “atone” would eventually be the price of the Court’s actions that day, which he accurately predicted would rival in infamy the Court’s conduct in *Dred Scott*.<sup>233</sup> If the Court aims for true atonement and the maximum it can inspire in racial reconciliation, there is reason to doubt that it has adequately reckoned with that call to conscience.

#### A. *Brown and its Aftermath in the 1950s*

The Court did not atone in *Brown v. Board of Education*.<sup>234</sup> Despite the iconic and beloved status of that decision among those who believe in the “Great Progressive Narrative” of our Constitution,<sup>235</sup> the holding and rationale of the *Brown* opinion were narrowly limited.<sup>236</sup> The Court declared *de jure* segregation unconstitutional for public primary and

231. See *infra* notes 234–287 and accompanying text.

232. Individual justices or groups of justices constituting less than a Court majority have at times hinted at their embarrassment over *Dred Scott* or *Plessy*. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (noting that, in *Plessy*, “this Court endorse[d] the oppressive practice of race segregation” and that “[n]ot until *Loving v. Virginia*, 388 U.S. 1 (1967) . . . could one say with security that the Constitution and this Court would abide no measure ‘designed to maintain White Supremacy’”); *Bd. of Educ. of Oklahoma City Public Sch. v. Dowell*, 498 U.S. 237, 257 (1991) (Marshall, J., dissenting) (referring to the “ugly legacy” of *Plessy*); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 631 (1990) (Kennedy, J., dissenting) (“The fundamental errors in *Plessy*, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades . . .”); *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (“we have sought to free ourselves from the burden of this history”).

233. See *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting) (“The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.”); *id.* at 559 (“In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case.”).

234. 347 U.S. 483 (1954).

235. See Balkin, *supra* note 229, at 3–5 (asserting that “*Brown* has become a beloved legal and political icon,” in part because the ruling comports with the “Great Progressive Narrative”). But see Gerald N. Rosenberg, *African-American Rights After Brown*, in *BLACK, WHITE AND BROWN* 203, 208–33 (2004) (expressing doubts that *Brown* had significant impact on school desegregation or the civil rights movement). See also KLARMAN, *JIM CROW*, *supra* note 43, at 7 (arguing for “a middle ground” between the views at one extreme that *Brown* “created the civil rights movement and at the other that it had no impact whatsoever”).

236. For a more transparent and institutionally self-reflective version of what at least a concurring opinion in *Brown* might have said, see Drew S. Days III, *Days, J., Concurring*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 92–99 (Jack M. Balkin ed., 2001).

For a forceful and insightful version of what a dissenting opinion in *Brown* might have said, see Derrick Bell, *Bell, J., Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185–200 (Jack M. Balkin ed., 2001).

secondary schools as a carve-out from *Plessy*'s "separate but equal" doctrine.<sup>237</sup> This declaration did not include a renunciation of the Court's position in *Dred Scott* and *Plessy* that African Americans were naturally "inferior."<sup>238</sup> The *Brown* Court asserted simply that public education had become much more important to personal and civic development since *Plessy* and that "modern" psychological authority, unavailable when *Plessy* was decided, showed that legally-segregated schools tended to retard the development of black children by generating in them a feeling of inferiority.<sup>239</sup> There was no explicit rejection even of the *Plessy* Court's fabrication about the neutrality of Jim Crow laws generally.<sup>240</sup> One could read *Brown* without surmising that the Court experienced institutional shame for anything said or done in *Plessy*.<sup>241</sup>

In the immediate aftermath of *Brown*, the Court also offered no institutional apology for its past conduct. *Bolling v. Sharpe*,<sup>242</sup> a companion case to *Brown*, saw the Court extend *Brown*'s equal protection ruling to the District of Columbia schools through the Fifth Amendment Due Process Clause without mention of *Plessy* or much elaboration.<sup>243</sup> In *Brown II*,<sup>244</sup> which focused on remedy, the Court also did not mention *Plessy* and, as for the future, softened *Brown*, by allowing localities to proceed with school desegregation with "all deliberate speed," meaning gradually.<sup>245</sup> The Court extended *Brown* to public graduate and professional schools in a terse opinion in 1956 that called for immediate action but that also made no mention of *Plessy*.<sup>246</sup> The Court's extension of *Brown* to other kinds of public accommodations in the 1950s came

237. The Court posed the question presented as "whether *Plessy v. Ferguson* should be held inapplicable to public education." *Brown*, 347 U.S. at 492. The Court articulated its ruling as follows: "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

238. See *supra* notes 122–124 & 190 and accompanying text (quoting *Dred Scott* and *Plessy*).

239. See *Brown*, 347 U.S. at 492–95.

240. An implicit and oblique rejection of the *Plessy* Court's fabrication, see *supra* notes 191–193 and accompanying text, arguably appeared in the *Brown* Court's citation to authorities indicating that legally-enforced segregation outside of the public-school context also could negatively affect the self-perceptions of African Americans. See *Brown*, 347 U.S. at 494 n.11.

241. See STEIKER & STEIKER, *supra* note 11, at 91 (describing the *Brown* opinion as having "whitewashed the long-standing connections between chattel slavery, white supremacist ideology, and state segregation of schools").

242. 347 U.S. 497 (1954).

243. See *id.* at 499–500.

244. See *Brown v. Board of Education*, 349 U.S. 294 (1955).

245. *Id.* at 301. See also CHARLES J. OGLETREE, ALL DELIBERATE SPEED 125 (2004) ("*Brown II* . . . signaled that southern school boards could move gradually . . .").

246. See *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413, 414 (1956) (per curiam).

through several orders merely affirming lower court decisions, in none of which the Court offered any institutional repentance for its own past complicity in the nightmare of *de jure* segregation.<sup>247</sup>

### B. *The 1960s Through the Mid-1970s*

In decisions from the 1960s and 1970s, the Court also expressed no institutional contrition. Even when rejecting some of the post-Reconstruction precedents that helped subjugate African Americans,<sup>248</sup> the Warren Court offered no apologies for the past. For example, in *Harper v. Virginia Board of Elections*,<sup>249</sup> the Court, over three dissents,<sup>250</sup> rejected a state law that imposed as a prerequisite to voting in state elections a poll tax of \$1.50 that Harper, an African-American woman, could not pay.<sup>251</sup> The ruling partially undermined the *Williams* decision that came two years after *Plessy*.<sup>252</sup> Justice Douglas, for the majority, at least mentioned *Plessy* and noted that its declarations of what constituted equal or unequal treatment “sound strange to a contemporary ear.”<sup>253</sup> However, he offered no further indication of institutional shame.<sup>254</sup> The

247. See, e.g., *New Orleans City Park Improvement Ass’n v. Detiege*, 252 F.2d 122 (5th Cir. 1958) (public parks), *aff’d per curiam*, 358 U.S. 54 (1958); 142 F. Supp. 707 (M.D. Ala. 1956) (public transportation), *aff’d per curiam*, *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 223 F.2d 93 (5th Cir. 1955) (public golf courses), *rev’d*, 350 U.S. 879 (1955); *Mayor & City Council of Baltimore v. Dawson*, 220 F.2d 386 (4th Cir. 1955) (public beaches), *aff’d* 350 U.S. 877 (1955).

248. The Court has not overruled all of those old rulings. For example, the modern Court has reaffirmed its ruling in the *Civil Rights Cases*, 109 U.S. 3 (1883), that section 5 of the Fourteenth Amendment does not give Congress power to regulate private parties. See *United States v. Morrison*, 529 U.S. 598, 620–23 (2000). That ruling remains harmful because it means that, “[i]f states fail to enforce their laws to protect certain groups, federal legislation offering alternative remedies” to try to enforce the Equal Protection Clause will be hampered to the extent that the private conduct cannot be regulated under the Commerce Clause. Kermit Roosevelt, III, *Bait and Switch: Why United States v. Morrison is Wrong About Section 5*, 100 CORNELL L. REV. 603, 623 (2015).

249. 383 U.S. 663 (1966).

250. See *id.* at 670 (Black, J., dissenting); *id.* at 680 (Harlan, J., dissenting).

251. See *id.* at 664 n.1. Harper’s claim was based on the Equal Protection Clause. The Twenty-fourth Amendment, ratified in 1964, had made poll taxes unconstitutional in federal elections, but not state elections. See U.S. CONST. amend. XXIV.

252. For discussion of *Williams*, see *supra* text at notes 174–175.

The *Harper* Court actually rejected a more recent precedent. In *Breedlove v. Suttles*, 302 U.S. 277 (1937), the Court had reaffirmed that states could impose poll taxes as a condition of voting. See *id.* at 283–84. The *Harper* Court said that it overruled *Breedlove* on that score, without reference to the 1898 *Williams* decision. See *Harper*, 383 U.S. at 669.

253. *Harper*, 383 U.S. at 669.

254. Justice Douglas several times conveyed a more insightful and irreverent view of judicial and legislative history in civil rights cases when he was not writing for the Court majority. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 444–49 (1968) (Douglas, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 242–85 (1964) (Douglas, J., concurring); *Heart of Atlanta Motel, Inc. v. United States*,

stated reason for abandoning precedent was antiseptic: “[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”<sup>255</sup> In other 1960s cases overruling *Plessy*-era precedents, the Court did no better in atoning. For example, in *Loving v. Virginia*,<sup>256</sup> the Court struck down long-standing Virginia statutes that criminalized, as to both parties, any marriage between a “white person” and a “colored person.”<sup>257</sup> Through Chief Justice Warren, the Court at least conveyed that the racial classification embodied in the miscegenation laws involved “invidious” discrimination that were designed to maintain “White Supremacy.”<sup>258</sup> Warren also openly rejected Virginia’s claim that the *Pace* decision, from 1883,<sup>259</sup> supported the state’s “equal application” theory that the law was proper because it punished both parties equally.<sup>260</sup> Of course, that was similar to a theory that the Court had later used in *Plessy* to support de jure segregation.<sup>261</sup> However, Warren simply noted that the reasoning in *Pace* had not “withstood analysis in the subsequent decisions of this Court.”<sup>262</sup> And as for *Plessy*, there was no mention of it, let alone any expression of institutional remorse.<sup>263</sup>

There is also nothing close to an apology from the Court in its primary and secondary school desegregation decisions from the 1960s and 1970s.<sup>264</sup> In several of those cases, the Court affirmed remedies for past constitutional violations in the form of legally-enforced segregation.<sup>265</sup> Those cases presented precisely the kinds of segregation that the *Plessy*

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379 U.S. 241, 279–91 (1964) (Douglas, J., concurring).

255. *Harper*, 383 U.S. at 669 (emphasis added).

256. 388 U.S. 1 (1967).

257. *See id.* at 4–6 (describing the statutes and noting that they dated to Virginia’s “Racial Integrity Act” of 1924).

258. *Id.*; *id.* at 11–12.

259. For more on *Pace*, see *supra* notes 151–152.

260. *See Loving*, 388 U.S. at 10.

261. *See Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (asserting that there was not “anything found in the act” mandating separation of the races that “stamps the colored race with a badge of inferiority”).

262. *Loving*, 388 U.S. at 10 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964)).

263. For a history of Fifteenth Amendment litigation that begins with states’ efforts to disenfranchise African Americans voters in the 1800s but omits the Court’s complicit decisions and selectively mentions rulings that aimed to be more helpful to African American citizens, see Chief Justice Warren’s majority opinion in *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 (1966).

264. In some such cases, the Court rejected desegregation remedies imposed by lower courts, because the remedies were deemed to exceed the extent of the violations. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413–18 (1977); *Milliken v. Bradley*, 418 U.S. 717, 737–53 (1974).

265. *See Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971).

opinion had approved in dicta,<sup>266</sup> and, thus, those cases presented relevant vehicles for pursuing judicial expiation. However, the Court did not express contrition.

### C. *The Late 1970s and Beyond*

The Court's opinions from the late 1970s and beyond also lack in efforts at purgation for the Court's past degradation of African Americans. The "affirmative action" cases do not meet the standard. The Court has agreed that Congress can, within limits, "identify and redress the effects of society-wide discrimination."<sup>267</sup> The Court also has declared that "a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," subject to "strict scrutiny."<sup>268</sup> In the sphere of higher education, the Court also has held that states can use narrowly-tailored racial preferences in admissions to pursue diversity-associated goals.<sup>269</sup> However, one searching through those opinions for anything approaching a confession and apology by the Court for *Dred Scott* and *Plessy* will come up empty-handed.

The Court at times seems to have consciously avoided acknowledging the violence, its own complicity, or any duty to atone. Consider *Coker v. Georgia*,<sup>270</sup> a 1977 decision in which the Court held that the death penalty for the rape of an adult was cruel and unusual.<sup>271</sup> From 1930, when national statistics began being compiled, to 1972, when the Court

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266. See *Plessy*, 163 U.S. at 544 (asserting that segregated schools for children had long been the norm almost universally).

267. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (reiterating Congress's power to identify and redress discrimination under section five of the Fourteenth Amendment, but ruling that states are restricted from doing so under section one of that Amendment); see also *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion) (upholding a 10% set-aside for minority business enterprises, contained in a federal public works employment act against a challenge based on the equal protection demands of the Due Process Clause).

268. *J.A. Croson Co.*, 488 U.S. at 491–92, 493.

