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Judicial Racism and Judicial Antiracism: Retelling the Dred Scott Story

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ABSTRACT

This Essay retells the Dred Scott story as a set of intersecting stories about judicial racism and judicial antiracism. Part I defines racism and antiracism, then discusses how racist and antiracist ideas are realized through government power. Next, this Essay visits one of the most prominent moments of judicial racial history: the story of Dred Scott. Part II walks through the procedural history of the entire legal battle using the antiracist lexicon. In so doing, this Essay shows how racist and antiracist ideas are realized with judicial power. Part III finally proceeds to the seminal case of Dred Scott v. Sandford. Throughout, the reader will observe courts as institutions with racist or antiracist character. This Essay concludes by emphasizing that U.S. courts are still battlegrounds where racist and antiracist ideas compete for realization. There has been no scholarly treatment of judicial racism or antiracism, despite ample academic discussion of race and the law. Therefore, this Essay advances two goals by making the first academic foray into those issues. First, it promotes antiracist lawmaking by opening a space for academic discussion of judicial racism and antiracism. Second, it advocates for historically-tested methods of antiracist lawmaking that do not rely on U.S. courts.

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INTRODUCTION

Summertime in Egypt is hot and dry. Its capital is Cairo—one hundred miles south of the Mediterranean and seventy-five miles west of the Gulf of Suez. To the west: over five-thousand miles of desert. Thermometers touch 104 in the summertime. Locals seek shade, and travelers seek other destinations. Yet in the summer of 1964, Malcom X knelt in the heat, reflecting on his recent months[1].

In March, he met the Rev. Dr. Martin Luther King, Jr. in Washington, D.C. By April, he was in Saudi Arabia beginning his hajj. He had toured the whole of Africa by August. At summer's peak he was in Egypt, professing his change of heart in local papers. "I no longer subscribe to sweeping indictments of any one race," he wrote.[2] Racism was a ghost, invisible to the eye but illuminated by the mind. His mind, for decades, was guided by the ideals of the Nation of Islam. When he severed from the Nation, creating room for new ideas, the ghost changed form before his eyes. What had he really been fighting all those years?

Nearly sixty years later, racism is still a ghost. In the United States, courts struggle to define and regulate racist behavior. The result is the feeling of a bifurcated universe: On one side, racialized socioeconomic inequality is racism; on the other, that inequality is not racism without clear racial animus. International courts similarly struggle to catch the ghost;[3] after World War II, global negotiations over United Nations (UN) treaties on racism stalled when Saudi and Israeli diplomats disagreed on whether antisemitism was racism or religious persecution.[4] In either case, the issue is that a person's vision of racism is informed by the ideas animating their mind at that time.

1. *See* Malcom X, *Racism: The Cancer That Is Destroying America*, EGYPTIAN GAZETTE (Aug. 25, 1964), http://malcolmxfiles.blogspot.com/2015/09/racism-cancer-that-is-destroying.html [https://perma.cc/49GC-5EGW].
2. *Id.*
3. *Cf.* Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 1 (2019) ("[R]acism should be affirmatively and explicitly recognized as a human rights violation under international law."); *see also* Ibram X. Kendi, *Reigning Assimilationists and Defiant Black Power: The Struggle to Define and Regulate Racist Ideas*, *in* NEW PERSPECTIVES ON THE BLACK INTELLECTUAL TRADITION 157, 162–63 (Keisha N. Blain, Christopher Cameron & Ashley D. Farmer eds., 2018).
4. Bradley, *supra* note 3, at 21–22.

Scholars have recently reframed racism with great effect.[5] Under modern frameworks, racism is best understood as describing the character, rather than the motivation, of an object or action. A racist is a person whose actions produce racial inequality. Comparatively, an artist is a person whose actions produce a lot of art—even if the person has never intended to make art. The word racism can certainly describe a state of mind, but properly used, it always describes a state of being—racism is a condition, not an objective.

The racist/antiracist lexicon popularized by Dr. Ibram X. Kendi gives new life to traditional narratives about race, especially American Black history. Dr. Kendi's language turns tales of slavery and revolution into stories about racism and antiracism. Black history thus becomes a history of ideas competing to become real—a story of different forces seeking to possess the soul of government.

Judicial history has never been told as a history of judicial racism and antiracism. Judicial academia has treated judicial racism as a regulatory matter, but never a concept. Judicial antiracism has received no treatment at all. Consequently, the grand struggle to catch the ghost of racism receives no support from legal academia. This Essay cracks open the academic discussion on judicial racism and judicial antiracism, hoping to give antiracist ideas an opening to flow inland into the plains of contemporary judicial thought.

Part I defines racism and antiracism, then discusses how racist and antiracist ideas are realized through government power. Next, this Essay visits one of the most prominent moments of judicial racial history: the story of Dred Scott. Part II walks through the procedural history of the entire legal battle using the antiracist lexicon. In so doing, this Essay shows how racist and antiracist ideas are realized with judicial power.

Part III proceeds to the seminal case, *Dred Scott v. Sandford*.[6] Therein, the Essay continues to describe judicial conduct in racist/antiracist terms, and it further emphasizes the different qualities of judicial actors: lawyers, parties, and judges. Throughout, the reader observes courts as judicial institutions whose conduct can take on racist or antiracist character. In conclusion, this Essay exhales with thoughts of racism's shifting nature. I encourage future advocates of equality to give less faith to the U.S. judicial system as a reliable

5. *See, e.g.*, NPR Morning Edition, *Ibram X. Kendi's Latest Book: 'How To Be An Antiracist'*, NPR (Aug. 13, 2019, 5:00 AM), https://www.npr.org/2019/08/13/750709263/ibram-x-kendis-latest-book-how-to-be-an-antiracist [https://perma.cc/P8MH-ADLD].

6. Allegedly, this is how the defendant spelled his name; it is said the court clerk misspelled it as 'Sandford' in the trial papers. *See* John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 373 n.1 (1988). Accordingly, I use 'Sanford' throughout this Essay.

vehicle for empowering antiracist ideas. Instead, nontraditional paths must be considered.

I. INSTITUTIONAL CHARACTER

Picture sweeping red curtains framing a wood-patterned stage. The space is large, empty, and dark, but for the illuminate cone of a single, centered spotlight. In that light, a single tuxedoed man sits. He is holding a trumpet—it gleams in the light. The silence ripples: Underneath it, all possible sounds percolate at the edge of reality. The musician is the center of the ripples. He grips his trumpet with the familiarity only afforded by expertise.

A light glimmers—he moved the trumpet to his face. His head is tilted down a degree. He is reading sheet music, for the notes will guide his conduct, and his conduct will guide his instrument. Silent still, he briefly considers the faceless composer who put the notes to paper. That faceless man now reaches through time and space to guide the musician, note-by-note. The musician's eyes tilt up: A nine-headed conductor holds his baton in the air.

Nature, silent, is disturbed by a deep inhale through the nostrils. The conductor swings his hands and his robe flutters like a jumping shadow. Still-ephemeral music launches off the sheet and into the musician. He obeys; he exerts the composer's will onto his instrument in-time with the flailing conductor. The ritual culminates: The players' collective power imbues empty air with their will, pulling the silent sounds through the instrument's tubes. At last, the trumpet's cries fill the silence.

Each person, the musician, the composer, and the conductor, is an actor in a musical institution: the symphony. Their collective action—playing the trumpet, writing the notes, and conducting—is the symphony's action. Institutional action is simply the aggregated actions of the underlying institutional actors. The goal, of course, is to realize something grander than what the actors can realize as individuals.

The individual actors are of course useful as individuals—they each have unique powers. The musician's expertise, for example, is the power to turn a trumpet into a tool, rather than a wonky bronze paperweight. The composer's expertise is the power to turn ink and thoughts into the legible notes on sheet music. Likewise, the conductor's power is to turn sweeps and flicks of a wand into instructions for the musician—almost like hypnosis. With their powers combined, the symphony makes music.

Without an institution to organize their powers, each actor's ability to create is more limited. Sheet music is just paper. A musician is a man who

can play an instrument. A conductor looks more like a magician if he is not standing near a symphony. Separated, they have less power to change the world—a world whose natural state is quiet. Together, they have the power to make the world a musical place. The institution of symphony thus possesses the power to impose music onto silence.

Law, like music, is an expression of power. As music disturbs the natural state of silence, law disturbs the natural state of freedom. Without power, an actor has no way to influence his world. In that case, any ideas the actor has are irrelevant to the extent that they are not consistent with the natural state of things. An idea with no power has no way to be realized as law. But if an actor with an idea gains access to power, then the idea can be realized, and imposed on others.

