

Project title: The Matter of *Dred Scott*: Towards a Theory of Reparative Citizenship

Abstract: This project unsettles the discursive power of *Dred Scott v. Sandford* in narratives of an unbroken march towards justice. In its denial of Black citizenship in the years just prior to the American civil war, *Dred Scott* often operates – in classrooms, academic scholarship, legal decisions, activist materials, and political myth-making – as “anti-canon,” that is, an entity against which just laws and policies ought to be made. Although not incorrect, this framing does not fully capture the lingering ways in which *Dred Scott* continues to exert latent force on contemporary American practices, particularly those related to belonging, membership, and community inclusion. By way of both revealing and redressing these forms of exclusion, this project reconstructs the archival ephemera of Chief Justice Roger Taney’s legal life. In doing so, this project argues that Taney’s matter – like hurried scribbles in the margins of a divorce decree, notes on cross-examinations for the escaped enslaved, or directives for the policing of farms – centers an ideal individual whose property in themselves not only runs counter to his decision in *Dred Scott*, but also compels contemporary race-conscious remedies. This project, in other words, argues that an historically-situated reassessment of *Dred Scott*’s stakes can both reveal much about the liberatory potential of our modern state and cultivate a new vision of community bonds.

Argument overview: Consider the following. In late November 1864, six weeks after the death of then-United States Supreme Court Justice Roger Brooke Taney and five months prior to the surrender of Confederate forces to the Union army at Appomattox, Taney’s surviving kin wrote to his biographer, Samuel Tyler: “It gives the family great satisfaction to learn that you intend to write about the Chief Justice’s life. However, the Chief Justice kept no copies of the letters he wrote and, with very few exceptions, destroyed all that he received.”¹ Although the family assured Tyler that he would be furnished with “everything available”² so that he could compile an image of Taney’s life that would “vindicate one so gravely misrepresented,”³ the exchange nonetheless highlighted a curiosity: for an individual’s whose life’s work was mediated through and conditioned by the written word, Taney preferred sparse – albeit flower-laden⁴ – lodgings uncluttered by material items. And just as Taney kept no personal correspondence, the family continued, so too did he preserve no private records of his jurisprudence; if Tyler wished to understand Taney’s legal philosophy, he would be best served by what had been “recorded on the minutes of the Court.”⁵ Read nearly two centuries later, these letters imply that any trenchant account of Taney’s political and legal commitments would require what he called, after contracting with Tyler, “a difficult and delicate undertaking”⁶ – that is to say, an expansive and peripatetic investigation designed to retrieve, contextualize, and conserve the words that Taney sent into the world, but declined to memorialize.

¹ Letter from J. Mason Campbell to Samuel Tyler (November 29, 1864), as cited in Tyler, Samuel. *Memoir of Roger Brooke Taney: Chief Justice of the Supreme Court* (Baltimore: John Murphy & Co, 1872), pp. ix-x.

² *Ibid*, p. x.

³ Tyler, *Memoir of Roger Brooke Taney*, p. x.

⁴ Letter from J. Mason Campbell to Samuel Tyler (November 4, 1864), as cited in Tyler, *Memoir of Roger Brooke Taney*, p. ix.

⁵ *Supra* note 3.

⁶ *Supra* note 4.

This project takes as its point of departure Taney's determination that, in order to understand the import of his jurisprudence, one must begin by building an archive. Yet crucially, this project also rejects the ask made of Tyler: to restore to Taney, in his death, a sterling reputation that he believed to be unfairly denied to him because of his decision in *Dred Scott v. Sandford*. This case, which at once denied Black individuals citizenship in the United States and conferred upon them a legal status of property, is a fixture in contemporary American academic and popular life. For instance, scholars like Jamal Greene have argued that *Dred Scott* must be taught across the higher education curriculum because it demonstrates the ultimate and eventual capacity of the law to cultivate ethical values and democratic commitments in the communities it serves,⁷ while jurists like Christopher Eisgruber and Lea VanderVelde have sought to restore to *Dred Scott* (the case) the complexity of Dred Scott (the person) in order to demonstrate the violent power possessed by the law.⁸ Still others have argued that *Dred Scott* propelled the United States to civil war and, in doing so, provided the momentum to not only end enslavement, but secure the rights of personhood for all persons in the Constitution.⁹ In popular discourse, journalists, academics, and activists alike have suggested that – should President Donald Trump's efforts to end birthright citizenship prove successful – *Dred Scott* is the standard to which the law will return in its treatment of non-citizens of color.¹⁰

Yet what is absent from contemporary considerations of *Dred Scott* is the possibility that the decision itself, when placed in conversation with its author, possesses the potential to remake American life along more egalitarian lines – and thus reimagine what the bonds of political membership require. Put slightly differently, these considerations miss that *Dred Scott* may not just be the “anti-canon” against which justice is defined and found, but rather also serve as the discursive site where personhood can be restored and belonging can be fostered; it can be site, in other words, that generates a political theory of race-conscious reparative citizenship. To make this argument, this project assembles the disparate matter of Taney's life and harnesses a rich body of interdisciplinary literature – that assesses the generative potential of archives,¹¹ recovers the lived experiences of

⁷ Greene, Jamal. “The Anticanon” in 125 *Harvard Law Review* 2 (2011), pp. 380-474.