269. See *Fisher v. Univ. of Texas*, 579 U.S. \_\_\_, 136 S. Ct. 2198, 2207–15 (2016) (upholding narrowly-tailored use, as determined non-deferentially by the judiciary, of racial preferences for minority applicants to secure the educational benefits of student diversity); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding narrowly-tailored use of racial preferences in admissions by the University of Michigan Law School to obtain the educational benefits of a diverse student body); cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (striking down racially-based set-aside program of admissions by state medical school but holding that a state "has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin").

270. 433 U.S. 584 (1977) (plurality opinion).

271. See *id.* at 598–600.

invalidated standard-less capital sentencing in *Furman v. Georgia*,<sup>272</sup> 89%, or 405, of the 455 men executed for rape were African American, and “virtually all . . . were accused of raping white women.”<sup>273</sup> Also, it seems that “no white man has ever been executed for raping a black victim.”<sup>274</sup> Those statistics almost certainly help explain why the Court, in *Coker*, declared the death penalty disproportionate punishment for the rape of an adult victim.<sup>275</sup> However, the Court avoided discussing the racial bias problem or any hint of the past judicially legitimized degradation of African Americans.<sup>276</sup> In a context involving the discriminatory use of extraordinary state violence against African Americans, the Court eschewed a rationale that it could have used to atone for its complicity in the long and *violent* campaign for white supremacy.<sup>277</sup>

In *Planned Parenthood v. Casey*,<sup>278</sup> concerning whether to overrule precedent in the abortion context, a five-justice majority asserted that “we think *Plessy* was wrong the day it was decided,”<sup>279</sup> but did not go much further in its criticism. Indeed, the larger point of those justices was that the “facts” arguably had changed between *Plessy* and *Brown*, unlike in the abortion context.<sup>280</sup> Those justices wanted to underscore that, if members of the *Plessy* Court, they would have found the legislatively mandated segregation to be a “badge of inferiority” and “inherently unequal.”<sup>281</sup> That concession was commendable. At the same time, they implied that reasonable people could have disagreed: “[s]ociety’s understanding of the facts [was] . . . fundamentally different from the basis claimed for the decision in 1896.”<sup>282</sup> Such qualified disagreement with *Plessy* can hardly count as a confession and apology.

Perhaps the Court’s best effort at institutional contrition for the insult and injury of *Plessy* (or *Dred Scott*) to African Americans and their

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272. 408 U.S. 238 (1972).

273. Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in *DEATH PENALTY STORIES* 171, 193 (John H. Blume & Jordan M. Steiker eds., 2009).

274. *Id.*

275. See *Coker*, 433 U.S. at 597, 600; Steiker & Steiker, *supra* note 11, at 97 (concluding that “*Coker* represents the height of the Court’s avoidance of race”).

276. See Johnson, *supra* note 273, at 179–83.

277. For an outline of the constitutional rationale that the Court could have employed, see *infra* Parts V and VI.

278. 505 U.S. 833 (1992).

279. *Id.* at 863 (O’Connor, Kennedy, & Souter, J., joined by Blackmun & Stevens, J.).

280. See *id.* at 864.

281. *Id.* at 862–63.

282. *Id.* at 863.

supporters came in *Bob Jones University v. United States*.<sup>283</sup> There, the Court held that nonprofit, private schools and universities that enforce racially discriminatory admissions standards based on religious grounds do not qualify as tax-exempt organizations under the Internal Revenue Code and that contributions to such institutions are not deductible as charitable contributions.<sup>284</sup> The opinion contained several sentences denouncing racial discrimination and implicitly criticizing *Plessy* and, perhaps, *Dred Scott*. At one point, the Court asserted, “[g]iven the stress and anguish of the history of efforts to escape from the shackles of the ‘separate but equal’ doctrine of *Plessy v. Ferguson*, . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising ‘beneficial and stabilizing influences in community life.’”<sup>285</sup> At another point, the Court proclaimed that “Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of the Nation’s constitutional history.”<sup>286</sup> Those statements aim to heal. Yet they do not qualify as a confession and apology. No effort can come close if it does not acknowledge in some detail the degrading consequences of Jim Crow, including the *physical and psychic violence* that was inflicted on African Americans.<sup>287</sup>

### III. OVERCOMING POSSIBLE OBJECTIONS TO ATONEMENT

Given the Court’s failure thus far to explicitly atone institutionally for *Dred Scott* and *Plessy*, should it now do so? This Article argues that it should and proposes robust atonement that would include transparent confession of the wrongs done, acknowledgment of the associated damages inflicted, apology for the transgressions and injuries, and a relevant ruling to underscore sincerity. Following that course would signal that the Court believes enough in equal justice for African Americans and the nation’s ability to achieve it to reject lingering concern with treading lightly so as not to inflame opposing forces. The message could also invite a shared recognition—and a “shared anger and grief”<sup>288</sup>—regarding the brutally improper treatment of a large segment of our people. Given the Court’s participation in the subjugation of African Americans for

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283. 461 U.S. 574 (1983).

284. *See id.* at 604–05.

285. *Id.* at 595 (internal citations omitted).

286. *Id.* at 604 (footnote omitted).

287. *See supra* notes 200–208 and accompanying text.

288. Kim, *supra* note 18, at 500.

decades,<sup>289</sup> that seems like a worthy effort. Nonetheless, to further examine the utility and feasibility of the endeavor, this Part considers some possible general objections.<sup>290</sup>

A. *The Argument that the Rulings in Dred Scott and Plessy Were Not Wrong When Rendered*

Could one argue that the Court was not wrong in its holdings in *Dred Scott* and *Plessy* when they were rendered and, thus, that there is little reason to apologize?<sup>291</sup> The underlying explanation would center on the notion that the Constitution did not give clear answers in *Dred Scott* and *Plessy*. An approach to constitutional construction other than originalism would have to underlie such an objection. Virtually no serious scholars now publicly contend that the original Constitution or the Reconstruction Amendments *required* the rulings in *Dred Scott* and *Plessy*.<sup>292</sup> Indeed, to try to save originalism as an interpretive approach, some of its leading proponents have attempted to explain why, instead, *Brown v. Board of Education* was required as a matter of original meaning.<sup>293</sup> “It is often said that no theory of constitutional interpretation is sound if it cannot explain and justify” the *Brown* decision.<sup>294</sup> But originalism contemplates a Constitution with many fixed meanings and that a ruling justified on original meaning does not become unjustified absent changed facts or a constitutional amendment.<sup>295</sup>

289. See *supra* Parts II & III.

290. This Part does not aim to address all possible general objections but rather some central ones as to which answers can best help elucidate the rationales and value of confession and apology.

291. Cf., e.g., GRABER, *supra* note 43, at 28 (“Taney’s constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought.”); CHARLES A. LOFGREN, THE PLESSY CASE 197–98 (1987) (asserting that the conclusions in the majority opinion in *Plessy*, from the standpoint of the 1890s, “did not rest on bad logic, bad social science, bad history or bad constitutional law” and “did not lack substantial support in contemporary expert opinion”).

292. But cf. JERROLD M. PACKARD, AMERICAN NIGHTMARE 75–76 (2002) (“The [*Plessy*] decision, in fact seemed to have been precisely what the framers of the Fourteenth Amendment intended when they so cautiously wrote it three decades earlier.”).

293. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 82–83 (1990) (asserting that *Brown* should have been written “in terms of the original understanding” of the view that “equality, not separation was written into the text,” and “equality and segregation were mutually inconsistent, though the ratifiers did not understand that”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 954–55 (1995) (arguing, based on historical research focusing on votes and speeches by Congressional actors in the aftermath of passage of the Fourteenth Amendment, that, as a matter of originalism, *Plessy* was wrong and *Brown* was right).

294. Jack M. Balkin, *Preface*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID ix, x–xi (Jack M. Balkin ed., 2001).

295. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV.

Therefore, if *Brown* were actually correct as a matter of original meaning, *Plessy* would have been wrong under that interpretive theory.<sup>296</sup> That means an attempted demurrer that would cover both *Dred Scott* and *Plessy* would have to rest, instead, on the idea that the Constitution often does not give fixed, determinate answers and did not in those cases.<sup>297</sup> On that view, the argument would go, the *Dred Scott* rulings could have been plausibly correct when rendered although the Reconstruction Amendments soon overruled them. And, as for *Plessy*, the argument would go, the ruling could have been plausibly correct when rendered but deemed clearly wrong today, although neither the relevant facts nor the relevant Constitutional language changed in the interim.

The grounds to reject such a demurrer trace back to why *Dred Scott* and *Plessy* are the heart of constitutional law's anti-canon—"the most important constitutional texts that we, the retrospective constructors of constitutional history, regard as normatively repulsive."<sup>298</sup> In the modern era, we have decided that it was unreasonable to say the things the Court said in those cases even when the Court said them.<sup>299</sup> Although pronounced white hegemony prevailed in this country in those eras,<sup>300</sup> we think the Court should have risen above forces that we understand as depraved, given that the Constitution gave the Court that authority. The Court's function was not to enable a racial hierarchy through a delusion that black people were inferior and, thus, that there was no constitutional problem with their subjugation by force. By conforming to the widespread inhumanity of a maladapted society, the Court itself acted not reasonably, but wrongfully.<sup>301</sup>

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453, 456 (2013) (noting that the "two core ideas" of originalism are that "the original meaning . . . of the constitutional text is fixed at the time each provision is framed and ratified" and that "constitutional actors . . . ought to be constrained by the original meaning").

296. See McConnell, *supra* note 293, at 954–55 (contending that only one of the two could have been correct as a matter of original meaning).

297. See, e.g., GRABER, *supra* note 43, at 17 (asserting that constitutional law did not generate any clearly correct answers in *Dred Scott*); KLARMAN, JIM CROW, *supra* note 43, at 47 (asserting that in four areas of black subjugation during the *Plessy* era—"segregation, disenfranchisement, black jury service, and separate-and-unequal education—traditional sources of constitutional law were sufficiently indeterminate to accommodate white supremacists preferences").

298. Primus, *supra* note 9, at 254, n.41 (noting also that "the canon and the anti-canon are mutually constructing," which suggests that rejection by a canonical text also may be part of what lands certain texts within the anti-canon).

299. Cf. Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 710 (2005) (contending that we want to conclude that *Dred Scott* and *Plessy* were wrongly decided because we do not want those decisions to "reflect our nature or who we are").

300. See *id.* (acknowledging that "we were once a nation premised on racial inequality and racial ideologies").

301. See, e.g., MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 145

Once we reject as wrong even in those eras the brutal enforcement of white supremacy, the *Dred Scott* and *Plessy* opinions become incorrect when rendered. The wrongfulness in the Court's behavior does not reside only in the rulings. In *Dred Scott*, the Court announced repeatedly that African Americans were inferior to white people and even declared African Americans essentially sub-human.<sup>302</sup> In *Plessy*, the Court effectively declared that all African Americans were naturally inferior to all white people such that the law was powerless to make any correction.<sup>303</sup> Simultaneously, the *Plessy* Court disingenuously declared that African Americans were only imagining that the Louisiana segregation law denigrated them.<sup>304</sup> We can easily believe that the Court should have been better than to hold or utter those ideas.

If we disavow the violent quest to enforce white domination as unreasonable even in the nineteenth century, the central rulings in both *Dred Scott* and *Plessy* also become wrong when rendered. The idea that those rulings were "correct" (although the Constitution did not require them) apparently would be that substantially different rulings would have been so widely resisted that the actual rulings avoided bad social ends.<sup>305</sup> But, what bad social outcomes did *Dred Scott* forestall?<sup>306</sup> Promptly, the South seceded and the Civil War ensued, resulting in the deaths of 750,000 people.<sup>307</sup> (As for what the nation could then accept, the central *Dred Scott* rulings that slavery was permitted in federal territories and that black persons could not be citizens were repudiated by the Reconstruction Amendments only a decade later).<sup>308</sup> And what more horrible social ends were avoided by *Plessy*'s holding approving de jure segregation of public facilities or other *Plessy*-era rulings that, for example, helped

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(1994) (describing *Plessy* as a "ridiculous and shameful opinion"); Eisgruber, *supra* note 54, at 180 (describing the *Dred Scott* decision as "profoundly immoral").

302. See *supra* notes 122–123 and accompanying text.

303. See *supra* notes 186–189 and accompanying text.

304. See *supra* notes 190–191 and accompanying text.

305. See, e.g., GRABER, *supra* note 43, at 14 (asserting that "in 1860, the alternative to *Dred Scott* was a civil war that—with different battlefield accidents—might have further entrenched and expanded human bondage"); KLARMAN, *supra* note 43, at 21–22 (asserting, regarding *Plessy*, that "[r]ising white-on-black violence, including lynchings, made segregation seem . . . a progressive solution to growing interracial conflict"); KLARMAN, JIM CROW, *supra* note 43, at 58 (noting with respect to the *Williams* case, from 1898, that "[d]isenfranchisement seemed preferable to racial massacres").

306. See MALTZ, *supra* note 68, at 155 (noting that the majority justices in *Dred Scott* "clearly misapprehended the impact their decision would have on the political disputes" of the time and did not avert tumult and Civil War).