Stated otherwise, law is the use of power to realize an idea; to realize an idea, things as they are (reality or status quo) must either be preserved (if the status quo is consistent with the idea) or changed (if the status quo is inconsistent with the idea).[7] The ideas animating U.S. law change over time, but they are frequently unnatural. It follows that the power of the U.S. government—the sum of executive, legislative, and judicial powers—are imposed onto an otherwise naturally free people. Like notes guiding a symphony's intrusion into silence, U.S. law guides the American institutions' intrusion into people's lives. The result is not a state of music, but a state of American law.[8]

The United States's judicial power is guarded by the judicial branch, a judicial institution. The judiciary are the collective courts of the nation, and in each court U.S. power is exerted through judicial conduct. Writing a legal opinion, for example, is given power only through proper judicial conduct: the set of actions required to animate a document with legal force.[9] The

7. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 207 (2019) (describing Rev. Dr. Martin Luther King, Jr.'s "problem of power" as the "confrontation between the forces of power demanding change and the forces of power dedicated to the preserving of the status quo").

8. *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 3–4 (2008) (reviewing references to rule of law as a pertinent factor in analyzing governmental stability, international trade, and domestic ideology).

9. *See generally* R. L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807 (1977) (analyzing the doctrines governing courts' judicial powers and their accessibility to potential litigants); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."); Kimberly L. Wehle, *"Law and" the OLC's Article II Immunity Memos*, STAN. L. & POL'Y REV. (forthcoming 2021) (draft on file with author) (articulating types of government conduct that can carry force of law).

relevance of a judicial opinion invalidating gay marriage varies greatly on the level of the issuing court: If issued by a high court, that opinion is backed by great judicial power.

A lower court, conversely, exercises a lesser power and has less authority. The court with the most consequential conduct, and indeed the court with the most judicial power, is the U.S. Supreme Court. It alone possesses the power to interpret the meaning of the U.S. Constitution—America's supreme judicial text. This is not to say that state law and state courts are irrelevant; rather, it is to say that those courts simply lack the power to issue final, nationally-binding legal interpretations. Conversely, with a bit of ink and a majority consensus, the Supreme Court has the power to tell the President and Congress what freedom means.[10]

The Supreme Court's character, like anything else's character, is a description of the nature of its conduct. Character is the glow radiating off the edges of a jar of fireflies: In the jar, each firefly's glow depends on what and how it is. As more fireflies fill the jar, the jar aggregates their individual glows and shines. The color of the jar's light will depend on the individual glow of each firefly it contains, and the color of the jar becomes discernible as more fireflies give it their light.

As another example, picture a man who did ten thousand things in his life, but only painted once. His obituary will probably not read: "artist dead." Conversely, Basquiat died an artist. A court is the same—its character is reflective of the things it does. So too, the character of courts is consistent with the conduct of courts.

Racist, like artist, is a descriptor earned with consistent conduct.[11] The animating force defining racist conduct is a racist idea. Remember our first analogy: A musical idea would be a concept that, if realized, would create

10. *See* Cover, *supra* note 9, at 1601–02 n.2 (describing orthodox literature on legal interpretation as the study of "a normative universe . . . held together by . . . interpretive commitments," which ignores "the violence" caused by legal interpretation (quoting Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 7 (1983))); *id.* (advocating that legal interpretation analysis should be "the traditional set of questions about how a particular word, phrase, or instrument should be given effect in some particular context").

11. *See* KENDI, *supra* note 7, at 22 ("'Racist' and 'antiracist' are like peelable name tags that are placed and replaced based on what someone is doing or not doing, supporting or expressing in each moment."); *id.* at 17–18 (defining "racist" as a descriptor signaling that the subject supports racist policy, which is "any measure that produces or sustains racial inequity"); *id.* at 21–22 (exemplifying Black voter disenfranchisement, which "evolved from disenfranchising by Jim Crow voting laws to disenfranchising by mass incarceration and voter-ID laws," as racist policy).

music reflecting the idea. Similarly, a racist idea is a concept that, if realized, would promote or sustain racial inequality.[12] The idea of white supremacy, for example, is a racist idea because it promotes the superiority of one race over any other.[13] The opposite of a racist idea is an antiracist idea: a concept that, if realized, would promote or sustain racial equality.[14] Concepts like birthright citizenship have been realized as law, advancing the idea that people of all races have an equal right to citizenship.[15]

Not unlike how a musical idea is realized as music through musical conduct, a racist idea is realized through racist conduct. Racist conduct gives power to racist ideas—seventeenth through nineteenth-century slavery in America was racist conduct because it gave power to the idea that one race was superior to another; that idea was realized as America's racially-targeted mass human trafficking and slave-labor industries.[16] American antiracism exists. In a 1954 case, the Supreme Court held that all races were equally entitled to protection by the Fourteenth Amendment.[17] Issuing that holding was antiracist conduct because it gave power to the idea that constitutional protection should be equally accessible to all races.[18]

If an institution's conduct tends to be racist, then the institution is racist. The converse is true for antiracism—persistent antiracist conduct makes an antiracist. What makes a hip-hop album a hip-hop record? The genre of the music waiting to be played; when I play a Snoop Dogg record, I anticipate hearing hip hop music. When I engage with a racist actor, I anticipate racist conduct. Regrettably, I anticipate racist judicial conduct when I look toward

12. *Id.* at 20 ("Racist ideas argue that the inferiorities and superiorities of racial groups explain racial inequalities in society.").
13. *See id.* at 19–20 ("The blacks . . . are inferior to the whites in the endowments of both body and mind." (quoting Thomas Jefferson)).
14. *See id.* at 20 ("An antiracist idea is any idea that suggests the racial groups are equals . . . . Antiracist ideas argue that racist policies are the cause of racial inequalities.").
15. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 704 (1898) (holding Chinese persons cannot be excluded "from the operation of the broad and clear words of the Constitution, 'All persons born in the United States . . . are citizens of the United States'"). *But see id.* at 732 (Fuller, C.J., dissenting) (arguing the U.S. Constitution does not "arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens").
16. *See infra* text accompanying note 78.
17. Hernandez v. Texas, 347 U.S. 475 (1954) (holding all nationality groups in the United States have equal protection under the Constitution).
18. *Id.* at 478 ("[C]ommunity prejudices are not static, and, from time to time other differences from the community norm may define other groups which need the same protection. . . . The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.").

the Supreme Court today. The Court's marble walls are oversaturated with hate—centuries of ink shaping hateful judicial phrases seep out of the bench's wood and slowly drip over its edges to tile floors below.

The Supreme Court is not a court of exclusively racial issues, though—it is a court of many issues. It follows that America's judicial character is not only defined by its racist tendencies. Nonetheless, some moments in judicial history involved race more than others. In those moments, racial questions are subject to judicial answers. In those moments, racist and antiracist ideas claw at the edge of the justices' pens. In those moments, judicial racism or judicial antiracism occurs. Viewed as such, judicial history becomes a history of judicial racism and judicial antiracism. One such story is the story of Dred Scott.[19]

II. *SCOTT V. EMERSON*

A. Free Since Fort Armstrong

Dred Scott, his wife, Harriet, and their children were a Black midwestern family. In 1830, they were purchased in St. Louis, Missouri by a military doctor named John Emerson.[20] Dred was around forty at the time. John took the Scotts with him to Fort Armstrong, a military base in the free territory of Illinois. He moved west a few years later, taking the Scotts—his Scotts—with him. Dred, Harriet, and their children spent the next five years as enslaved people in the Iowa territory.

John took the Scotts around the United States over the next decade—he moved from station to station, occasionally renting the Scott family out when he had no use for their labor. When Dred was in his late forties, John was ordered to move to Florida. He left the Scotts in Missouri at one of the largest military bases in the expanding United States, Jefferson Barracks. John rented the Scotts to a man named Captain Bainbridge, who was to use them while John was in the South. But then John died in Florida, and the Scotts were left to face his wife, Irene Emerson. Irene and her family assumed ownership of the Scotts as part of her husband's estate.

19. *See generally* BRIAN MCGINTY, LINCOLN AND THE COURT 39 (2008) ("*Dred Scott* was the most highly publicized decision ever made by the Supreme Court, and one of its most ambitious.").

20. *See generally Missouri's Dred Scott Case, 1846–1857*, MO. SEC'Y STATE, https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott [https://perma.cc/GKP4-DU38] (last visited Aug. 27, 2020); Dred Scott Petition for Leave to Sue for Freedom (Apr. 6, 1846), *in* 13 AMERICAN STATE TRIALS 223, 223–25 (John D. Lawson ed., 1921).