⁸ See: Eisgruber, Christopher L. “Dred again: Originalism's Forgotten Past” in 10 *Constitutional Commentary* (1993), pp. 37-65. Eisgruber, Christopher L. “The Origin Story of *Dred Scott*” in 72 *Yale Law Review* (2015), pp. 1239-1301. VanderVelde, Lea. *Redemption Songs: Suing for Freedom Before Dred Scott* (New York: Oxford University Press, 2014). VanderVelde, Lea. *Mrs. Dred Scott: A Life on Slavery's Frontier* (New York: Oxford University Press, 2009).

⁹ See, for instance: Hutchinson, Allan C. *Critical Legal Studies* (Totowa, NJ: Rowman and Littlefield, 1989). Pinsker, Matthew. “The Coming of the Civil War” in 25 *OAHI Magazine of History* 2 (2011), pp. 5-37. Simon, James F. *Lincoln and Chief Justice Taney* (New York: Simon and Schuster Paperbacks, 2006).

¹⁰ See, for instance: Rierson, Sandra L. “From *Dred Scott* to Anchor Babies: White Supremacy and the Contemporary Assault on Birthright Citizenship” in 38 *Georgetown Immigration Law Review* 1 (2023), pp. 3-70. Liptak, Adam. “Is Trump's Plan to End Birthright Citizenship *Dred Scott* II” in *The New York Times* (January 29, 2025). Reed, Rachel. “Can Birthright Citizenship Be Changed?” in *Harvard Law Today* (January 24, 2025). Serwer, Adam. “The Attack on Birthright Citizenship is a Big Test for the American Constitution” in *The Atlantic* (January 22, 2025).

¹¹ See, for instance: Derrida, Jacques and Eric Prenowitz (trans). “Archive Fever: A Freudian Impression” in 25 *Diacritics* 2 (1995), pp. 9-63. Fuentes, Marisa J. *Dispossessed Lives: Enslaved Women, Violence, and the Archive* (Philadelphia: University of Pennsylvania Press, 2016). Terry, Jennifer. “Theorizing Deviant Historiography” in 3 *Differences: A Journal of Feminist Cultural Studies* 2 (1991), pp. 55-73. Farge, Arlette. *The Allure of the Archives* (New Haven: Yale University Press, 2015). Mawani, Renisa. “Law's Archive” in 8 *Annual Review of Law and Social Science* (2012), pp. 337-365. Osborne, Thomas. “The Ordinarity of the Archive” in 12 *History of the Human Sciences* 2 (1999), pp. 51-64. Bennett, Jane. *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010).

subordination endured by enslaved persons,¹² builds a legal framework of tort that recognizes the body as a locus of both harm and redress,¹³ and considers the egalitarian possibilities of an expansive vision of citizenship¹⁴ – to illuminate the transformative potential of this very same matter. In undertaking these analyses, the following questions serve as this project’s guide: First, how (and to what extent) do archives serve as a shifting repository of community mores, such that they can operate beyond their origins and impose obligations on those who encounter them? Second, if contemporary conceptions of citizenship fall short of fostering true forms of inclusion and belonging, and if this shortfall renders fragile the protections afforded to citizens and non-citizens alike, how (if at all) could this be remedied through the recovery of a theory of personhood tied to bodily integrity? And finally, how might this vision of citizenship function as a means to repair historical wrongs while also insulating our modern polity from reliving such wrongs?

¹² See, for instance: Cover, Robert. *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1975). Hartman, Saidiya V. *Scenes of Subjection: Terror, Slavery, and Self-Making in the 19th Century* (New York: Oxford University Press, 1997). Johnson, Walter. *Slavery’s Ghost: The Problem of Freedom in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2011). Huebner, Timothy. “The Unjust Judge: Slave Power and the Meaning of Emancipation,” in 17 *Journal of Supreme Court History* 8, pp. 92-134. Williams, Kidada E. *I Saw Death Coming: A History of Terror and Survival in the War Against Reconstruction* (New York: Bloomsbury Publishing, 2019). See also *supra* note 8.

¹³ See, for instance: Sepper, Elizabeth W. “A Missing Piece of the Puzzle of Dignitary Torts” in 104 *Cornell Law Review* 70, pp. 70-87. Brophy, Alfred. “Reparations Talk: Reparations for Slavery and the Tort Law Analogy” in 24 *Boston College Third World Law Journal* 1 (2004), pp. 81-138. Brown, Wendy. *States of Injury* (Princeton: Princeton University Press, 1995). Hamilton, David. “Emancipation and Contract law: Litigating Human Property After the Civil War” in Konig, D.T. et al (eds). *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law* (Columbus: Ohio University Press, 2010).

¹⁴ See, for instance: Balfour, Lawrie. “Reparations After Identity Politics” in 33 *Political Theory* 6 (2005), pp. 786-811. Brophy, Alfred. “Considering Reparations for *Dred Scott*” in Konig, D.T. et al (eds). *The Dred Scott Case: Historical and Contemporary Perspectives of Race and Law* (Columbus: Ohio University Press, 2010). Matsuda, Mari. “Looking to the Bottom: Critical Legal Studies and Reparations” in 22 *Harvard Law Review* 2, pp. 323-400.