307. See Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES, April 2, 2012, at D1.

308. See *supra* note 129.

disenfranchise African Americans? Contrary rulings would have been resisted in large swaths of the country until they were finally accepted or enforced and then followed.<sup>309</sup> Whites may well not have suffered significantly except, perhaps, in some cases from the eventual limitations on their power to enjoy black subjugation.

Even assuming that renewed civil conflict had erupted and whites had suffered greatly,<sup>310</sup> why, if black lives mattered, would that have been a greater tragedy than the one inflicted for many decades on innocent African Americans and their supporters? There is no compelling reason. Moreover, the notion that life would have been even worse for African Americans with contrary rulings is impossible to substantiate and not intuitive.<sup>311</sup> The road toward equality for African Americans undoubtedly would still have been long and torturous.<sup>312</sup> Yet, once we see the quest to promote white hegemony even then as wrong, there was no sound basis for the *Plessy* Court to have surmised that it would be better for the nation as a whole or for African Americans in particular that the Court conspire in the endeavor.

The final rejoinder concerns good faith ignorance. What if the rulings and pronouncements in *Dred Scott* and *Plessy* were based on honest unawareness by the Court as to the indecent implications?<sup>313</sup> Ignorance, moral or otherwise, may be no better an explanation for the conduct of the majority justices than their balefulness or their fear of criticism and ostracism by those around them who were white supremacists.<sup>314</sup> Given,

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309. See, e.g., KLARMAN, JIM CROW, *supra* note 43, at 47–60 (explaining that contrary rulings by the Supreme Court on civil rights issues during the *Plessy* era would have been resisted in the South and largely unenforceable).

310. See PACKARD, *supra* note 292, at 78 (asserting that had the Court ruled for *Plessy*, “it might have started another civil war” or “so it was feared”).

311. The actual rulings, for example, did not avoid massacres of blacks by whites based on racial hatred. In the early twentieth century, there were various race riots in which whites destroyed black neighborhoods and killed many black residents. See ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921 (2002); JAMES S. HIRSCH, RIOT AND REMEMBRANCE (2002); ELLIOT RUDWICK, RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917 (1966); ROBERTA SENECHAL, THE SOCIOGENESIS OF A RACE RIOT; SPRINGFIELD, ILLINOIS, IN 1908 (1990); WILLIAM M. TUTTLE, RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919 (1972).

312. See KLARMAN, JIM CROW, *supra* note 43, at 59 (concluding that “even enforceable Court decisions would have had relatively little effect on the lives of southern blacks.”).

313. See, e.g., *id.* at 58 (“Justices in the *Plessy* era were too immersed in their historical context to spot the oppression that historical hindsight can readily see in racial practices at the turn of the twentieth century.”). *But see* *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (asserting that the Louisiana law “practically[] puts the brand of servitude and degradation upon a large class of our fellow citizens”).

314. Concluding that the majority justices were either ignorant or craven still allows us to recognize, as Jack Balkin argues we should, that anti-black racism was widely, even predominantly, considered “reasonable” in the United States during the *Dred Scott* and *Plessy* eras. See Balkin, *supra*

for example, that Frederick Douglas had published his compelling first autobiography in 1845,<sup>315</sup> and that seventeen African Americans had been elected to and served in Congress between 1870 and 1887,<sup>316</sup> the justices in *Dred Scott* and *Plessy* had no good excuse for ignorance about the full humanity and potential of humans of African descent.

However, assuming that we should not treat those justices “as villains”<sup>317</sup> (on the notion that they acted unknowingly), we can still properly look back on the Court’s behavior as wrong when committed. Consider a murder conviction that was based on weak evidence presented to a gullible (rather than malicious or cowardly) jury but is thrown out many years later when DNA evidence reveals the aged prisoner’s innocence. Was the conviction right until it was declared wrong or wrong all along? And which is preferable—that the reversing judge (1) throw out the conviction without addressing the prisoner and his family, friends and supporters, or (2) speak to the community with humility, admit that the conviction was always erroneous, acknowledge the many years of untold suffering by so many and apologize on behalf of the judiciary?

*B. The Argument that Contrary Rulings in Dred Scott and Plessy Would Not Have Alleviated Black Oppression*

Opponents may contend that the opinions in *Dred Scott* and *Plessy* at least did not significantly contribute to the subjugation and suffering of African Americans. As for *Dred Scott*, objectors might contend that the Civil War and Reconstruction Amendments promptly negated the importance of the decision. As for *Plessy*, objectors might urge that, had the opinion favored *Plessy*, it would not have been enforced or followed and African Americans would have endured just as much pain as they did in actuality. Some modern scholarship casts doubt on the importance of *Dred Scott* or *Plessy* in contributing significantly to the oppression of African Americans.<sup>318</sup> Based on such contentions, objectors might also

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note 299, at 710.

315. See FREDERICK DOUGLAS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLAS FREDERICK (Dover Thrift ed. 1995) (originally published as *Narrative of the Life of Frederick Douglas, an American Slave*, by the Anti-Slave Office, Boston, 1845) (detailing the early life of Douglas, who escaped slavery and became a brilliant writer, eloquent orator and spokesperson for African Americans).

316. See U.S. CONG., BLACK AMERICANS IN CONGRESS, 1870–1887, 22–25 (Matthew Wasniewski ed., 3d ed. 2008).

317. KLARMAN, JIM CROW, *supra* note 43, at 6.

318. See, e.g., LOFGREN, *supra* note 291, at 203–04 (contending that there is only slight evidence of *Plessy*’s direct role in promoting segregation); MALTZ, *supra* note 68, at 154 (noting that the Civil

argue that the decisions were not sufficiently causal regarding the injuries visited to warrant Supreme Court expiation.

There are two answers. First, the no-causation argument is weak on its merits. Particularly as to *Plessy*, we can plausibly infer that, while there were non-judicial influences as well,<sup>319</sup> the Court's ruling, as opposed to a ruling strongly in their favor, made life significantly worse for African Americans.<sup>320</sup> After all, the *Plessy* Court declared African Americans natively inferior and authorized their segregation in public settings, which served as a "public symbol[] and constant reminder[]" of their "inferior position."<sup>321</sup> No generally accepted account would allow the Court to deny that the decision helped stimulate the subsequent survival and burgeoning of segregation laws.<sup>322</sup> By officially approving as opposed to denouncing the color-line, the ruling seems likely also to have encouraged the increasingly hostile attitudes and vicious behaviors that developed toward African Americans by many whites.<sup>323</sup> Moreover, *Plessy* should not be considered apart from the Supreme Court's other anti-black decisions from the post-bellum era, which reflected a "cumulative weakening in the resistance to racism."<sup>324</sup> (*Dred Scott* also may have had continuing ripples

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War "clearly led to the demise of the constitutional doctrines embraced by" the majority justices in *Dred Scott*); see also KLARMAN, JIM CROW, *supra* note 43, at 60 (asserting, regarding the *Plessy* era, that "more favorable Court rulings, even if enforceable, would not have appreciably alleviated the oppression of southern blacks").

319. See, e.g., WOODWARD, *supra* note 1, at 54 (noting the influence on national attitudes about race of the U.S. assumption of control after 1898 of over eight million "people of the colored races" in the Caribbean and Pacific).

320. See, e.g., GOLDSTONE, *supra* note 1, at 169 ("*Plessy*, then, was a fulcrum, a point of departure for southern states, immensely significant in the struggle for equal rights."); HIGGINBOTHAM, *supra* note 1, at 115 (contending that *Plessy* "resulted in decades of blatant segregation of blacks in public settings" such that "the racial hierarchy was intensified and expanded, and segregation was given a false patina of judicial legitimacy"); WOODWARD, *supra* note 1, at 51–56 (noting the Supreme Court's failure to support civil rights, including in *Plessy*, as one of several important factors in the South's "adoption of extreme racism").

321. WOODWARD, *supra* note 1, at 7.

322. In his dissent in *Plessy*, Justice Harlan had intuited that the decision would have such an effect. See *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (predicting that the ruling would "encourage . . . state enactments [] to defeat the beneficent purposes" of the Reconstruction Amendments); see also JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 65 (1976) (contending that *Plessy* spurred more segregation laws between 1898 and 1907 affecting public transportation and also the extension of segregation laws in other areas); HIGGINBOTHAM, *supra* note 1, at 37 ("*Plessy* provided a catalyst for states to enforce segregation and inequality well beyond public accommodations.").

323. Justice Harlan had also intuited this consequence. See *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (predicting that the decision would "stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens").

324. See GOLDSTONE, *supra* note 1, at 170 (noting that, while *Plessy* was unremarkable in the series, that was "the most damning thing about it," given that the series could have been decided

of influence in the survival of notions of black inferiority.) Considering the series as a whole makes the lack-of-causation claim too counter-intuitive to expect that anyone but proponents of that position should bear the burden of persuasion. And scholars who have raised doubts about the deleterious consequences of *Plessy* cannot disprove its influence.<sup>325</sup>

Second, causation can easily be seen as a red herring. Based on longstanding principles that apply every day in criminal courts across the nation, complicity liability does not require causation.<sup>326</sup> In criminal law, we do not absolve the aider and abettor for lack of proof that his encouragement of the target crime induced the principal actor.<sup>327</sup> By encouraging the target offense, the accessory effectively steps into the shoes of the principal.<sup>328</sup> Likewise, while the rule has critics and some states dissent, the accessory becomes fully liable for any other crimes of the principal that are the natural and probable consequence.<sup>329</sup> Applying those principles to *Dred Scott* and *Plessy*, the target offense was the creation of the racial hierarchy and state-mandated segregation. The Supreme Court authorized and encouraged those outcomes and thereby became institutionally responsible. The natural and probable consequence was the deprivation and damage inflicted on African Americans not only through segregation but through the racial prejudice and hatred that it fomented. From this perspective, the argument that all of the segregation and the associated injuries would have happened anyway—even were it persuasive—is irrelevant.

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differently); WOODWARD, *supra* note 1, at 53.

325. Scholars who doubt *Plessy*'s impact have relied in part on the inability to *prove* the contrary position. See, e.g., KLARMAN, JIM CROW, *supra* note 43, at 48 ("measuring the effects of counterfactual judicial rulings is a daunting task"); LOFGREN, *supra* note 291, at 203–04 (suggesting that *Plessy* may have been one among several factors but arguing that proponents of that view cannot prove it).

326. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 472 (7th ed. 2015) ("A secondary party is accountable for the conduct of the primary party *even if his assistance was causally unnecessary to the commission of the offense.*").

327. See *id.* ("S is guilty of an offense as an accomplice even if, but for his assistance, P would have committed the offense anyway.").

328. See *id.* ("The absence of a causation requirement is premised on the underlying rationale . . . that accomplice liability is derivative in nature.").

329. See *id.* at 479 ("At common law, and today in most jurisdictions, 'a person encouraging or facilitating the commission of a crime [may] be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted.'").

C. *The Argument that Confession and Apology Would Foster Unproductive Illusions of Redemption and Power*

Some may argue that Supreme Court confession and apology, by acknowledging and responding to black victimization, would mostly foster unproductive illusions of white redemption and black power. On this view, the effort would make those whites who read Supreme Court opinions feel badly about the racial hierarchy and Jim Crow such that they would try to deny their own responsibility, but still feel relieved that, if they bear any culpability for their white privilege, the Court's apology provides redemption. As a consequence, they would gain little motivation to help advance black equality. Simultaneously, on this view, the effort would encourage African Americans, in the words of Shelby Steele, to pursue "a victim-focused racial identity."<sup>330</sup> That approach, Steele's argument suggests, could involve "trading an illusion of power for an illusion of redemption."<sup>331</sup> From that vantage, the concern would be that African Americans might be misled to believe that they could secure full and just reparations "(with their illusion of deliverance) from the larger society."<sup>332</sup>

The answer to this dual-sided objection begins with clarifying what makes a Supreme Court confession and apology part of pursuing "careful and true development of equality between the races."<sup>333</sup> The risks of misunderstandings are real, because there can never be anything close to full redemption or full reparations for the consequences of the racial hierarchy and segregation.<sup>334</sup> Among various problems, including resistance by the beneficiaries of black subjugation, we cannot adequately identify and evaluate who owes and who is owed and how much.<sup>335</sup> Those problems haunt any effort to acknowledge and discuss our racial history and pursue reconciliation.<sup>336</sup> Before yielding to these concerns, however, we should consider the benefit of the endeavor.

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330. SHELBY STEELE, *A DREAM DEFERRED* 4 (1994).

331. *Id.* at 12.

332. *Id.* at 9.

333. *Id.* at xiii.

334. For the argument for a non-comprehensive package of reparations for African Americans, involving monetary compensation, education programs, and transformational opportunities, see RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); see also BORIS BITKER, *THE CASE FOR BLACK REPARATIONS* (1973) (focusing on *Plessy* as the basis for black reparations); Coates, *supra* note 19 (emphasizing decades of racist housing policy).

335. See John McWhorter, *Against Reparations*, in *SHOULD AMERICA PAY?* 180, 191–93 (Raymond A. Winbush ed., 2003) (noting, among other problems, the difficulty of defining what is owed and by whom and to whom).