Sometime in the spring of 1846, Dred, Harriet, and their children were attacked by their new owners. The Scotts suffered "force and arms," and were then imprisoned for over twelve hours somewhere in St. Louis, where they lived with Irene.[21] This attack was not societally abnormal. Orthodox American White Supremacy could not be realized without acts of physical violence against nonwhite people. Under Missouri law, however, Blacks could sue for freedom.[22]

Dred and Harriet Scott separately petitioned the St. Louis Circuit Court for permission to sue for freedom.[23] Judge John M. Krum, a jurist with proslavery leanings, granted both petitions.[24] As part of the grant, the court gave the Scotts "reasonable liberty," whatever legally authorized freedom they needed to pursue their case.[25] By default, a Black person in America had all the liberty of an enslaved person; a Black woman was somehow less free, suffering a disproportionate share of the weight of America's black soul on her brown shoulders.

In executive, legislative, and judicial spheres of power, the American government served to promote and prolong Black inferiority. Racist ideology rejected the presence of Black bodies in court, unless they were to be

21. F. B. Murdock, Summons in False Imprisonment (Apr. 6, 1846), *in* 13 AMERICAN STATE TRIALS, *supra* note 20, at 225.

22. *See* Act of Dec. 30, 1824, ch. 35, 1824 Mo. Laws 404 ("[I]t shall be lawful for any person held in slavery to petition the circuit court . . . and stat[e] the ground upon which . . . freedom is founded."); *e.g.*, Winny v. Whitesides, 1 Mo. 472, 472–73 (1824) (affirming an 1822 decision to grant a freedom petition filed by an enslaved person who was brought to a free territory, kept there for "three or four years," then moved to Missouri, a slave state); *see also Suits for Freedom, St. Louis, 1804–1865*, NAT'L PARK SERV., https://www.nps.gov/jeff/learn/historyculture/loader.cfm?csModule=security/getfile&PageID=3120182 [https://perma.cc/CDT9-5YYW] (last visited Aug. 26, 2020) (counting over three hundred enslaved people who filed freedom suits under Missouri law between 1812 and 1865). *But see Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("From 1844 to 1846, twenty-five freedom suits had been filed in the St. Louis Circuit Court; only one resulted in freedom.").

23. *See* Dred Scott Petition for Leave to Sue for Freedom, *supra* note 20; *see also* Harriet Scott Petition for Leave to Sue for Freedom (Apr. 6, 1846), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS, http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;rgn=main;view=text;idno=dre1846.0002.002 [https://perma.cc/PZM3-AK5Y].

24. 13 AMERICAN STATE TRIALS, *supra* note 20, at 226 n.7 (noting the parties agreed "the judgment in [Harriet's] suit should abide by the decision in her husband's").

25. *See* Notice of Decision to Grant Petition (Apr. 6, 1846), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS, http://digital.wustl.edu/d/dre/drexml/dre1847.0025.025.html [https://perma.cc/8PRK-K2YD] (ordering that "Dred Scott *have* reasonable liberty to attend his counsel and the court . . . *be not* removed out of the jurisdiction of the court, and that he *be not* subject to any severity on account of his application for freedom" (emphasis added)). *But see* WALTER EHRLICH, THEY HAVE NO RIGHTS 42 (2007) (characterizing "reasonable liberty" as one of four "conditions" required for Judge John M. Krum to grant the Scotts' freedom suit).

sentenced to death and torture by racist judges and juries. But with the antiracist blessing of a circuit court in Missouri, the Scotts bucked white supremacy.

B. To Harriet, a Woman of Color

Empowered by the court, the Scotts made two pleadings: (1) they were free people when they were assaulted two days earlier, and (2) that assault was illegal.[26] The court issued two orders, one for Dred's claim against Irene, and the other for Harriet's. Dripping with invisible judicial power, the Circuit Court orders made three previously uncertain things true: (1) Dred and Harriet could sue Irene; (2) Dred and Harriet had the liberty required to work with counsel; and (3) Dred and Harriet were legally protected from any "severity" prompted by their case for freedom.[27] In the Spring of 1846, a judge ordered[28] a slaveowner's widow, "to answer unto Harriet, a woman of color . . . ." Two days later, Irene responded.[29] She filled out a form-letter motion to dismiss, writing the basis for the suit into the attorney's standard language: "Take notice that on the 9th day of April 1846 I shall move the Court to dismiss the suit of yourself against me for the reason *your freedom* now pending in this court . . . ."[30]

The pleadings were filed with the St. Louis Circuit Court: *Dred Scott v. Irene Emerson*, and *Harriet a woman of color v. Irene Emerson*.[31] The ensuing trial was focused on one issue: whether Dred and Harriet Scott were attacked as enslaved people, or as free people.[32] Accordingly, lawyers dueled over whether the facts supported a finding of the Scotts' freedom.[33] One person

26. *See* Dred Scott Petition for Leave to Sue for Freedom, *supra* note 20.
27. *See* Notice of Decision to Grant Petition, *supra* note 25.
28. Irene Emerson Summons (Apr. 6, 1846), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS, http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;rgn=main;view=text;idno=dre1846.0006.006 [https://perma.cc/PZM3-AK5Y].
29. *See* Notice of Motion to Dismiss (Apr. 8, 1846), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS, http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;rgn=main;view=text;idno=dre1846.0008.008 [https://perma.cc/259L-6SPJ].
30. *Id.* (emphasis added).
31. Dred Scott Plea, *in* 13 AMERICAN STATE TRIALS, *supra* note 20, at 226; *id.* at 226 n.7 ("[T]he judgment in [Harriet's] suit should abide by the decision in her husband's."); *see also* Harriet Scott Plea (Nov. 19, 1846), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS,, http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;rgn=main;view=text;idno=dre1846.0009.009 [https://perma.cc/RE74-7EYX].
32. *See Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 (explaining the Scotts' case turned on proving they were taken "to reside on free soil, making them free by Missouri law," and that Irene "claimed and held them as slaves in Missouri").
33. 13 AMERICAN STATE TRIALS, *supra* note 20, at 228–29 (summarizing evidentiary findings).

testified that his father sold Dred to John, Irene's deceased husband.[34] Another testified that she was one of many people who rented Harriet from John while he travelled between military bases.[35]

One witness, a man from Missouri, testified that he recently rented the Scotts from Irene, but he did not pay her directly. Rather, he paid her father, a man named Alexander Sanford.[36] Hearsay findings led the jury to conclude that, as a transactional matter, the Scotts belonged to Irene at the time they were attacked.[37] They returned a verdict: The Scotts were beaten as property, not people.[38]

C. The Three-Headed Conductor

A flurry of motions cast the Scotts' loss into suspended animation—a retrial was to be had.[39] In the interim, Irene rented the Scotts to the Sheriff of St. Louis County—he was to manage them until their freedom suit was decided.[40] She moved to Massachusetts and married an abolitionist who later was elected to Congress. Back in Missouri, the Sheriff hired the Scotts to a man named Charles LaBeaume, who owned them for the three years until the retrial in 1850. By that point, an abolitionist jurist named Judge Alexander Hamilton had replaced proslavery Judge Krum on the St. Louis Circuit Court.

On retrial, Judge Hamilton allowed the testimony proving that Irene, through her father Mr. Sanford, had been paid for the Scotts. Shifting their stance, Irene's lawyers argued that her husband's job as a military doctor meant that military law, not civil law, should govern the case. Under those

34. *Id.* at 228 (reviewing testimony of Henry T. Blow, who said Dred Scott "was formerly owned by my father . . . who sold him to Dr. Emerson").
35. *Id.* at 229 (reviewing testimony of Catherine A. Anderson, who claimed "[Irene] Emerson exercised control over and used plaintiff entirely as a slave. . . . [Harriet] was hired to me as a servant by Dr. [John] Emerson and was in my family some two or three months.").
36. *Id.* at 228 (recounting cross examination of Samuel Russell: "I did not hire the negroes myself, it was my wife who made the arrangement . . . ; [I] did nothing but pay the hiring money to Colonel Sanford.").
37. *See Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("[Russell's] testimony was dismissed as hearsay and did not prove to the jury that Irene Emerson held the Scotts as slaves. Because of this technicality, the jury returned a verdict against the Scotts . . . .").
38. *See* 13 AMERICAN STATE TRIALS, *supra* note 20, at 229.
39. Order Sustaining Motion for a New Trial (Dec. 2, 1847), *reprinted in The Revised Dred Scott Case Collection*, WASH. U. ST. LOUIS, http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;rgn=main;view=text;idno=dre1847.0046 [https://perma.cc/2DZW-SH8G]; *see also* 13 AMERICAN STATE TRIALS, *supra* note 20, at 229–31 (detailing the motions leading to retrial).
40. *See Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("[C]ustody of the Scott family would remain with the St. Louis County sheriff until March 18, 1857 . . . .").

terms, the Irene never "sold" the Scotts at all, and thus retained ownership of them. The court was not convinced. Judge Hamilton issued jury instructions negating the relevance of military jurisdiction.

The case, in his mind and expressed by the resultant jury instructions, turned on where the Scotts lived: If they ever entered a legally free territory, then they were free people. Under those terms, the Scotts had been free since the early 1830s, when Dr. John took them to Fort Armstrong, which was in the free state of Illinois. The jury's 1850 verdict was in the Scotts' favor. In 1850, a state court order gave freedom to Dred, Harriet, and their children.

On appeal, Dred's lawyers saw a clear case: The Scotts had lived in a free state or territory, which was the judicial standard for freedom in Missouri. Military jurisdiction did not matter, according to Dred's appeal. When the Scotts were left in Illinois by Dr. John, they gained their freedom under state and federal law. The appeal, which would be argued in the Missouri Supreme Court, seemed straightforward. Political winds, unfortunately, shifted the course of the underlying legal journey.

In 1851, Missouri held a popular vote, the first in the state, to fill seats on the Missouri Supreme Court.[41] Proslavery and antislavery advocates battled all over the country; jurists were of particular importance because legislative prohibition of slavery in the territories was vulnerable to judicial invalidation. Judicial conduct became thus a signal of political allegiance.[42] The powerful proslavery establishment did not take kindly to its antiracist opponents' maneuvers in the courts and Congress.

Racist ideas, if animated by judicial actors, could ensure that the slavery debate was resolved in favor of racist ideas.[43] Unfortunately for the Scotts, the

41. *Supreme Court Judges*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=133 [https://perma.cc/7EYB-HVT6] (last visited Aug. 27, 2020) ("In 1851, the constitution was amended to require popular election of Supreme Court judges."); *see also* Hon. William B. Napton, *The Election*, *in* THE UNION ON TRIAL 103 (Christopher Phillips & Jason L. Pendleton eds., 2005) ("[P]arties . . . or the mass of them, vote for their political friends—and what is worse, local and sectional combinations determine the result.").

42. *See, e.g.*, Avidit Acharya, Matthew Blackwell & Maya Sen, *The Political Legacy of American Slavery*, 78 J. POL. 621, 635 (2016) (explaining how federal antislavery legislation "pitted states' rights extremists, who openly discussed secession, against more moderate Unionist candidates" in 1851 gubernatorial elections); s*ee also Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("[T]he questioning of congressional authority now turned the case into a lightning rod for the slavery controversy."). *But see* Acharya et al., *supra*, at 635 (suggesting 1851 gubernatorial election data showed "little evidence of a strong relationship between slavery and vote choice").

43. *Cf.* KENDI, *supra* note 7, at 19 (describing someone who "reproduce[es racial] inequity through permanently assisting an overrepresented racial group into wealth and power" as racist).

1851 election gave two of the three Missouri Supreme Court seats to jurists who campaigned on racism.[44] Even though the Scotts' claims were preserved by the Circuit Court in 1850, the circumstances of the appeal changed with the election of racist justices in 1851. The following year, the Missouri Supreme Court decided the case of *Dred Scott v. Emerson*.[45]

In a 2–1 vote, the Court reversed and remanded the St. Louis Circuit Court's 1851 holding. Writing for the two-man majority, Justice William Scott made two judicial maneuvers. First, he argued that Missouri's history of judicial antiracism, a history of granting freedom to enslaved people who sued for it, was nonbinding. Many of those suits were predicated on freedom as defined by other states, and Missouri should not be presumptively bound by the laws of other states.[46]

Second, Justice William Scott argued that the Missouri Compromise only had power where it applied; it did not apply in Missouri.[47] Consistently, freedom granted under the laws of one state or under the laws of Congress did not persist in slave states. In clear contradiction with Missouri law, the Missouri Compromise, and indeed the Missouri Constitution itself, the Missouri Supreme Court decided that Missouri was a slave state.[48]

"Times are not now as they were when the former decisions on this subject were made," wrote[49] Justice Scott. "Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery."[50] That dark spirit, argued Justice Scott, would lead to "the overthrow and destruction of our government."[51] Gratifying that anarchic spirit, he argued, "does not behoove the State of Missouri."[52] Given that the state of

44. Three Justices took seats on the bench: incumbent John Ryland, who "could not be described as anti-slavery," William Scott, "a pro-slavery Democrat" who previously served as Missouri's Secretary of State, and Hamilton Gamble, who would dissent from the majority in the Scotts' 1851 case. *Missouri's Dred Scott Case, 1846–1857*, *supra* note 20.
45. Scott v. Emerson, 15 Mo. 576 (1852).
46. *See id.* at 586.
47. *Scott*, 15 Mo. at 585 ("Laws operate only within the territory of the State for which they are made, and by enforcing them [in Missouri], we, contrary to all principle, give them an extra territorial effect."); *see also Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("[Justice Scott] acknowledged the right of slaves to obtain their freedom when taken to free states and/or territories; he advised, though, that slavery status reattached upon return to a slave state.").
48. *See infra* notes 72, 95 and accompanying text.
49. *Scott*, 15 Mo. at 586.
50. *Id.*
51. *Id.*
52. *Id.*

Missouri did not seek to jeopardize the existence of the U.S. government, "[s]he [was] willing to assume her full responsibility for the existence of slavery within her limits."[53]

Speaking on Missouri's behalf, Justice Scott declined to continue "the comity shown to the laws of other States," who gave Black people freedom.[54] The majority did not mince words:

> [T]he consequences of slavery . . . are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. . . . [W]e are almost persuaded, that the introduction of slavery amongst us was, in the providences of God, . . . a means of placing that unhappy race within the pale of civilized nations.[55]

Crying out alone in dissent, Justice Hamilton Gamble argued for comity.[56] Congress had decided to declare the territories a free land, and to grant liberty to every Black person who reached them. Louisiana, Virginia, Mississippi, Kentucky, and indeed Missouri[57] were all hosts to judicial antiracism: Courts in each state allowed Black people to gain liberty from court decisions. "[P]ublic feeling may have changed," Justice Gamble dissented, "but principles have not and do not change."[58]

He accosted the majority for upending decades of antiracist precedent in Missouri and antiracist legislation from Congress: "there can be no safe basis for judicial decisions, but in those principles, which are immutable."[59] As such, the majority's decision, being based in racist principles, was an unsafe one. Nonetheless, Justice Gamble's judicial antiracism was outnumbered. Two racist men used judicial power to reject the idea and practice of racial equality. The justices, institutional actors in the judicial branch, used judicial conduct to judicially impose a racist idea.

Dred Scott v. Emerson was judicial racism—underneath it all, Dred, Harriet, and their children lost their liberty again.[60]

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53. *Id.*
54. *Id.*
55. *Id.* at 587.
56. *Id.* at 856 (Gamble, J., dissenting).
57. *Id.* at 591.
58. *Id.* at 591–92.
59. *Id.*
60. *Id.* at 576 n.1 (holding the voluntary removal of an enslaved person by his master from a free jurisdiction to a slave jurisdiction, even "with a view to a residence there, does not entitle the slave to sue for his freedom" in Missouri). *But see* John D. Lawson, *The Second Trial of the Action of Dred Scott (A Slave) Against Irene Emerson, for False Imprisonment and Assault*, *in* 13 AMERICAN STATE TRIALS, *supra* note 20, at 233 (stating although the

III. *SCOTT V. SANDFORD*

Luckily for the Scotts, Charles LaBeaume, their owner at the time they lost in the Missouri Supreme Court, was sympathetic to their enslavement.[61] He was also well connected, finding new lawyers to take the Scotts' case. One of those attorneys was an ambitious man named Roswell Field, who represented the Scotts for free. He foresaw a challenge striking at the source of judicial power: the U.S. Constitution.

When the Missouri Supreme Court held that Dred and his family were enslaved people on slave-state soil, it raised the question of whether Black citizenship was a constitutional right. If the U.S. Constitution gave citizens liberty, then having some states grant liberty and other states rescind it is an unconstitutional outcome; liberty would have to be guaranteed, no matter which state line was crossed and no matter what color the traveler's skin was.

The idea that the U.S. Constitution protected the liberties of Black people was extremely antiracist.[62] The racist alternative, indeed the status quo, was that Black people are not constitutionally entitled to the same liberties as white people. Recall that questions of liberty, equality, and freedom are all questions for the U.S. Supreme Court alone.

Thus, seeking an answer to the diaspora's collective call for equality, Dred Scott was offered to the highest house of judicial power: the U.S. Supreme Court.