336. For a comprehensive view of the African American reparations debate, see ALFRED L.

The value of Supreme Court confession and apology finds explanation largely in the insight offered by Janine Young Kim that race, as a social and political construct,<sup>337</sup> “is not purely cognitive but is also imbued with emotional meaning.”<sup>338</sup> That reveals, as she has explained, that pursuing full equality between the races requires a reallocation and sharing at the emotional level, not merely within other realms, such as the material or the cognitive.<sup>339</sup> Consider that because “unjust subordination is the paradigmatic condition of racial minorities in the United States,”<sup>340</sup> the negative emotions of race can appropriately include “grief, anger, fear, hatred, and disgust” at times.<sup>341</sup> Further, those negative emotions can “block the . . . positive feelings of joy, love, and even hope that each believe are attached to equal status.”<sup>342</sup> To work toward equality requires changing the distribution of these emotions. After all, “part of *being* equal is *feeling* equal.”<sup>343</sup>

Supreme Court confession and apology could help promote a reallocated sharing of the positive and negative emotions of race. By confessing the errors and harms of *Dred Scott* and *Plessy* and apologizing, the Court could convey respect, caring, and concern for the unjustly oppressed.<sup>344</sup> That effort would aim to bring to all observers, including victims, “the feeling of joy in belonging, love in fellowship, and hope for a better future that, together with a fairer distribution of resources, constitute a comprehensive transformation of the racial condition in the United States.”<sup>345</sup> At the same time, the confession and apology would aim “to assert . . . the humanity of blacks” and to “challenge . . . the humanity”<sup>346</sup> of those who might not otherwise consider the enormous

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BROPHY, REPARATIONS PRO & CON (2006).

337. See JAMES BALDWIN, *THE FIRE NEXT TIME* 104 (1962) (“Color is not a human or personal reality; it is a political reality.”); ALAIN LEROY LOCKE, *RACE CONTACTS AND INTERRACIAL RELATIONS* 5 (1992) (recognizing that “there is no stable physical basis for the sociological concept of race”).

338. See Kim, *supra* note 18, at 497.

339. See *id.* at 497–500.

340. *Id.* at 490.

341. *Id.* at 440.

342. *Id.* at 498.

343. *Id.* at 441 (emphasis in original).

344. See ANA LUCIA ARAUJO, *REPARATIONS FOR SLAVERY AND THE SLAVE TRADE* 5 (2017) (“A first step in the reparatory process requires that those who benefit from the wrongdoing offer an apology to those they victimized.”); HIGGINBOTHAM, *supra* note 1, at 220–21 (urging the importance of “government . . . acknowledge[ment] [of] culpability in the racial paradigm” in any effort at racial reconciliation and the pursuit of equality).

345. Kim, *supra* note 18, at 499.

346. *Id.* at 499–500.

suffering caused by slavery, Jim Crow, and societal resistance to the idea of racial equality. “Rather than seeking to . . . divide,” it would “invite[] all to participate in a more ethical and just conception of collective flourishing.”<sup>347</sup>

The idea of stimulating a “desire for otherness”<sup>348</sup>—a desire to feel the negative emotions—is perhaps an under-appreciated part of pursuing racial equality. Yet this aspect appears intertwined with helping the oppressed move toward their rightful place in society. Michelle Alexander urges that all of us should feel shame over the parallels between Jim Crow (and slavery) and the modern black experience with mass incarceration based on drug laws<sup>349</sup> so that we commit to “dismantling this new racial caste system.”<sup>350</sup> James Cone wrote of the importance of white people striving “to empathize fully with the experience of black people”<sup>351</sup> to “give voice to the victims” and, ultimately, to confront the sin of white supremacy and separate ourselves “from the culture that lynched blacks.”<sup>352</sup> Michael Eric Dyson has urged that whites should educate themselves about black life and culture, including slavery and the black freedom struggle to help “close the distance between the white self and the black *other*.”<sup>353</sup> And for the Supreme Court to express its concern and grief over *Dred Scott* and *Plessy* and the associated tragedies would “signal that this is not ‘just a black thing,’ but rather ‘an American thing.’”<sup>354</sup>

In the process of confessing and apologizing, the Court could also take steps to reduce misunderstandings. The Court could underscore—while also emphasizing the value of continuing efforts at redemption—the inability for various reasons to achieve full reparations for *Dred Scott* and *Plessy*, including the inability to identify and assess all of the injuries. Recognizing that there are many victims, including those who simply doubt the Court’s strong commitment to racial equality and human decency, the Court could apologize both to black victims and to all who have been fearful, troubled, or ashamed in the wake of learning about the Court’s history. Further, the Court could deliver the confession and

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347. *Id.* at 500.

348. *Id.*

349. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010) (urging an understanding of “the plight of African Americans” in “this new system of racialized social control” that “creates and maintains [a] racial hierarchy much as earlier systems of control did”).

350. *Id.* at 11.

351. CONE, *supra* note 16, at 41.

352. *Id.* at 165.

353. DYSON, *supra* note 15, at 199–206.

354. *Id.* at 204–05.

apology in a context in which there is primarily a symbolic sacrifice by societal members that could be accepted not as divisive, but as the pursuit of a common flourishing.

*D. The Argument that the Court Would Have to Act Arbitrarily or Be Drawn into Undermining Its Own Credibility*

Objectors may assert that atonement inevitably would lead the Court either to act arbitrarily or to become mired in a quagmire of apologies, undermining public confidence in its legitimacy. On this view, the Court would appear unprincipled if it only apologized for *Dred Scott* and *Plessy*. Over history, the Court has rendered numerous decisions that have later been viewed by the vast majority of those who study them as wrong-headed. What about other appalling, anti-black decisions from the antebellum era, such as *Prigg*,<sup>355</sup> or from the post-bellum era, such as *Pace*, or *Berea College*?<sup>356</sup> What about *Lochner*?<sup>357</sup> What about *Korematsu*?<sup>358</sup> What about the Court's acquiescence in the criminalization of intimate, gay sexual encounters in *Bowers v. Hardwick*?<sup>359</sup> And what about the Court's historical treatment of Native Americans?<sup>360</sup> If the Court is to begin confessing embarrassing errors and apologizing, the argument would proceed, it should atone for some or all of those decisions and several others as well. At the same time, the objection would continue, if the Court were to offer mea culpa after mea culpa, it could undermine the

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355. For discussion of *Prigg*, see *supra* notes 110–119 and accompanying text.

356. For discussion of *Pace* and *Berea College*, see *supra* notes 151–152, 181–182, and accompanying text.

357. For discussion of the reasons that *Lochner* has been widely viewed in the modern era (although with an increase in libertarian dissent) as fundamentally erroneous, see Greene, *supra* note 9, at 417–22.

358. For discussion of why *Korematsu* is difficult to defend using conventional constitutional arguments, see *id.* at 422–27.

359. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

360. Consider *Johnson v. McIntosh*, 21 U.S. 543 (1823). There, the Supreme Court declined to recognize title to land sold by an Indian tribe to a private person and declared that Native Americans had been “savages” who had no right to the land that warranted legal recognition. See *id.* at 590–91, 604–05. We should not forget that “[a] long-established language of racism that speaks of the American Indian as an uncivilized, lawless, and warlike savage can be found at work throughout the leading Indian law decisions of the nineteenth-century U.S. Supreme Court.” ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 33 (2005) (footnote omitted).

Recent scholarly work has substantiated the widespread enslavement of indigenous people in our nation even after the middle of the nineteenth century. See ANDRÉS RESÉNDEZ, THE OTHER SLAVERY 295–314 (2016).

public view that it operates mostly as a neutral interpreter of the Constitution. The perception might take hold that the justices in the past frequently made up the meaning of the document on bad reasoning and that the justices today must frequently do the same.

The answer to this grievance begins with a simple denial that the Court must go deeply into the atonement business to atone for *Dred Scott* and *Plessy*. While the Court has made various decisions that later have been widely deemed erroneous,<sup>361</sup> *Dred Scott* and *Plessy* are easily understood as warranting particular shame and special expiation.<sup>362</sup> As we have seen, even among the Court's anti-black decisions, *Dred Scott* and *Plessy* most openly dismissed the humanity of African Americans and endorsed the racial hierarchy.<sup>363</sup> That is largely why they, along with *Lochner*, occupy the center of constitutional law's anti-canon.<sup>364</sup> But, even *Lochner* is a "less demonic precedent than *Dred [Scott]* and *Plessy*."<sup>365</sup> Not only do they seem distinctively depraved, the Court itself holds essentially all the power to decide which of its past decisions are so disgraceful as to warrant the institution's most dramatic atonement. If the Court were to decide to confess and apologize only for *Dred Scott* and *Plessy*, there is little reason to think that major public campaigns would mount to press for many other Supreme Court atonements.<sup>366</sup>

Without causing much further complication, however, the Court could cite *Dred Scott* and *Plessy* as representative of its anti-black decisions throughout most of the nineteenth and early twentieth centuries and apologize for that broader failing.<sup>367</sup> In the process, the Court could acknowledge the associated harms, most of which it could still tie to its negative declarations about blacks and the endorsement of the racial hierarchy in *Dred Scott* and *Plessy*. In that way, the Court could effectively also apologize for decisions such as *Prigg*, *Pace*, and *Berea College*, among others. That approach would not require the Court to pursue the same level of atonement for all of its other rejected decisions that did not involve black subjugation. The Court's historical debasement

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361. See Greene, *supra* note 9, at 386–96 (discussing various Supreme Court cases that are widely thought to have been wrongly decided).

362. See Savage, *supra* note 6 (noting that these two cases top the list of Supreme Court decisions widely regarded as the worst of all time).

363. See *supra* notes 120–128, 183–189, and accompanying text.

364. See Amar, *Plessy v. Ferguson*, *supra* note 9, at 76 (asserting that those three occupy "the lowest circle of constitutional hell").

365. *Id.* at 81.

366. Would confessing and apologizing once for *Dred Scott* and *Plessy* foment calls for the Court to do the same thing repeatedly? While some repetition might be good, it seems doubtful that the Court would face problematic pressure of this nature.

367. See *supra* text accompanying notes 129–228.

of black people and the associated injuries to them and all who have suffered vicariously are plausibly understood as the institution's most dishonorable legacy.<sup>368</sup>

Would Supreme Court atonement for *Dred Scott* and *Plessy* alone (or in their representative capacities) tend to undermine the Court's legitimacy by effectively revealing that the Court creates constitutional meaning? This concern seems overwrought. *Dred Scott* and *Plessy* are already widely recognized among those who pay attention to Supreme Court opinions and history as severely misguided. For the Court to acknowledge that they were erroneous decisions that endorsed unjust and destructive propositions would only catch up with, rather than challenge, that informed, popular opinion. Nor is it demonstrably bad that more citizens understand that the Supreme Court must often construct, rather than merely discern and apply, constitutional doctrines.<sup>369</sup>

#### IV. PURSUING ATONEMENT WHILE LIMITING THE DEATH PENALTY

Having addressed why the Supreme Court should atone for *Dred Scott* and *Plessy*, this Article posits that abolishing the death penalty for aggravated murder would provide an appropriate context to do so. This Part offers three reasons, besides the availability of a plausible approach for the Court to implement such a plan as constitutional law, which is the subject of Part VI. First, abolition is relevant to atonement. Studies concerning racial discrimination in capital selection and parallels between modern executions and Jim Crow-era lynchings provide grounds to understand the modern application of the death penalty as both a product

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368. Cf. David Brooks, Opinion, *The Case for Reparations*, N.Y. TIMES, Mar. 7, 2019, at A27 (contending that the continuing effects of the racial hierarchy represent a national social crisis).

369. See JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS xi (2015) (defending “conceptions of the Constitution as embodying abstract moral and political principles—not codifying concrete historical rules or practices—and of interpretation of those principles as requiring normative judgments about how they are best understood”). See also Scott W. Howe, *Slavery As Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1034 (2009) (concluding that the “slavery-as-punishment clause should remind all of us why [the] original public meaning, even when clear, does not resolve the modern meaning of the constitution”); Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 75 (2019) (determining that during Justice Scalia’s career, “less than 14% of the opinions of the Court addressing a disputed question of Fourth Amendment law were originalist”); Solum, *supra* note 295, at 458 (contending that, even from a perspective focused on finding original meaning, “the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases”).

and perpetuation of the violent, white hegemony that the Court abetted in *Dred Scott* and *Plessy*.<sup>370</sup> The second reason likewise focuses on the relevance of abolition but also on the questionable utility of the death sanction. Modern capital punishment has such modest penological value when applied to aggravated murder as to further imply that it would already have disappeared had it not gained earlier momentum as an outgrowth of and instrument for maintaining the racial hierarchy.<sup>371</sup> The final reason addresses whether abolition of the death penalty for aggravated murder would have enough positive impact on African Americans and their supporters to underscore sincere judicial atonement. The answer is that prompt abolition would not only eliminate racial discrimination in the use of the death penalty but could also have important symbolic value even apart from the opportunity that such a course poses for achieving the secondary benefits of apologizing for *Dred Scott* and *Plessy*.<sup>372</sup>

#### A. *Linkage Between the Death Penalty and the Color-Line*

The central argument for focusing on partial abolition of capital punishment as the vehicle for atonement is that the modern death penalty appears to have descended from the country's quest for white supremacy.<sup>373</sup> Many students of the death penalty have asserted this integral connection, including prominent leaders of the African-American community.<sup>374</sup> The conclusion that the death penalty links to the maintenance of the color-line rests heavily on evidence that the death penalty in the post-*Furman* era has continued to be applied in a racialized fashion, even if less so than in the Jim Crow era.<sup>375</sup> The point (for present purposes) is not that the death penalty is unfair to some but not all guilty murderers who receive it, or to some but not all murder victims whose killers fail to receive it,<sup>376</sup> but rather that the death penalty doubtfully would exist as a punishment for aggravated murder today in the United States absent the long, brutal quest to subjugate blacks and maintain white

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370. See *infra* text accompanying notes 373–413.