A. Waiting Decision of the Supreme Court

In the fall of 1853, twenty years after John (dead and gone) took the Scotts to Fort Armstrong and seven years after they first asserted their equality in the St. Louis Circuit Court, Dred Scott sued again.[63] By this point, Irene's brother, Alex Sanford, claimed ownership of Dred, Harriet, and their

1852 case "remanded Dred Scott to slavery," changing national conditions allowed "friends of the slave and of freedom" to pursue the case in the Supreme Court, "where a nation-wide decision might be obtained").

61. *Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 (noting that Charles LaBeaume began consulting new attorneys to represent the Scotts after the Missouri Supreme Court's 1852 judgment).

62. *See* KENDI, *supra* note 7, at 20 ("An antiracist idea is any idea that suggests the racial groups are equals . . . . Antiracist ideas argue that racist policies are the cause of racial inequalities.").

63. *Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("The November 1853 suit was similar in most respects to Dred Scott's original plea of trespass against Irene Emerson in 1846.").

children. Sanford was a wealthy, racist man: He married into one of the largest slaveholding families in Missouri.[64]

Together, Sanford and his family fought to preserve slavery at all junctures of government.[65] Sanford needed institutional racism; if the state of U.S. law allowed him to beat, kill, sell, and use Black people, then his life was secure. Sanford was to become the hero of the story of American racism—Dred Scott would become his antagonist, an antiracist idea to be snuffed out with racist power. Dred filed a diversity suit in the Circuit Court of St. Louis—his second lawsuit against Sanford's family.[66]

This time, a more detailed retelling of Harriet's abuse lived in Dred's briefs. So too did the suffering of their children, who, for the first time, were mentioned by name in the proceedings: Eliza and Lizzie Scott.[67] Sanford, like his sister, moved to dismiss. Unlike his sister, Sanford did not assert that the Scotts were enslaved people. Rather, he attacked the court's jurisdiction. Diversity requires a controversy between citizens of two different states—Sanford was a citizen of New York, and Dred was not a citizen—no African "negro" was a citizen.[68]

The Circuit Court nonetheless assumed jurisdiction: A Black man sued his white owner for freedom in a U.S. court. He lost.[69] This was not surprising. All involved knew the case was destined for the U.S. Supreme

64. *Id.* (explaining that John Sanford was married to "Emilie Chouteau, [the] daughter of . . . one of St. Louis' largest slave-holding families").

65. *See id.* ("The Chouteau family were unyielding in their defense of the institution of slavery and had been involved in numerous freedom suits."); *e.g.*, Theoteste v. Chouteau, 2 Mo. 144 (1829) (affirming a decision to deny an enslaved person's petition for freedom after she was brought to Missouri after being in a free territory for twenty-seven years); *see generally* STAN HOIG, THE CHOUTEAUS: FIRST FAMILY OF THE FUR TRADE 237, 249–64 (2008) (describing how the Chouteaus held positions of government in nine states and influenced several U.S.-Native American treaties); Thomas C. Danisi, *The Chouteaus: First Family of the Fur Trade*, 40 W. HIST. Q. 226 (2009) (reviewing HOIG, *supra*) (noting Hoig's discussion of "the idea that the Chouteau men exploited Native Americans," with the "anonymous[]" service and support of the Chouteau women); *see also* KATHARINE T. CORBETT, IN HER PLACE: A GUIDE TO ST. LOUIS WOMEN'S HISTORY 27 (1999) (retelling the story of Marie Scypion, daughter of an enslaved Native American mother and an enslaved African father, who sued the Choteaus along with her sisters in a case considered to be the end of Native American slavery in Missouri).

66. *See generally* 13 AMERICAN STATE TRIALS, *supra* note 20, at 242.

67. *Id.* at 244–45 ("The declaration of Scott contained three counts: one, that Sanford had assaulted the plaintiff; . . . that he had assaulted Harriet Scott, his wife; . . . and . . . that he had assaulted Eliza Scott and Lizzie Scott, his children.").

68. *Id.* at 246–48 ("Dred Scott, is not a citizen of the State of Missouri, . . . because he is a negro of African descent; his ancestors were of pure African blood and were brought into this country and sold as negro slaves . . . .").

69. *Id.* at 252 ("The *jury* returned . . . that the plaintiff was a negro slave and the property of the defendant. . . . Harriet . . . and Eliza and Lizzie . . . were negro slaves and the property of the defendant.").

Court.[70] In this particular legal dispute, antiracism and racism clashed at the juncture of citizenship—this was no question for a circuit court.

The scale of this ideological conflict was foreshadowed in the notes of *Dred Scott v. Emerson*: Following remand, Judge Hamilton recorded the sister case as, "[c]ontinued by consent, waiting decision of the Supreme Court."[71] Two years would pass before Judge Hamilton's premonition materialized in Washington. In 1956, champions of racism and antiracism gathered before the U.S. Supreme Court.

On one side, Dred and his support: a network including leaders from the abolitionist Missouri's Free Soil Movement. Rich publishing magnates funded Dred's costs, and abolitionist political actors turned their attention to Dred's brown body as the vehicle for their antiracist ideas.[72]

Opposite, Sanford was supported by racist power—he even had a U.S. Senator, Henry Geyer, representing him. The racist establishment, entrenched in Congress, the White House, and throughout the Supreme Court, braced behind him. Having accessed the Supreme Court's presence, Dred argued:[73] (1) If a Black person enters a jurisdiction where they are free, they stay free; (2) The Missouri Supreme Court squashed antiracist common law in the interest of racist political ideas; and (3) Black people could be U.S. citizens.

Sanford countered that Black people are not and were never free. Congress had no power to declare the territories free. And even if Dred was a "free negro," he had no right to citizenship in Missouri, Illinois, Maryland, or anywhere else in the United States. Sanford argued to give power to racism using judicial voice: He argued that Black people, legally, were inferior to white people.[74]

70. *Id.* at 233 ("[National] conditions had changed so as to permit the friends of the slave and of freedom" to pursue the case in the U.S. Supreme Court, "where a nation-wide decision might be obtained, and which led the way to a *cause celebre*, destined to make history . . . .").
71. Scott v. Emerson, 24 St. Louis Cir. Ct. Rec. 33.
72. *See Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 (discussing the antislavery establishment's influence on the Scott case, and quoting the St. Louis Daily Morning Herald: "But no doubt [Scott] will find at the bar of the Supreme Court some able and generous advocate.").
73. *See* Scott v. Sandford, 60 U.S. 393, 394 (1857).
74. *See id.* at 393–94 (outlining the reasons "[a] *free* negro . . . is not a 'citizen'" under the Constitution (emphasis added)); *compare id.* (stating the only express mentions of Black people in the Constitution "treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves."), *with* KENDI, *supra* note 7, at 19 ("Racist ideas argue that the inferiorities and superiorities of racial groups explain racial inequalities in society"), *and id.* at 19–20 ("The blacks . . . are inferior to the whites in endowments of both body and mind." (quoting Thomas Jefferson)).

The Supreme Court loomed over the warring factions: Nine pairs of eyes and ears took the case in.

B. A Question Involving the Liberty of a Human Being

Justices McLean and Curtis, speaking from the eventual dissent in judicial tongues, shed light on the Scotts' story.[75] "[Dred] and Harriet were married at Fort Snelling . . . [and] Eliza and Lizzie . . . are the fruit of that marriage." The law, in their opinions, was clear:[76] "When Dred Scott, his wife and children," were moved from Fort Snelling to St. Louis in 1838, "they were free."[77]

To begin, institutionalized slavery was a product of "a traffic which is now declared to be piracy, and punished with death by Christian nations."[78] America's "mercenary spirit" was perhaps an animating mass of racist ideologies, leading to industrialized "traffic[king]," built on "the degradation of negro slavery in our country."[79] The dissent laments: "I admit the Government was not made expecially [sic] for the colored race . . . ."[80]

The twin-minded dissent hailed President James Madison's constitutional philosophy;[81] he "guarded" the text from "the idea that there could be property in man."[82] Slavery is not natural: It cannot be justified with "any reasons, moral or political." Rather, slavery can only be justified "by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory."[83]

Racist ideas like slavery were drawn from dark ground. "All slavery has its origin in power," explained the Court, "and is against right."[84] The dissent noted its institutional complicity by referencing the Court's command of "the judicial power of the Union."[85] It posited that not only was Sanford's racist

75. *Sandford*, 60 U.S. at 530 (McLean, J., dissenting).
76. *See id.* at 554 ("[T]hey were free, as the law was then settled, and continued for fourteen years afterwards," until interrupted by the Missouri Supreme Court's 1852 decision).
77. *Id.*
78. *Id.* at 537.
79. *Id.*
80. *Id.*
81. *Id.* (further stating Justice McLean's preference for the philosophies of "Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings").
82. *Id.*
83. *Sandford*, 60 U.S. at 535 (quoting Lord Mansfield); *see* Philippe Nonet, *What Is Positive Law?*, 100 YALE L.J. 667, 667 (1990) ("[P]ositive law . . . is law that exists by virtue of being . . . laid down and set firmly, by a will empowered so to will.").
84. *Sandford*, 60 U.S. at 538.
85. *Id.* at 537.

position unconstitutional, it was a position that could not be lawfully realized with government power.

The Constitution is the source of judicial authority, and the Constitution does not support slavery. Further, "there is no power in the Constitution by which Congress can make either white or black men slaves," so no U.S. law could allow one race to enslave another.[86] Dred's antiracist position was that citizenship was a race-independent constitutional right.

"The most general and appropriate definition of the term citizen," said the dissent, "is 'a freeman,'" and everyone born under the Constitution, Black or white, is a freeman.[87] The dissenting justices claimed that the antiracist position was both constitutional and popular; several states, including Missouri, amended their state constitutions to abolish slavery. Other states similarly followed the lead of the Missouri Compromise, a valid exercise of Legislative power that "would manumit the slave as effectually as if he had executed a deed of emancipation."[88]

In Dred's case, the Missouri State Constitution itself was the document that granted him the statutory right to sue for freedom. Many men and women like him around the nation successfully did so in their own states. Indeed, leading men believed "the institution of slavery would gradually decline," and fade into economic history.[89]

Unfortunately, the dissent sighed, the cotton and sugar booms increased the value of slave labor. "Like all other communities," it explained "the South were influenced by what they considered to be their own interests."[90] When the South began promoting racist ideas to preserve their economic interests, the Missouri Supreme Court fell in line. And the Scotts, tragically, brought their suit for freedom at the same time as that powerful push for institutional racism.

The dissent mournfully admitted that "judicial power of the Union" had "faithfully discharged" racist laws such as the fugitive slave act.[91] Despite Madison's antiracist advocacy, the U.S. Constitution's drafters turned Black men into property with lengthy expanses of prose. "In the provision respecting the slave trade," they considered enslaved people as fractional-persons and property taxes and "in no other respect are they considered in the Constitution."[92] In that sense, the dissent and the majority agreed.

86. *See id.* at 542–43.
87. *Id.* at 531.
88. *Id.* at 554–55.
89. *Id.* at 538.
90. *Id.*
91. *See id.* at 537.
92. *See id.*

And so, the dissent sadly accepted that the judicial branch would continue to defy the laws of God and nature, and warp the laws of the United States, to realize white supremacy. The proper course of conduct, it insisted, would have been to reverse the Missouri Supreme Court and grant the Scotts their liberty. Antiracist ideas had gripped the Missouri Constitution and the Missouri Compromise, two laws that "for twenty-eight years," the Missouri Supreme Court "had not only regarded, but carried into effect."[93]

Yet the Court would strike citizenship from the Black man's skin: A conclusion that when considered as "a question involving the liberty of a human being," made the dissent genuinely question whether the law meant anything at all.[94] Certainly, as it posited earlier, a law's meaning is an idea. Thus, the real issue was which ideas would be allowed into the Constitution.

The Supreme Court's binding opinion in *Dred Scott v. Sandford* is the narrative history of Dred Scott's' life, but with a judicial ritual woven into the tale. Justice Taney wrote the Opinion of the Court, and therein he stitched Dred's story together with racist power—white supremacy coded in constitutional language. The resultant work was an enforceable racist narrative—a racist idea given power by the most powerful judicial actor in American government.

As such, the story of *Dred Scott v. Sandford* is a story of judicial racism. That story starts, as this story did, with Dred and Harriet. The U.S. Supreme Court's 1857 opinion begins with Judge Taney's tale. . . .

C. Beings of an Inferior Order

Like the dissent, Justice Taney's judicial song was about the story of Dred and Harriet Scott. In 1834, Dred was enslaved to Dr. [John] Emerson, a US Army surgeon. That year, he took Dred from Missouri to Illinois, holding him as a slave for two years. Dr. John then took Dred to Fort Snelling, an Army base on the west bank of the Mississippi river. Then, that land was the vast Territory of Upper Louisiana, recently purchased from the French. Fort Snelling was in the territory's northern expanse—north of Missouri. Dr. John took his post there, bringing Dred with him in 1836.

Harriet had been enslaved at Fort Snelling since 1835; she was brought there by U.S. Army Major Taliaferro. In 1836, Harriet had been enslaved at Fort Snelling for around a year. Then, the Major sold her to a military surgeon who had just arrived at the fort: John Emerson. Another of John's slaves, a

93. *Id.* at 564.
94. *Id.* ("If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford?").

man named Dred Scott, fell in love with her. They married that year, with John's consent.

One day the following year, Dred and Harriet were on board a steamboat called Gipsey. They were moving up the Mississippi river, having passed the national line marking North from South. Aboard the Gipsey, sailing up the northern stretch of the Mississippi river, Harriet gave birth to Eliza Scott. In 1838 the Scott Family, enslaved by society and by birth to John, was moved from the Upper Louisiana Territory to Jefferson Barracks, Missouri. Lizzie Scott was born here, when her sister Eliza was seven. Sometime after the Scotts were taken to Missouri, John sold them to the defendants—John Sanford's family. Sanford, according to the majority, then repeatedly "laid his hands upon [Dred], Harriet, Eliza, and Lizzie, and imprisoned them."[95]

It was that moment when the parties' interpretations of the situation diverged, the Court notes.[96]

Procedurally, the first issue was jurisdiction: The Supreme Court has the power to correct unlawful uses of lower judicial powers. Before touching the underlying case—the beatings, Missouri law, the Missouri Compromise—it considered the Circuit Court's decision to claim jurisdiction. Were there two citizens of different states, as is required for federal diversity? Nine pairs of eyes turned to the parties, and the Court listened to the parties' claims.

On one hand, Dred: He argued that he and his family had been wrongfully enslaved, and as such were unlawfully beaten and imprisoned. They had been free people since Fort Armstrong, Illinois. That is why he and Harriet sued for their freedom. That is why the Circuit Court of St. Louis gave them liberty to sue, and then ruled in their favor.

That is also why the Missouri Supreme Court was wrong to reverse the Circuit Court and remand the case. That is why the remanded case was continued, awaiting the decision of the Supreme Court of the United States. Dred, Harriet, Eliza, and Lizzie returned to the Circuit Court of St. Louis in 1954, humbly requesting their freedom but knowing that the jury's decision would be cast aside: The Scotts' case for freedom was a case brought on behalf of every Black person in the United States. Such broad questions of equality are destined for adjudication by the supreme judicial power of the country.

On the other hand, Sanford: His family beat the Scotts. His family took hands and clubs to Dred, Harriet, and their children: Eliza and Lizzie. Sanford posited that those beatings were allowed by law. The Scotts were a family of

95. *See id.* at 397–99 (reviewing the agreed-on statement of the facts).
96. *Id.*

"negro slaves," his "lawful property."[97] That is why the St. Louis Circuit Court was wrong to grant them freedom—they had no right to sue for that freedom to begin with.

The Scotts' initial victory was not unlike judicial antiracism seen in Maryland, Missouri, and other states allowing freedom suits: None of them was valid. Black people were not citizens—they were property, and the Scotts were his property since his family bought them from Dr. John in Missouri. The Court recognized Sanford's request as a plea to, with the power of the U.S. Constitution, affirm the supremacy of the white race.

D. The "Limits" of Judicial Power

The Court declared it had no power to declare the justice or injustice or the policy or impolicy of laws enforcing or abolishing the enslavement of Black people. Rather, its only power was to declare,[98] through a written opinion, whether those laws were consistent with the original intent of the Constitution. The Court specified its power was "to interpret [the Constitution] with the best lights we can obtain on the subject."[99]

Having obtained the "best lights" to search the supreme text for racial equality, the Court's next power was "to administer it as we find it, according to its true intent and meaning when it was adopted."[100] As such, the question before the Court was first, whether Black people were citizens under the Constitution, such that they could sue to begin with, and second, whether state and federal laws abolishing slavery were valid under the Constitution.[101]

The first question: citizenship. Given that the constitutional text, "people of the United States" meant the same thing as "citizens,"[102] the question within the Court's judicial power is thus: Can Black people, "whose ancestors were imported into this country, and sold as slaves," be people of the United States?[103] Are Black people beneficiaries of the Constitution, like white people? The Court closed its nine pairs of eyes, and began to think.