371. See *infra* text accompanying notes 414–432.

372. See *infra* text accompanying notes 433–444.

373. See Austin Sarat, *The Rhetoric of Race in the "New Abolitionism,"* in FROM LYNCH MOBS TO THE KILLING STATE 260, 264 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) ("Criticism of capital punishment should focus on the work it does as a living embodiment of the legacy of lynching and the system of white privilege that it expressed.").

374. See *supra* notes 20, 27, and accompanying text.

375. See *infra* notes 379–404 and accompanying text.

376. The racial disparities also reveal a separate "inequality" aspect of unfairness regarding the death penalty for murder. See *infra* notes 465–474 and accompanying text.

supremacy. Additional evidence to support that conclusion comes from research that shows corresponding state patterns in the relative levels of use of lynching in the *Plessy* era as compared to the relative levels of use in modern times of the death penalty.<sup>377</sup> Thus, focusing on limited abolition of the death penalty as the context for Supreme Court expiation builds on the constitutive tie between the violence associated historically with maintaining the judicially sanctioned color-line and the racialized state violence embodied in the modern death penalty.<sup>378</sup> This linkage makes limited abolition a *germane context* in which to atone for *Dred Scott* and *Plessy*.

### 1. *Racialized Use of the Modern Death Penalty*

Many studies of capital sentencing combine to suggest that the racial hierarchy that the Court endorsed in *Dred Scott* and *Plessy* is crucial in explaining the survival of death as a sanction for murder in the modern era.<sup>379</sup> With high consistency, studies have shown pronounced white-victim favoritism by capital decision-makers.<sup>380</sup> Evidence of the operation of prejudice against African-American capital defendants is more equivocal,<sup>381</sup> although some studies have shown that influence as well.<sup>382</sup> The studies also have taken place in enough states to conclude that race

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377. See ZIMRING, *supra* note 20, at 66 (noting the correlation between high and low lynching states “at the dawn of the 20<sup>th</sup> Century” and the high and low execution states “late in the twentieth century”).

378. Kaufman-Osborn, *supra* note 20, at 49 (contending that “the administration of capital punishment in the United States, like the practice of lynching, is one of the state practices by means of which the racial polity is reproduced”); Sarat, *supra* note 373, at 273 (asserting that “the death penalty itself perpetuates prejudice, discrimination, and racial subordination”).

379. See LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 364 (4th ed. 2018) (asserting the prevalence of race discrimination in capital selection and noting some of the supporting studies); Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 525–76 (Charles S. Lanier, Robert Bohm & James Acker eds., 3rd ed. 2014) (discussing various studies); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (summarizing various studies).

380. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (1990) (study based on synthesizing twenty-eight other studies and concluding that race-of-victim bias typically strongly influences capital selection).

381. See *id.* (asserting that race-of-defendant bias is typically more equivocal or not identifiable).

382. See, e.g., Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2118–19 (2004) (summarizing studies finding discrimination against black defendants and black victims); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 837–39 (2008) (study regarding capital selection in Harris County, Texas, finding that black defendants and killers of white victims were disfavored in the overall selection process).

bias has continued to play a central role in the use of the capital sanction generally in the United States.<sup>383</sup>

The most famous of the post-*Furman* studies, conducted by lead investigator David Baldus, focused on the Georgia system in the 1970s and was the basis for the separate challenges under the Equal Protection Clause and the Eighth Amendment that the Supreme Court rejected in *McCleskey v. Kemp*.<sup>384</sup> For all suspects charged with murder in Georgia between 1973 and 1979, the Baldus researchers found the following death-sentencing rates in four categories of race-of-defendant and race-of-victim combinations:

**Race of Defendant & Victim Death-Sentencing Rate:**

black defendant/white victim .21 (50/233)

white defendant/white victim .08 (58/748)

black defendant/black victim .01 (18/1443)

white defendant/black victim .03 (2/60)

TOTAL. 05 (128/2488)<sup>385</sup>

Those skewed figures went far on their own to substantiate that the flames of prejudice that the Court fanned in *Dred Scott* and *Plessy* continued to play a central role in explaining the operation of Georgia's post-*Furman* death-penalty system. Nonetheless, one could postulate—however unlikely given our history of racial animus<sup>386</sup>—that unapparent, legitimate factors might correlate with the racial factors to explain the Georgia capital-sentencing outcomes. To test that hypothesis, the Baldus researchers investigated 230 variables for each case and each defendant and employed sophisticated statistical techniques, including cross-tabulations and multivariate regression analysis.<sup>387</sup> They found no combination of legitimate variables that could come close to explaining the results.<sup>388</sup> They concluded that the figures reflected what they seemed

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383. See, e.g., BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 84 (2017) (asserting that “study after study in nearly every death penalty state” shows a race-of-victim influence).

384. See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 3 (1990) [hereinafter BALDUS STUDY] (noting that the study provided the basis for litigation over the claim of racial discrimination in *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

385. See *id.* at 315 tbl.50.

386. See, e.g., *McCleskey*, 481 U.S. at 332 (Brennan, J., dissenting) (asserting the need to consider our racial history in assessing the plausible explanations for the disparities).

387. See BALDUS STUDY, *supra* note 384, at 46.

388. See *id.* at 316.

to reflect—virulent prejudice by decision-makers, whether conscious or not.<sup>389</sup>

The Baldus study indicated that race powerfully influenced case outcomes. The researchers estimated that the odds were 4.3 times higher that a defendant would receive the death penalty solely because his victim was white rather than black.<sup>390</sup> In part because the vast majority of murders were intra-racial and, as in the Jim Crow era, there was often less intense pursuit of the maximum punishment in cases involving black victims,<sup>391</sup> black defendants had a modest advantage over white defendants across all cases.<sup>392</sup> Nonetheless, within white-victim cases, the researchers estimated that a black defendant faced odds of receiving the death penalty 2.4 times higher solely because he was black rather than white.<sup>393</sup> Thus, the odds of a death sentence facing a black defendant who killed a white victim were many times higher than those facing a white defendant who killed a black victim under otherwise identical circumstances.

Various subsequent studies of modern capital selection in many jurisdictions have consistently confirmed the operation of racial prejudices, including several studies conducted in the last decade.<sup>394</sup> A study in the state of Washington recently found that “juries are more than four times as likely to impose a death sentence in cases involving Black defendants (after controlling for case characteristics).”<sup>395</sup> A recent study in Louisiana revealed “racial disparities even more striking than the Georgia disparities the Court tolerated in its *McCleskey* decision.”<sup>396</sup> A 2013 California study found major disparities favoring white victims in charging decisions in murder cases between the North and South of

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389. *See id.*

390. *See id.*

391. *See supra* notes 215–216.

392. *See* BALDUS STUDY, *supra* note 384, at 328.

393. *See id.*

394. *See supra* notes 395–401 and accompanying text.

395. Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 COLUM. J. RACE & L. 77, 103–04 (2016).

396. STEIKER & STEIKER, *supra* note 11, at 110; *see also* Frank R. Baumgartner & Tim Lyman, *Race-of-Victim Discrepancies in Homicides and Executions, Louisiana 1976-2015*, 17 LOY. J. PUBLIC INT. L. 129, 141 (2015) (finding that, in Louisiana, “the likelihood of being executed for [killing an African-American male] in th[e] modern era is forty-eight times lower than for the killing of a white woman”); Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 670–71 (2011) (finding that in an urban Louisiana parish, “the odds of a death sentence are 97% higher for those who kill whites than for those who kill blacks”).

Alameda County.<sup>397</sup> A study from North Carolina, published in 2011, found that “the odds of a death sentence for those . . . suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks.”<sup>398</sup> The studies are not always as sophisticated as the original Baldus study;<sup>399</sup> they do not consistently find race-of-defendant prejudice;<sup>400</sup> and they vary on whether it is the prosecutors or juries who discriminate.<sup>401</sup> Nonetheless, the implication from the combined studies that racial prejudice influences capital selection on a broad geographic scale is powerful.

The combined racial studies also tend to substantiate that the death penalty for aggravated murder in the United States would have altogether or nearly disappeared by now if we had never had the color-line. Considered alone, those studies do not prove the point beyond doubt. The death penalty has survived although the studies also show that its use in the post-*Furman* era is substantially less racialized than was capital selection during the Jim Crow era.<sup>402</sup> The countervailing point, however, is that overall use of the death penalty also has dwindled in recent decades.<sup>403</sup> That could mean that to the extent that racism has moderated and that there is increased concern with consistency and fairness (including the desire to avoid executing the innocent),<sup>404</sup> there is less

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397. See Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1229–30 (2013).

398. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119, 2145 (2011).

399. See, e.g., Howe, *supra* note 382, at 2111 (noting various studies that were not as thorough as the original Baldus study).

400. See, e.g., Pierce & Radelet, *supra* note 396, at 670 (noting that “the race of the defendant had no value in predicting who is sentenced to death”).

401. Compare, e.g., Phillips, *supra* note 382, at 830, 834 (in Houston, prosecutors but not juries discriminate), with Beckett & Evans, *supra* note 395, at 103–04 (in Washington state, juries rather than prosecutors are the problem).

402. Compare, for example, the statistics from the original Baldus study in Georgia, see *supra* note 385 and accompanying text, with the statistics regarding the use of the death penalty for rape in the Jim Crow era. See *supra* notes 283–284 and accompanying text. See also David C. Baldus et. al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 158–61 (1986) (asserting that “by and large, the evidence of race-of-defendant discrimination, particularly the most recent evidence, is neither strong nor consistent” and that there was a “strong and systematic bias against black defendants” in the “pre-*Furman* sentencing patterns in the South”).

403. See *infra* notes 424–430 and accompanying text.

404. In the modern era, “the rhetorical center of abolitionist argument has come to focus less on race and more on claims of actual innocence.” Sarat, *supra* note 373, at 263. However, the modern concern with innocence as an argument against capital punishment can be understood as connected to a reduction in racism. In the Jim Crow context, when the state-imposed death penalty was replacing lynching, the guilt of the defendant often did not matter. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 57 (2000). Just as “the purpose of a lynching

interest in using the death penalty. On that view, the suspicion remains from the totality of racial studies that our history of white hegemony is integral to the continuing existence of the death penalty where it has not yet disappeared. The inference is also made difficult to refute by the counter-factual nature of any reimagining of our past and present without the racial hierarchy that the Court abetted, rather than eschewed, in *Dred Scott* and *Plessy*.

## 2. *Modern Executions and Jim Crow-Era Lynchings*

The parallels between patterns of modern executions and patterns of Jim Crow-era lynchings also help substantiate that without the violently enforced color-line, capital punishment for aggravated murder would not have survived in the United States. In a study published in 2003, Franklin Zimring found that states with high lynching rates from 1889 to 1968<sup>405</sup> tended to be high execution states between 1977 and 2000.<sup>406</sup> He also found that states that had abandoned the death penalty tended to be states with low or minimal lynching rates from 1889 to 1968.<sup>407</sup> Those findings

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usually was to ensure black subordination rather than to punish guilt," death-penalty trials in that context "had little to do with establishing factual guilt or innocence." *Id.*

405. Regarding lynching, Zimring ranked states according to their absolute number of lynchings for two periods: 1889 to 1918 and 1882 to 1968. *See* ZIMRING, *supra* note 20, at 208, tbl.A.1. There were only minor ranking variances between states for these two periods. *See id.* For the full 1889 to 1968 period, the top fourteen states ranked as follows: (1) Mississippi; (2) Georgia; (3) Texas; (4) Louisiana; (5) Alabama; (6) Arkansas; (7) Florida; (8) Tennessee; (9) Kentucky; (10) South Carolina; (11 and 12) Missouri and Oklahoma (tie); (13) North Carolina; (14) Virginia. *See id.* For the full 1889 to 1968 period, the bottom fourteen states ranked as follows: (31) Idaho; (32) Iowa; (33) North Dakota; (34) Minnesota; (35, 36, and 37) Michigan, Pennsylvania, and Utah (tie); (38) Nevada and Wisconsin (tie); (40 and 41) New Jersey and New York (tie); (42) Delaware, Maine, and Vermont (tie). *See id.*

406. *See id.* at 95–96.

407. Zimring provided a chart that roughly summarized the correlations:

### Executions 1977—2000 in High-versus Low-Lynching States

14 High-Lynching States	Execution Records 1997-2000	14 Low-Lynching States	Execution Records 1997-2000
Alabama	23	Connecticut	None
Arkansas	23	Delaware	11
Florida	50	Maine	None*
Georgia	23	Massachusetts	None*
Kentucky	2	Michigan	None*
Louisiana	26	Minnesota	None*
Mississippi	4	Nevada	8
Missouri	46	New Hampshire	None
North Carolina	16	New Jersey	None

suggest<sup>408</sup> that an important explanation for lynching during the Jim Crow era—enforcement of the racial hierarchy<sup>409</sup>—is also important in explaining the survival of capital punishment through the twentieth century. That view also conforms with evidence of a transition from lynchings toward mob-dominated, death penalty trials—essentially sham proceedings—in the Jim Crow regions in an effort to give a legal veneer to what still amounted to racial subjugation through violence.<sup>410</sup> Zimring noted that the “saga of lynching” was linked to “racial repression” and that “the lynching tradition as a[n] historical institution . . . seems to have lasting influence on capital punishment in parts of the United States.”<sup>411</sup> He found it “likely” that the history of a “coercive white supremacist context” is central to the explanation for the “willingness to execute” in those states in which capital punishment has survived most vigorously.<sup>412</sup> With particular concern for the brutal violence associated with the color-line, that conclusion underscores the relevance of substantial abolition of the death penalty as a vehicle for judicial atonement.<sup>413</sup>

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Oklahoma	30	New York	None
South Carolina	25	Pennsylvania	3
Tennessee	1	Rhode Island	None*
Texas	239	Vermont	None*
Virginia	81	Wisconsin	None*

\*No death penalty in effect throughout the period.

See *id.* at 95, tbl.5.1.

408. Given the rankings on lynching, the comparisons in Zimring’s chart, see *supra* note 407, reflect some inconsistencies, although the overall picture remains one of positive correlation. Mississippi, for example, ranked as first in historical lynchings but had few modern executions. Likewise, some of the other historically high-lynching states—for example, Kentucky and Tennessee—were not high-execution states in the modern era. Further, some of the historically low-lynching states—for example, Delaware and Nevada—had more executions in the modern era than one might have expected. Zimring noted some of the non-symmetries. See ZIMRING, *supra* note 20, at 117.

Developments since 2003 have reduced some of the seeming anomalies among the historically low-lynching states. Delaware has abolished the death penalty. See Carter et. al., *supra* note 379, at 483. It is also noteworthy that Nevada has not executed anyone since 2006, and Pennsylvania has not executed anyone since 1999. See Death Penalty Information, *supra* note 35.

409. See *supra* notes 219–228 and accompanying text; see also Klarman, *supra* note 404, at 57 (noting that, well into era of Jim Crow in the South, the “purpose of a lynching usually was to ensure black subordination rather than to punish guilt”).

410. See, e.g., Klarman, *supra* note 404, at 55–57 (noting that the decline in lynchings in the 1920s appeared dependent on their replacement by such state-run exercises and concluding that “the state-imposed death penalty in these cases was little more than a formalization of the lynching process”).

411. ZIMRING, *supra* note 20, at 90.

412. *Id.* at 116–17.

413. An additional symmetry would also favor the abolition proposal. Given Zimring’s findings, partial abolition would tend to have the most direct impact (in eliminating death sentences) in the states that had the most lynchings. The proposal would also eliminate the federal death penalty for murder and, in that sense, apply nation-wide to a small number of death sentences. Yet that outcome also appears appropriate in that lynching, while very much a regional malady, was also “a national

B. *Dubious Utility of the Penalty Absent a Racialized Polity*

An examination of death penalty rationales further shows that abolition of the capital sanction for aggravated murder bears relevance to the Court's decisions in *Dred Scott* and *Plessy*. The generally unstated and improper rationale seems to be the punishment's role in honoring "the Racial Contract"—the imbedded understanding among most whites that whites are the people who matter.<sup>414</sup> The privileging of whiteness is usually tacit in the death-selection process and almost always in public discussions about the benefits of capital punishment.<sup>415</sup> The implicit nature of this understanding has aided the perpetuation of the sanction by conferring deniability of invidious purpose.<sup>416</sup> However, the modern death penalty is of questionable legitimate utility in the United States,<sup>417</sup> which suggests that it survives in important measure because it has long been valued, at least subconsciously, for its symbolic reminder of the violence available and the willingness to use it to maintain the racial hierarchy.

Consider the spoken rationales for capital punishment: desert and deterrence.<sup>418</sup> Under those two theories, it is the marginal value of the death penalty over the maximum alternative punishment—perpetual imprisonment—that matters.<sup>419</sup> However, the death penalty for

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practice," indeed, "a practice that helped define the boundaries of the nation." ASHRAF H.A. RUSHDY, *AMERICAN LYNCHING* ix (2012). For example, Congress repeatedly failed to enact proposed anti-lynching legislation "throughout the lynching era," even if that was largely because "Southern white representatives predictably and consistently protested so-called federal interference in local affairs." EQUAL JUSTICE INITIATIVE'S REPORT ON LYNCHING, *supra* note 20, at 81.

414. CHARLES W. MILLS, *THE RACIAL CONTRACT* 3 (1997).

415. *See, e.g.*, Kaufman-Osborn, *supra* note 20, at 46 (noting that "executions are now performed not in the name of white hegemony but in the name of a citizenry that, as liberalism requires, is abstract in the sense of without color.").

416. *See id.* at 48–49 (asserting that the importation of "practices constitutive of due process" in the capital-selection process masks "the continued articulation of the racial contract within a polity that no longer espouses the rhetoric of white supremacy."); *McCleskey v. Kemp*, 481 U.S. 279, 292–97 (1987) (rejecting equal protection challenge resting on statistical evidence of discrimination because of the absence of evidence that any of the decision-makers in capital case "acted with a discriminatory purpose"). *Cf.* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379–83 (1988) (asserting, in the civil-rights context, that the elimination of race conscious laws does not eliminate racism but "creates the illusion that racism is no longer the primary factor responsible" for racially disparate outcomes).

417. *See infra* notes 418–432 and accompanying text.

418. *See* Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1178–79 (1981).

419. *See, e.g.*, CARTER ET. AL., *supra* note 379, at 10 (noting that, regarding deterrence, the marginal effect is what matters).

aggravated murder is carried out so infrequently and arbitrarily, and so long after the crime, that skepticism has long existed over its deterrent value.<sup>420</sup> Those problems also undermine the notion that the death penalty represents appropriate deserts, as does the evidence that racial bias affects death selection.<sup>421</sup> We have no way to plausibly determine in non-racialized terms that certain people “deserve” the death penalty when “[t]he social meaning of murder . . . comes to vary systematically with the races of those involved.”<sup>422</sup> The idea of deserved death sentences, uninfluenced by race, seems especially fanciful when almost all of the worst murderers escape that sanction.<sup>423</sup>

The rationalizations for capital punishment have become even more problematic in the last two decades due to the reduced, fragmented, and halting use of the sanction.<sup>424</sup> Out of the several thousand persons who annually commit a murder in the United States, the total number who received a death sentence fell to 42 in 2018, down from 295 in 1998.<sup>425</sup>

420. See, e.g., Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1670 (1986) (“I submit that this system is deeply incompatible with the proclaimed objectives of death penalty proponents.”); Lempert, *supra* note 418, at 1225 (concluding that “the renewed effort to punish by death cannot withstand . . . scrutiny” on either desert or deterrence theories); see also BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 1, 161 (1987) (noting the rarity of a death sentence and ultimately concluding that, because of its arbitrariness, “the Court should no longer permit it to be carried out”).

421. See *supra* notes 379–404 and accompanying text; Lempert, *supra* note 418, at 1184–85 (asserting that a desert theory cannot justify distributing capital punishment in “an invidious or inconsistent fashion”).

422. Michael Cholbi & Alex Madva, *Black Lives Matter and the Call for Death Penalty Abolition*, 128 ETHICS 517, 519 (2018) (emphasis omitted).

423. See, e.g., John Blume et al., *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 tbl.1 (2004) (noting that the death-sentencing rate among murder arrestees in Georgia from 1977 to 1999 was 0.022—243 death sentences out of 10,912 murder arrestees).

If capital punishment had modest value based on the spoken rationales of desert and deterrence, evidence that death sentences are much more expensive than sentences of perpetual imprisonment would still weigh against it as a social policy. See, e.g., CARTER ET. AL., *supra* note 379, at 10 (summarizing the policy debate and the many studies concluding that a death sentence costs substantially more than a sentence of life imprisonment without parole).

424. See generally *Glossip v. Gross*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2726, 2759–70 (2015) (Breyer, J., dissenting).

425. The following chart shows the twenty-one-year decline:

Year:	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Sentences:	295	279	223	153	166	151	138	140	123	126

Year:	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>
Sentences:	120	118	114	85	82	83	74	49	31	39

(Essentially all murders are constitutionally death-eligible, given that, while the Court also has required the finding of an “aggravating circumstance,” there is expansive latitude on what is aggravating and on the number of possible aggravators a state can specify.<sup>426</sup>) Death sentences also now are largely concentrated in only a few counties, even within states that retain the death penalty.<sup>427</sup> In addition, twenty-two states plus the District of Columbia have abolished capital punishment, with ten having jettisoned it in the last twenty years.<sup>428</sup> Moreover, among the twenty-eight states that retain the death penalty, nine have not executed anyone in more than a decade, and fifteen have not executed anyone since 2012.<sup>429</sup> Gavin Newsome, the governor of California, which has the largest death row, also recently declared a moratorium on executions in that state.<sup>430</sup> We also should acknowledge that, between 2004 and 2014, the average delay between sentencing and execution grew from approximately eleven years to approximately eighteen years.<sup>431</sup> Given those developments, any claim that our actual capital punishment system legitimately serves desert and deterrence goals warrants extreme skepticism.<sup>432</sup>

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Year: 2018

Sentences: 42

See Death Penalty Information Center, *supra* note 35, at 3.

426. See generally Scott W. Howe, *Repudiating the Narrowing Rule in Capital Sentencing*, 2012 BYU L. REV. 1477, 1482–1503. See also EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 362 (2013) (noting that the post-*Furman*, death-penalty statute from Georgia that the Supreme Court first upheld in 1976 has ten aggravating circumstances that cover almost all murders).

427. See *Glossip*, \_\_ U.S. \_\_, 135 S. Ct. at 2774 (Breyer, J., dissenting) (citing data to support conclusion that “the number of active death penalty counties is small and getting smaller”).

428. The twenty-three jurisdictions without the death penalty, with the year of abolition or judicial rejection in parentheses, are: Alaska (1957); Colorado (2020); Connecticut (2012); Delaware (2016); District of Columbia (1981); Hawaii (1957); Illinois (2011); Iowa (1965); Maine (1887); Maryland (2013); Massachusetts (1984); Michigan (1847); Minnesota (1911); New Hampshire (2019); New Jersey (2007); New Mexico (2009); New York (2007); North Dakota (1973); Rhode Island (1984); Vermont (1972); Washington (2018); West Virginia (1965); Wisconsin (1853). See DEATH PENALTY INFO. CTR., *State By State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [https://perma.cc/N5BK-VGLU].

429. See *id.*

430. See Opinion, *A Pause for California’s Death Row*, N.Y. TIMES, March 13, 2019, at A26 (noting that the governor’s order granted temporary reprieves to 737 condemned inmates).

431. See *Glossip*, \_\_ U.S. \_\_, 135 S. Ct. at 2764 (Breyer, J., dissenting).

432. See Corinna Barrett Lain, *Following Finality: Why Capital Punishment Is Collapsing Under Its Own Weight*, in FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE 30, 49 (Austin Sarat ed., 2017) (“The dramatic decline in death sentences and executions . . . has

Recognizing the problems with the rationales for capital punishment as it actually operates has two pertinent implications. First, the problems imply that another rationale, less pleasing, has helped explain capital punishment where it has not already crumbled. That conclusion hints, again, that the explanation centers on our sordid history of Court-endorsed, racial oppression. Second, the problems imply that our current system of capital punishment lacks much legitimate social value. This lack of value means that abolishing the sanction for murder would entail minimal social costs.

### C. *The Potential Value of Abolition to Convey Sincerity*

The third reason to use partial abolition to pursue atonement is its potential value, largely symbolic, in underscoring the Court's sincerity. By expressly acknowledging capital punishment's heritage in racial intimidation, the Court could imbue a decision announcing abolition with support for African-American humanity and equality whether or not the Court also included a forceful apology for *Dred Scott* and *Plessy*. If abolishing the death penalty for aggravated murder could stand alone as a decision conveying such an important message, it could also appropriately accentuate the Court's bona fides in pursuing expiation.

Some critics might assert that under-enforcement in black-victim murder cases is the primary discrimination problem with the death penalty today.<sup>433</sup> They might urge that the Court would do better to respect African Americans by continuing to try to increase the proportional use of the death penalty in black-victim cases. Without minimizing continuing discrimination, these critics could correctly note that a positive redistribution of death sentences has occurred since the Jim Crow era.<sup>434</sup> Even some whites who have committed racial-hatred murders against blacks in the modern era have received the death penalty, which sends a message that black lives matter, too.<sup>435</sup> Thus, abolishing the death penalty

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substantially negated the penological justifications that supported the death penalty in the first place.”).

433. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1436 (1988) (arguing that states could “level-up,” meaning that they could increase the proportion of death sentences in black-victim murder cases); *id.* at 1436–39 (reiterating that leveling up is a viable solution); KENNEDY, *supra* note 138, at 344–45 (reiterating that leveling up is plausible).