97. *See id.* at 398–99.
98. By declaring it had no power to judge racism on its merits, the Court legitimized (and arguably institutionalized) the merits of racism.
99. *Sandford*, 60 U.S. at 405.
100. *Id.*
101. *Id.*
102. *Id.* at 404.
103. *Id.* at 403.

The African race is not like "the Indian race," it considered,[104] although they have similarities: Neither formed a part of the colonial communities, and neither race joined in the "social communities" or "government" enjoyed by whites. But the Court distinguished Black from Indigenous: "although they were uncivilized," the Natives were a sovereign government.[105] Many of them became citizens, despite their subjugation.[106]

The United States entered into treaties with Indigenous governments and sought their alliance in war, the majority claimed—the tribes maintained their own land, which neither the English nor the colonies sought to claim without permission.[107] Indeed they were regarded as a free and independent people, proclaimed the Court; it was like an ocean separated the Native tribes from the expanding American border.[108]

Black men, conversely, were "were considered as a subordinate and inferior class of beings" when the Constitution was written. Indeed, they "had been subjugated by the dominant race," the white race, ever since.[109] And as to the question of free states and slave states, it is "very clear" that since the ratification of the Constitution, "no State can, by any act or law . . . introduce a new member into the political community created by the Constitution."[110]

Citizenship is a question only for the Supreme Court; Missouri and Illinois's definitions of free man are not law, insofar as they are inconsistent

104. *Id.* at 403–05.
105. *Id.* at 403.
106. *Id.* at 404–05 ("It is true that the course of events has brought the Indian tribes . . . under subjection to the white race . . . . [T]hey may, without doubt, like the subjects of any other foreign Government, . . . become citizens of a State, and of the United States . . . .").
107. *Id. But see generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007).
108. A note on language: This Essay uses court documents to retell the Dred Scott saga as a as a narrative. In doing so, the Essay quotes several racist comparisons, ideas, and outright slurs used by U.S. officials. Racist language is deeply disturbing to those who understand its consequence. Racist ideas can carry even without the use of specific words, and cause just as much harm. For example, the *Dred Scott* Court spoke of Indigenous sovereignty in deciding Black inferiority. The Court's references to Indigenous tribes were facially disgusting, but it was especially painful to see the Court frame early U.S.-tribal relations as normal. But therein laid the underlying point: Judicial conduct is a vehicle for ideas, even if the ideas are baseless and untenable. In some cases, racist ideas are codified as positive statements about a race; but in other cases, racist ideas are codified through dictum. Judicial lies institutionalizing a racist ideology. I hope that this Essay's readers are shocked to see how the judiciary has spoken racism into law. More broadly, I hope readers are shocked to see how the judiciary has lied, manipulated, and forced racism into law. Lastly, I hope readers are inspired to continually scrutinize judicial conduct today—microaggressions become macroaggressions when the aggressor is a justice
109. *Sandford*, 60 U.S. at 404–05.
110. *Id.* at 406.

with what the Court says. The Court looks down to its instrument—the Constitution—to ask: Were "African negroes" "intended to be included in the general words used in that memorable instrument"?[111]

E. The Utter Inconsistence of American Antiracism

When the Constitution was written and signed, Black people had, for over one hundred years, "been regarded as beings of an inferior order, and altogether unfit to associate with the white race,"[112] either in society or politics. Black men were "so far inferior[] that they had no rights which the white man was bound to respect."[113] Accordingly, the Black man "was reduced to slavery" for the white man's benefit. "He was bought and sold, and treated as an ordinary article of merchandise and traffic . . . ."[114]

This was not by accident. White supremacy "was at that time fixed and universal in the civilized portion of the white race." African inferiority was "an axiom in morals as well as in politics." This idea was realized "daily and habitually," not just in the United States, but in Europe as well. Indeed, the world gave life to white supremacy perpetually, "without doubting for a moment the correctness of this opinion."[115]

It is true, though, that the U.S. Constitution has words that "would seem to embrace the whole human family."[116] Specifically, the supreme text speaks of human equality—the universal endowment from God upon all people borne out of the Declaration of Independence: life, liberty, and the pursuit of happiness. At the crux of that great promise is government: the central source of U.S. power.

Under the U.S. Constitution, it is promised that all governments "deriv[e] their just powers from the consent of the governed."[117] Does the government's power over Black people require their consent? Were those words written with an intent to bring Black people into the fold of America's new constitutional democracy? Did the Framers intend to grant constitutional benefits to Black people?

There were two options: (1) Yes, when the Framers wrote the Constitution, situated squarely in the middle of a multicentury campaign of

111. *Id.* at 407.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 410.
117. *Id.*

Black inferiority, they meant to grant its protections to Black people; or (2) No, when the Framers wrote the Constitution, situated squarely in the middle of a multicentury campaign of Black inferiority, they did not mean to grant its protections to Black people.

The minds of nine Justices met in the Supreme Court's oaken corridors—each began to glow with the energy of its answer. Nine multicolored candles joined as one, and the strongest hues dominated the tone of the resultant flame. A majority had been reached. The Court opened its eyes and exhaled: In a Supreme voice, it declared the decision of *Dred Scott v. Sandford*.[118]

F. A Sad Song Played on a Legal Instrument

"We think they are not . . . included, and were not intended to be included, under the word 'citizens' in the Constitution . . . ."[119] Dred's heart sinks—he thinks of himself, his wife, his children, and everyone who looks like them. The Court continued. "[W]hether emancipated or not," Black people "remained subject" to white authority after the Missouri Compromise. Black people had no rights and no privileges, even in so-called free states. The only liberties they could have were whatever liberties "those who held the power," and "the Government" might choose to give them.[120]

The Court was both granting parties: It was an institution with power, and the supreme judicial arm of the government. Would it use judicial power to grant liberties to Black people? Of course not. Returning to the question of the Framers' intent, "the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted" had they held principles of Black equality.[121]

The Court was right: The Framers' conduct was racist. They and those like them, for centuries, "excluded" Black people "from civilized Governments of the family of nations." The Framers "spoke and acted" according to the "established doctrines and principles, and in the ordinary language of the day" when they wrote the Constitution and "no one

118. *See also* MCGINTY, *supra* note 19, at 51–56 (describing how on the day the Court issued the *Scott v. Sandford* decision, the Justices took turns reading their opinions aloud).
119. *Sandford*, 60 U.S. at 404.
120. *Id.* at 404–05.
121. *Id.* at 410.

misunderstood them." Black skin had always been an "indelible mark[]" separating Blacks from whites.[122]

So too did "laws long before established" enforce white superiority. The Framers of the U.S. Constitution, like the rest of the Country and Western world, operated on principles of Black inferiority. So it is clear that if the Framers intended the Constitution to provide any protections to Blacks, let alone protections equal to those of whites, it would clearly have been "utterly and fragrantly inconsistent with the principles they asserted."[123]

Indeed in 1854, the state of public affairs, as expressed by the word of law, was racist. One does not even have to discuss the South for evidence of institutionalized racism. Instead, look to Massachusetts: That state took measures for speedy abolition, and yet in 1786 passed a law forbidding "the marriage of any white person with any negro, Indian, or mulatto," punishable by fine and painting onto the marriage "the stain of bastardy."[124]

Massachusetts not only affirmed that law, but gave it *more* power: In 1836, the year Dred and Harriet married, the punishment for violating the same interracial marriage law became imprisonment or hard labor, plus the fine and nullification.[125] If Massachusetts was invalidating marriages and sentencing people to hard labor on the basis of white superiority, then how is its speedy abolition an indication of racial equality?

This hypocrisy is prevalent in every supposedly antiracist state in America. In no state was slavery an issue of fundamental rights—it was an issue of economy. As such, the St. Louis Circuit Court's antiracist streak was no evidence of the fundamentality of racial equality—neither was judicial antiracism anywhere else in the Union. Fundamentality is defined by the Constitution only—and the Constitution says that white supremacy is fundamental. So too do the laws of the states.

As such, it was like Dred Scott never walked into the St. Louis Circuit Court at all. The plea that he filed might as well have been blank. He was not a citizen, and no judicial power flowed to him except to punish him. The Circuit Court was particularly wrong to grant him freedom—such a decision was not theirs to make. The breadth of the question of racial equality in America was all-encompassing. As such, it was a question to be answered

122. *Id.*
123. *Id.*
124. *Id.* at 413, 413–16 (referencing similar laws in Connecticut, New Hampshire, and Rhode Island).
125. *Id.* at 413.

only by the supreme judicial power of judiciary's highest court, not a Circuit Court in St. Louis.