434. See *supra* note 402 and accompanying text.

435. In terms of infamy, two cases would appear near the top of any such list. In Texas, two white supremacists were executed for the brutal, race-hatred, killing in 1998 of an African American, James Byrd, Jr. See Campbell Robertson, *Texas Executes Man for 1998 Dragging Death*, N.Y. TIMES, April 25, 2019, at A18. Also, in federal court in South Carolina, a white supremacist was sentenced to death in 2017 for killing nine African-American churchgoers in Charleston, South Carolina in 2015. See

for murder now, these critics might assert, would amount to eliminating a valuable public commodity just as it is beginning to be distributed in a way that helps the African-American community.

The problem with the view of the death penalty as a legitimate public commodity is that the sanction has no such status, and there is no chance that the Court can make it qualify. The legitimate-public-commodity perspective represents an idealized view of the death penalty that has little connection to reality. Supreme Court regulation over the last fifty years has failed to bring about either a selection system that distributes death sentences with adequate fairness or the regularity to provide legitimate desert and deterrence outcomes.<sup>436</sup> The best we can say is that the Court's death-penalty regulation has contributed to some reduction in the influence of racism but also to the dwindling use of the sanction, which, in turn, demonstrates how well states can get along without it.<sup>437</sup> We should not imagine that the Court can now suddenly encourage a fair "leveling up" so that many more black-victim murderers receive the penalty. There is no workable methodology to bring about such a result.<sup>438</sup> A refusal to partially abolish capital punishment based on such a claim is not a better way to respect African Americans.

A separate group of critics, however, might emphasize that the death penalty is already crumbling to deny that substantial abolition would adequately honor African Americans. Those critics might contend that, even if the Court does not abolish the sanction for aggravated murder, states will continue to abandon it. If states would all soon abandon it anyway, the critics might contend, Court-imposed abolition would have minimal meaning in the lives of African Americans or their supporters.

The principal answer to this argument is that, as Kimberlé Crenshaw has explained, symbolism matters in the effort to dismantle the racial hierarchy.<sup>439</sup> She has noted that "much of what characterized Black oppression" during the Jim Crow era "was symbolic and formal," and the

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Alan Blinder & Kevin Sack, *Charleston Church Killer is Sentenced to Death*, N.Y. TIMES, Jan. 11, 2017, at A1.

436. The modern effort can be understood to have started, although modestly, with *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In that case, the Court rejected the Illinois approach to exclusion of capital jurors for mere qualms about the death penalty as overbroad under the Sixth and Fourteenth Amendments. *See id.* at 518–23. The decision "had the effect of vacating many existing death sentences . . . although many of these would be reimposed after new sentencing hearings." STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 254 (2002).

437. *See supra* notes 424–432 and accompanying text.

438. *See Howe, supra* note 382, at 2132–35 (explaining that leveling up is infeasible because of lack of control over the main arbiters in capital selection—prosecutors and juries).

439. *See Crenshaw, supra* note 416, at 1378.

elimination of those signs of subjugation (“Whites Only”) were important even though that was woefully insufficient to bring about equality.<sup>440</sup> The racially discriminatory use of the death sanction is a denial of African Americans’ “equal status under the law.”<sup>441</sup> While the Supreme Court has worked to make capital selection less racialized, the key to appreciating what Court abolition could *symbolize* is to recognize that the death penalty, as an institution, remains to those familiar with its heritage a *symbol* of white supremacy.<sup>442</sup> The Court need only lay out the connection between the sanction and our history of racial subjugation to further emphasize that meaning when abolishing the death penalty. Moreover, before the death penalty for aggravated murder dwindles even more significantly,<sup>443</sup> the Court could pursue the synergistic symbolism that would come with simultaneous abolition of the sanction and robust atonement for *Dred Scott* and *Plessy*.<sup>444</sup>

## V. IMPLEMENTING THE PLAN AS CONSTITUTIONAL LAW

In this Part, this Article proposes a way for the Supreme Court to pursue robust atonement for *Dred Scott* and *Plessy* through substantial abolition of capital punishment. This Part first describes an approach for constructing constitutional meaning by which the Court could justify substantial abolition. This Part then proposes how the Court in the process could strive for expiation.

### A. Combining Clauses to Justify Substantial Abolition

As a matter of constitutional law, substantial abolition of capital punishment could rest on an interpretive approach that is novel in the

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440. *Id.*

441. Cholbi & Madva, *supra* note 422, at 518.

442. See JACKSON, *supra* note 27, at 78 (“‘The death penalty’ says Bryan Stevenson, Director of the Alabama Equal Justice Initiative, ‘symbolizes whom we fear and don’t fear, whom we care about and whose lives are not valid.’”).

443. As Carol and Jordan Steiker have noted, truly nationwide abolition of the death penalty is unlikely to occur soon except through a Supreme Court ruling grounded on the Constitution. See STEIKER & STEIKER, *supra* note 11, at 256–58. This seems true as well regarding the application of the sanction to aggravated murder. However, the use of the penalty may continue to dwindle.

444. Using partial abolition as the context for atonement would also allow the Court to avoid focusing on the more controversial aspects of deciding what equality means. Because our history of white hegemony has disadvantaged African Americans to the benefit of whites, it is debatable how to apply the Constitution to promote equality. Is the Constitution colorblind or does it allow actions to counter the historical subjugation of African Americans? See Harris, *supra* note 51, at 222 (“Colorblind equality, like ‘separate but equal’ renders racial inequality virtually irremediable.”). Abolishing the death penalty for aggravated murder does not implicate that problem. Abolition would ensure that the death penalty is not used to deprive African Americans of equal status under the law.

death-penalty context but that the Court has used in other areas: combining constitutional clauses.<sup>445</sup> In the death penalty context, the Court could aggregate the equal protection mandate and the prohibition on cruel and unusual punishments. Support exists for this approach from a variety of Court decisions outside of the death-penalty arena, including several that overturned laws promoting discrimination based on race and sexual orientation.<sup>446</sup> This clause-aggregation methodology would also solve some central problems that the Court has noted as reasons not to substantially restrict the use of the death penalty under a single-clause methodology.<sup>447</sup>

### 1. *Precedents for Clause Aggregation*

In several cases, the Supreme Court has aggregated constitutional clauses to create new fundamental rights.<sup>448</sup> While the most prominent, recent endorsement of clause combination came in the *Obergefell* decision finding a right to same-sex marriage,<sup>449</sup> the Court has used the methodology in varied contexts, including to support rights of criminal defendants.<sup>450</sup> For example, the Court has combined the ideals of due process and equal protection to ensure effective access by indigent, criminal defendants to appellate courts.<sup>451</sup> Likewise, the Court has

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445. See *supra* notes 28–33 and accompanying text.

446. See *infra* notes 448–464 and accompanying text.

447. See *infra* notes 465–481 and accompanying text.

448. See generally Howe, *supra* note 28, at 830–44 (discussing various Supreme Court decisions that employed rights-based clause aggregation).

449. See *supra* notes 29–31 and accompanying text.

450. Perhaps the most famous example of transparent clause aggregation occurred in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court recognized a right of married couples to use contraception. See *id.* at 484–86. Justice Douglas, for the majority, identified the right in the safeguard for “privacy surrounding the marriage relationship” created by “penumbras[] formed by emanations” from the First, Third, Fourth, and Ninth Amendments. *Id.* *Griswold* has been severely criticized, among other reasons, for failing adequately to explain “how a series of specified rights combined to create a new and unspecified right.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971); see also Robert G. Dixon, Jr., *The “New” Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (1976) (criticizing *Griswold* on similar grounds). For the view, however, that the *Griswold* approach actually had “legitimacy and vitality,” see Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 624 (2006).

451. See *Douglas v. California*, 372 U.S. 353, 356–58 (1963) (citing the ideals of due process and equal protection together to reject state requirement that indigent, criminal defendants pay for their counsel on appeals of right); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (relying on combination of Due Process Clause and Equal Protection Clause to reject state requirement that indigent, criminal defendants pay for their trial transcripts as a condition of appeal); see also *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (declaring that the Court’s earlier decisions regarding indigent access to appeals

combined rights to freedom “of speech and press” and rights to “privacy” (each also based on multiple clauses) to support a right to be free from criminal prosecution for private, home viewing of obscene pornography.<sup>452</sup> In addition, the Court has relied on both due process and equal protection concerns to find a right to be free of criminal prosecution for engaging in intimate sexual contact with a person of the same sex.<sup>453</sup>

The Court also has used clause aggregation to reject some of its old decisions that, along with *Dred Scott* and *Plessy*, supported the racial hierarchy.<sup>454</sup> An example is *Loving v. Virginia*,<sup>455</sup> which, as we have seen, struck down Virginia miscegenation statutes that criminalized interracial marriage and that also rejected the old *Pace* decision that had upheld racially-discriminatory laws criminalizing adultery.<sup>456</sup> In *Loving*, the Court declared that the miscegenation statutes were “so directly subversive of the principle of equality” as to “deprive all the State’s citizens of liberty without due process of law.”<sup>457</sup> That declaration hinted of clause aggregation, and, in *Obergefell*, the Court looked back at *Loving* and declared that the “dynamic” that resulted from the “interrelation of the two principles” helped explain the holding.<sup>458</sup>

Clause combination at times also has helped members of the Court who favor originalism acknowledge new rights. For example, in the *Dale* case,<sup>459</sup> the Court combined the right of free expression and the right of

reflect “both equal protection and due process concerns”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (“We observe . . . that the Court’s decisions concerning access to judicial processes, commencing with *Griffin* . . . reflect both equal protection and due process concerns.”); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (declaring that principles from the two clauses “converge[d]” in the “analysis [of] these cases”); *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974) (declaring that the explanation for *Griffin* and *Douglas* was clause combination, “some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment”).

452. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also Howe, *supra* note 28, at 838 (discussing the clause aggregation employed in *Stanley*).

453. See *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584, 2604 (2015) (asserting that *Lawrence* “drew upon principles of liberty and equality to define and protect . . . rights of gays and lesbians”); *Lawrence v. Texas*, 539 U.S. 558, 575–79 (2003).

454. An example of such a decision, based on both notions of liberty and equality, and thus, due process and equal protection, is *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666–70 (1966), where the Court rejected a state poll tax of \$1.50; see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating under both notions a law that allowed sterilization of habitual criminals). For more on *Harper* and its effective undermining of the *Williams* decision that came two years after *Plessy*, see *supra* notes 249–255 and accompanying text.

455. 388 U.S. 1 (1967).

456. See *supra* notes 151–152 and accompanying text.

457. *Loving*, 388 U.S. at 12.

458. *Obergefell*, 135 S. Ct. at 2603.

459. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (recognizing a freedom of expressive association).

association to acknowledge a right of “expressive association” that enabled the Boy Scouts to exclude gay men from membership.<sup>460</sup> “The most originalist-oriented Justices, Thomas and Scalia, joined Chief Justice Rehnquist’s opinion for the Court without expressed concern that it was anti-originalist.”<sup>461</sup> Their willingness to endorse the clause-aggregation methodology to reach a desired outcome is, perhaps, not surprising.<sup>462</sup> Rights-based clause combination parallels other traditional strategies that the Court has employed in giving meaning to the Constitution, such as focusing on structure or on the restraining effect of one clause on another.<sup>463</sup>

In the end, cases in which the Court has used clause combination outside of the death-penalty context can support the use of the approach to substantially abolish the death penalty. Commentators have noted that the methodology is under-theorized in the Court’s jurisprudence; the justices have chosen to employ the approach in some circumstances and not others, and the explanations for those choices do not appear in the Court’s opinions.<sup>464</sup> Nonetheless, nothing about abolition of the death penalty for aggravated murder makes the application of a clause-combination rationale improper.

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460. See *supra* notes 32–33 and accompanying text.

461. Howe, *supra* note 28, at 879.

462. We should recognize, moreover, that any claim that there is an original meaning of the Equal Protection Clause or of the Cruel and Unusual Punishments Clause that would prevent their combination to substantially abolish the death penalty would be an alternative form of creative construction. There is no consensus that either clause has a well-defined, original meaning. See, e.g., Mark V. Tushnet, *Equal Protection*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 297, 297 (Kermit Hall ed., 2d ed. 2005) (concerning the Equal Protection Clause); Scott W. Howe, *Furman’s Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 461 (2007) (concerning the Cruel and Unusual Punishments Clause).

463. See Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1095–101 (2016) (contending that “combination analysis shares significant functional features with two widely utilized tools of constitutional decisionmaking: namely, the constitutional avoidance canon and arguments based on constitutional structure”).

464. See, e.g., Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, VA. PUB. L. & LEGAL THEORY, at 26–27 (Research Paper No. 42, 2016) (discussing the idea of “intersectional[ity]” between clauses but noting that in *Obergefell*, the Court “did not . . . define what the intersectional right consists in”); Howe, *supra* note 28, at 854–56 (concluding that “the Court chooses when to employ clause aggregation from among the cases where it is plausibly employed, and the factors that influence that choice are unspoken by the Court and typically non-evident to the observer”); Kanter, *supra* note 450, at 624 (noting that the use of clause aggregation in *Griswold* “was rather vaguely and poorly explained”).

## 2. *The Benefits of Clause Combination*

The modern death penalty embodies two related problems that unite in revealing its heritage in the ignominious quest for white supremacy. First, racism still infects capital punishment where it survives, as proven most directly by the many studies showing the racialized distribution of death sentences, but also by the punishment's geographical correlation with the historical use of racial-hatred lynchings.<sup>465</sup> Second, increasing public concerns over inequality and unfairness have contributed to a growing societal resistance to the use of capital punishment, a development that has progressively undermined the penological rationales for the sanction and underscored, again, that a more sinister rationale probably helps explain its survival.<sup>466</sup> The Court has concluded that the racial-disparity problem is inadequate to make out a constitutional violation without proving a racially-discriminatory purpose,<sup>467</sup> which is rarely possible.<sup>468</sup> Likewise, the Court has indicated that the dwindling-use concern makes out no constitutional violation at least until the sanction becomes so substantially rejected across the nation that the Court can conclude that a societal consensus has developed against it.<sup>469</sup> Yet the racialized-distribution problem and the dwindling-use problem together reveal a more profound infirmity regarding the modern death penalty: it would doubtfully exist as a punishment for aggravated murder absent a longstanding wrong (the racial hierarchy) that the Court wrongfully endorsed in *Dred Scott* and *Plessy*.<sup>470</sup>

Clause combination would empower the Court to substantially reject the death penalty based on this larger infirmity. According to the Court, neither the Equal Protection Clause nor the Cruel and Unusual

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465. See *supra* notes 373–413 and accompanying text.

466. See *supra* notes 414–432 and accompanying text.

467. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (asserting that the Fourteenth Amendment required proof from the petitioner “that the decisionmaker[] in *his* case acted with discriminatory purpose”); *id.* at 308 (asserting that, since Georgia’s death-penalty system complied with the Court’s precedents on capital-selection, “we lawfully may presume” that his death sentence did not violate the Eighth Amendment).

468. See John Charles Boger, *McCleskey v. Kemp: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637, 1678 (2018) (“*McCleskey* effectively closed the book, not only on further racial challenges in capital sentencing but, far more broadly, on empirical racial challenges in other kinds of criminal cases.”); Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1461 (2018) (describing the challenge of proving discrimination as “really difficult” although not “impossible”).

469. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 579–81 (2005) (finding objective evidence in support of a societal consensus against the use of capital punishment for juvenile offenders); CARTER ET AL., *supra* note 379, at 37–39 (describing the Court’s application of this test).

470. See *supra* notes 402–404 and accompanying text.

Punishments Clause individually can justify substantial abolition.<sup>471</sup> Yet clause combination can enable the Court to justify protections that neither clause alone could support,<sup>472</sup> and the concerns of each of those two clauses are heavily implicated by the institution of capital punishment.<sup>473</sup> We could plausibly conclude that the racial-disparities problem goes far toward revealing an equal-protection violation. Likewise, we could plausibly conclude that the dwindling-use problem almost reveals the violation of a societal consensus and thus, the Eighth Amendment. Further, the related implication that the wrongful quest to maintain white supremacy helped capital punishment survive (and vice versa) gives reason to combine some of the force from each of the clauses and reject the sanction for aggravated murder.<sup>474</sup> Because of the iniquity of states' efforts to subjugate African Americans and of *Dred Scott* and *Plessy*, the Court would properly resolve uncertainty over whether capital punishment would have survived had those wrongs never happened in favor of abolition.

The clause-aggregation approach would also avoid additional impediments to substantial abolition that would arise under a single-clause methodology. First, the Court could distinguish, rather than overrule, its prior decisions involving systemic challenges to the death penalty. The most salient is *McCleskey v. Kemp*,<sup>475</sup> where the Court confronted evidence from the Baldus study indicating pronounced racial discrimination in the Georgia capital-sentencing system.<sup>476</sup> The

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471. See *supra* notes 467–469 and accompanying text.

472. For a “systemic examination of combination analysis in U.S. constitutional law,” or what I call a “clause aggregation” or “clause combination” methodology, see Coenen, *supra* note 463, at 1068; see also Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 *YALE L.J.* 2, 48–49 (2012) (describing the idea of “hybrid rights” in constitutional law as an instance of “cross-claim normative aggregation”).

473. Michael Coenen contends that it is not insensible to conclude that a law almost violates—or only “barely” complies with—the demands of a particular clause. See Coenen, *supra* note 463, at 1095. This conclusion, he notes, depends on our “metaphysical picture” of the clauses. See *id.* “Some of us might prefer to compare the clauses to on/off switches, whereas others might prefer to compare them to sliding scales.” *Id.* Yet there is no “right” or “wrong” perspective on the metaphysical structure of the clauses; “there are only different metaphors that we may or may not choose to employ.” *Id.*

474. Combining the force of the two clauses to support partial abolition does not violate any norm from the natural order. See *id.* at 1067 (“Just as my limited desire to see a movie and my limited desire to buy clothes might together yield an overwhelming desire to go to the mall, so too might clauses providing limited individual support for a judicial result operate together to generate strong collective support for th[e] result.” (footnote omitted)).

475. 481 U.S. 279 (1987).

476. See *supra* notes 385–393 and accompanying text.

*McCleskey* Court analyzed and rejected claims based on that evidence brought separately under the Equal Protection and Cruel and Unusual Punishments Clauses.<sup>477</sup> However, the Court did not address whether a hybrid-clause basis existed to reject the death penalty as a descendant of the racial hierarchy. Likewise, the Court's other decisions in which it has rejected calls to abolish or substantially abolish the death penalty have not addressed such a claim and are thus, also distinguishable.<sup>478</sup>

The complexity of the dual-clause approach would also help allay concerns that the ruling might cast constitutional doubts on the larger criminal-justice system.<sup>479</sup> In *McCleskey*, Justice Powell, for the majority, asserted that "if we accepted *McCleskey's* claim . . . we could soon be faced with similar claims as to other types of penalty," and he anticipated arguments grounded on "unexplained discrepancies that correlate to membership in other minority groups, and even to gender."<sup>480</sup> In dissent, Justice Brennan characterized this concern as "a fear of too much justice."<sup>481</sup> With the complexities introduced by the dual-clause theory of the death penalty's invalidity, racial or non-racial discrimination regarding other criminal penalties is easily differentiated. Imagine, for example, a claim challenging a sentence of incarceration and alleging gender discrimination in the relative level of use of incarceration as opposed to probation. A dual-clause ruling from the Court substantially abolishing the death penalty based on our racial history would not apply to that problem, if only because incarceration is not dwindling to the point of being widely abandoned as a punishment.

### B. *Incorporating Confession and Apology*

An opinion substantially abolishing the death penalty based on its connection to the quest for white supremacy would allow the Court's justices to effectively pursue institutional expiation for *Dred Scott* and

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477. See *McCleskey*, 481 U.S. at 292 (addressing the equal protection claim); *id.* at 308 (addressing the Eighth Amendment claim).

478. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, J., Powell, J. & Stevens, J.); *id.* at 222 (White, J., concurring) (upholding against a facial challenge under the prohibition on cruel and unusual punishments a statute that required a judge or jury to find at least one statutory aggravating factor and to consider mitigating evidence before imposing a death sentence on a convicted capital offender); *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (concluding that standardless capital sentencing violates the prohibition on cruel and unusual punishments); *McGautha v. California*, 402 U.S. 183, 196 (1971) (rejecting due process challenge to standardless capital sentencing).

479. By adding complexity to the supporting rationale, clause combination can help confine the "precedential sweep" of a ruling. Coenen, *supra* note 463, at 1104.

480. *McCleskey*, 481 U.S. at 315–17 (footnote omitted).

481. *Id.* at 339 (Brennan, J., dissenting).

*Plessy*. This Article has proposed that there are four important parts to the effort: (1) confession of fundamental errors by the Court; (2) confession of the associated harms; (3) transparent apology; and (4) concrete action to indicate sincerity.<sup>482</sup> Substantial abolition of the death penalty would satisfy the last requirement.<sup>483</sup> Part V also has explained why substantially ending capital punishment would provide a relevant context for fulfilling the first three requirements.<sup>484</sup> Nonetheless, this final section focuses on aspects of fulfilling the first two requirements involving confession and the third involving transparent apology.

As for confession of past errors regarding *Dred Scott* and *Plessy*, this Article urges that the Court not cast those actions as simply the questionable products of a bygone era that the Court would not repeat today. To express disagreement with those opinions but suggest that they were plausible when rendered is to fail to take institutional responsibility for them as iniquities. While the current justices obviously did not participate in *Dred Scott* or *Plessy*, they are in charge of the Court's present ownership of its institutional history. To best fulfill that institutional responsibility, the proposal is that the Court identify the errors in *Dred Scott* and *Plessy* and, without equivocation, characterize them as atrocities.

Regarding confession of the associated harms, this Article advises that the Court acknowledge that *Dred Scott* and *Plessy* made it complicit in the *violent* degradation of African Americans. This means confessing, first, to complicity in general. The Court should admit that it joined forces with the white supremacists and became responsible for all of the foreseeable consequences of the color-line and the segregation regime. Those consequences extended not only to a denial of equal opportunities but to the psychic and physical brutality inflicted on African Americans.

The Court could not describe the full extent of the horrors, but it could summarize them. It could also offer some specific instances of the trauma inflicted from the perspective of African Americans. In *Missouri's Black Heritage*, for example, Professor Lorenzo Greene, a distinguished African-American historian, described his painfully insulting introduction to the white people of Jefferson City, Missouri, in 1933, after arriving by train from New York City to join the faculty at Lincoln University.<sup>485</sup> Within minutes, he was called a racial slur, denied a taxi ride, and refused

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482. See *supra* text accompanying note 15.

483. See *supra* text accompanying notes 20–27.

484. See *supra* Part V.

485. See GREENE ET AL., *supra* note 65, at 1–2.

service in a restaurant.<sup>486</sup> In *I Know Why the Caged Bird Sings*, Maya Angelou described witnessing as a ten-year old in the late 1930s “the most painful and confusing experience” she ever had with her grandmother.<sup>487</sup> She watched her “Momma” ordered about and mocked and insulted at her store in Stamps, Arkansas, by white children, and saw her confront the abuse with equanimity by quietly singing prayerful hymns.<sup>488</sup> In *Brown v. Mississippi*,<sup>489</sup> the Court itself described the torture of two African-American men to extract “confessions” that were used to secure their death sentences.<sup>490</sup> The *Brown* case also exemplifies the sham capital proceedings that descended from the lynchings that were used in the Jim Crow era to intimidate African Americans and their supporters. In the *Equal Justice Initiative’s Report on Lynchings*, the authors, led by Bryan Stevenson, recount the grisly details of some of the thousands of spectacle lynchings against African Americans that occurred during the era of de jure segregation.<sup>491</sup> A representative example concerns the three-hour, torture lynching of Lation Scott (for an alleged “assault”), across from the courthouse in Dyersburg, Tennessee, attended by thousands of whites, including children. The authors report: “A mob tortured Mr. [Lation] Scott with a hot poker iron, gouging out his eyes, shoving the hot poker down his throat and pressing it all over his body before castrating him and burning him alive over a slow fire.”<sup>492</sup>

Regarding apology itself, this Article advocates that it be emphatic and unconditional, although institutional. It would be inadequate simply to say that *Dred Scott* and *Plessy* and the associated harms were “regrettable.” There is value in more clearly pursuing redemption through a direct and forceful apology.

## CONCLUSION

This Article has presented two principal proposals that interconnect. It began by inquiring whether and ultimately finding that the Supreme Court should do more to atone for its endorsement of the color-line and de jure segregation in *Dred Scott* and *Plessy*. The Court will fail adequately to pursue expiation until it offers a transparent confession of errors and of the associated harms, an institutional apology, and some further action to

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486. See *id.* Professor Greene’s mistreatment occurred only miles from where Dred Scott earlier experienced the insult of the Court’s *Dred Scott* opinion. See *supra* text accompanying notes 64–73.

487. MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* 28 (1969).

488. See *id.* at 28–33.

489. 297 U.S. 278, 279–85 (1936).

490. *Id.*

491. See EQUAL JUSTICE INITIATIVE’S REPORT ON LYNCHING, *supra* note 20, at 51–68.

492. *Id.* at 35.

underscore its sincerity. The Article then asked what vehicle the Court might use to pursue atonement and concluded that a Court opinion substantially abolishing capital punishment would provide an especially appropriate context. The sanction is widely understood as tied to a history of black subjugation; and, indeed, we cannot refute that capital punishment for murder would have disappeared by now but for the judicially endorsed quest for white supremacy. Even were the Court not to apologize, substantial abolition of the death penalty is justified on that basis under a methodology for constructing constitutional meaning that combines partial forces from the equal protection mandate and the prohibition on cruel and unusual punishments. From that perspective, the Article might be understood as primarily an argument for substantial abolition of the death penalty and only secondarily as an argument for Supreme Court expiation. Yet the Article urges an understanding that gives primacy to neither proposal. The larger theme has been that the Court might achieve something unusually valuable by pursuing the synergistic symbolism that would come with simultaneous restriction of the death sanction and robust atonement for the violence of *Dred Scott* and *Plessy*.