And what of Congress and the Missouri Compromise? It is simple: "[P]owers over person and property," like America's enslaved, "are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them."[126] Congress has the power to write law; Congress, however, has no power to write laws regulating constitutionally-protected interests. Slavery is one such interest. No law is valid where it frees an enslaved person from his master without the master's consent.

Similarly, Congress, like the States, has no power to declare Black men citizens. Any past exercise attempting to advance such antiracist ideologies, including the Missouri Compromise, was an empty gesture. There was no governmental power backing such an action—they are notes on a sheet that cannot be played. Thus, Dred gained no liberty from the conduct of Congress, either.

With one more breath, the Court spoke in seven similar voices. Dred, Harriet, Eliza, and Lizzie Scott stood before the great bench. Nine pens answered questions of freedom, liberty, and equality with binding ink. The wood of the Court's walls began to bleed black, oversaturated with the racist ideologies now given physical form. The finale of the judicial ritual had arrived: Three questions were answered.

People of African descent, whose ancestors are of pure African blood, and were brought into this country and sold as slaves, are not citizens of the United States, nor any individual state therein.

Dred Scott is the lawful property of John Sanford—as such Sanford may lay hands upon Dred, and restrain him, as is consistent with Sanford's property rights.

With respect to the Harriet, Eliza, and Lizzie, who are also the lawful property of John Sanford, he may act in the same manner towards them, and in virtue of the same legal right.

Silently, Dred's brown body became a conduit. Hateful energies, summoned by judicial writings, arced through him and burst outward from Washington, D.C.

Racist ideas gained form. They took root in soldiers, who carried out the idea by kicking doors in and forcing their hands onto brown bodies. Racist ideas commanded judges, who worked across the country to spread their ideologies with written opinions and juries hungry for sacrifice.

126. *Id.* at 450.

By the time the wave dispersed into particles at the untouched Atlantic coast, the Supreme Court's job had been done. Through the act of writing *Dred Scott v. Sandford*, the judicial branch of the U.S. government gave the government's power to white supremacy.

At the apex of government power,[127] the song of judicial racism rang out. Not long after, that racism tore the United States in half.[128]

CONCLUDING THOUGHTS

After the Supreme Court decided their case, the Scotts were eventually freed for good. Recall how Irene Emerson left and married an abolitionist in Massachusetts? He took issue with the fact that his brother-in-law, John Sanford, just won the most prominent proslavery judicial opinion in American history. He moved to have the Scotts freed, and they were.[129] Nonetheless, racism was given so much power in that case that freeing the Scotts would do nothing to prevent the damage: *Dred Scott v. Sandford* arguably caused the Civil War.[130]

The history of judicial racism and antiracism does not end with *Dred Scott*. Judicial history is a history of racism and antiracism, and judicial history continues to this day. As such, scholars now have over two hundred years of judicial conduct to scrutinize. Consider also that Justice Sotomayor has implied the Supreme Court is bending to political whims.[131] One does not have to look too deep into the context of her claim to see its potential truth:

127. *Cf.* MCGINTY, *supra* note 19, at 59 (describing how 1858 Congressional candidates called the Supreme Court "the highest judicial tribunal on earth," appealable nowhere on "this side on Heaven").

128. *See id.* at 62, 63 ("The *Dred Scott* decision by itself did not have a convulsive effect on sectional politics, but it became one of the elements in an explosive compound." (quoting historian Don Fehrenbacher)).

129. *Missouri's Dred Scott Case, 1846–1857*, *supra* note 20 ("Irene Emerson's abolitionist second husband, Dr. Calvin Chaffee, now a Massachusetts congressman, found out his wife owned arguably the most famous slave in America in February 1857, just shortly before the Court's decision."). The Scotts were formally freed by the St. Louis Circuit Court that year. *Id.*

130. *See* Robert Meister, *The Logic and Legacy of* Dred Scott*: Marshall, Taney, and the Sublimation of Republican Thought*, 3 STUD. AM. DEV. 199 (1989).

131. *See, e.g.*, Alex Swoyer, *Justice Sotomayor Blasts Lawmakers, Media for Painting Judges as 'Partisan Creatures'*, WASH. TIMES (Sept. 25, 2019), https://www.washingtontimes.com/news/2019/sep/25/sonia-sotomayor-slams-lawmakers-casting-judges-par [https://perma.cc/HXF4-SFH6].

Within the past decade, the Supreme Court has stripped parts of the Voting Rights Act[132] and upheld partisan gerrymandering.[133]

Over the few months this Essay was under review, the Supreme Court weakened immigration protection for the children of undocumented immigrants, and it granted an emergency stay to pause census collection one month before a Presidential election.[134] The Court just moved—overnight—to block Wisconsin's decision to expand absentee voting in the middle of a global pandemic.[135] It may hear cases on the constitutionality of race-conscious affirmative action.[136] Now, as in the nineteenth century, the Supreme Court remains an institution of government whose conduct defines liberty, equality, and freedom as enforced by the United States. The present and three recent presidential administrations have been scrutinized for dramatically expanding the scope of executive power, possibly influencing the Court to support that expansion. The U.S. House of Representatives, fortunately, has experienced resurgences of progressive ideologies, especially those related to racial equality. Nonetheless, the fact remains that the Supreme Court is one of three sources of government power, none of which have a distinctly antiracist character.

Moving forward, antiracist advocates should be organized in terms of that racist institutional structure. It follows that judicial antiracists must be cognizant of the judicial branch's amenability to antiracism. Further, judicial antiracists should adopt the modern definitions of racism and antiracism so that they can more clearly discern racist and antiracist conduct. A fantastic example is the Create a Respectful and Open World for Natural Hair (CROWN) Act, which advances the antiracist idea that Black peoples' hair is no more or less socially acceptable than the hair of their fairer neighbors.[137]

132. Shelby County v. Holder, 570 U.S. 529 (2013).
133. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).
134. *See* Mark Joseph Stern, *The Post-RBG Supreme Court May Soon Let Trump Sabotage the Census*, SLATE (Oct. 9, 2020. 5:05 PM), https://slate.com/news-and-politics/2020/10/trump-sabotage-census-apportionment-redistricting.html [https://perma.cc/M7PT-HV5X].
135. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020).
136. *See* Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019); s*ee also* Anemona Hartocollis, *The Affirmative Action Battle at Harvard Is Not Over*, N.Y. TIMES (Feb. 18, 2020), https://www.nytimes.com/2020/02/18/us/affirmative-action-harvard.html [https://perma.cc/WG5D-YHVN].
137. *See, e.g.*, *Governor Cuomo Signs S6209A/A7797A to Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles or Textures Associated With Race*, N.Y. GOVERNOR (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-s6209aa7797a-make-clear-civil-rights-laws-ban-discrimination-against-hair [https://perma.cc/83H2-HHHG] ("Specifically the bill amends [two New York statutes] to add new subsections to the

This Act covers not only open and clear racism—hey, no black hair allowed because black hair is unkempt—but also hey, no dreads because dreads are unprofessional. Such antiracist law is forward-looking because it addresses racism as a measure of conduct, rather than just a measure of intent.

Conversely today's federal common law standard for illegal racism revolves around the "narrow purposeful discrimination rule."[138] That rule makes racism judicially cognizable only where a court can see the purpose of the conduct as racist. An example is *Memphis v. Greene*,[139] wherein a court reasoned that no illegal racism existed when a city organized the private sale of a street to prevent Black pedestrians from walking through a white neighborhood.[140] Similarly, the Supreme Court held that racism was no judiciable issue in recent cases of gerrymandering.[141] Majority Democrat neighborhoods had their votes diluted by 10–2 Republican-Democrat district structures; a similar fate was suffered by tens of thousands of Wisconsinites who were told to go to crowded polling sites in a viral pandemic if they wanted to vote.[142] On their surface, issues like these do not portend racial animus, even though their racial effect is a statistical certainty. As such, the judicial system has become a poor vehicle to advance antiracist ideas, a shift from the judicial antiracism of the Civil Rights Revolution.

Accepting that as a possibility, judicial antiracists should expand their arsenal of tools; judicial antiracists should lend their power to social movements, antiracist legislators, and community organizers. All three have proved more reliable than the judiciary for realizing antiracist ideas. On the same merit, judicial antiracists should follow the advice of Malcom X. He

definitions of race, to include 'traits historically associated with race, including but not limited to hair texture and protective hairstyles.'" (citations omitted)).

138. *See* Davis Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMPLE L. REV. 751, 763–64 (2006).

139. *Id.* at 763 (saying *Memphis* "epitomized" the narrow purposeful discrimination rule).

140. City of Memphis v. Greene, 451 U.S. 100, 129 (1981).

141. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019) ("[O]ur country's long and persistent history of racial discrimination in voting . . . would seem to compel" the conclusion that racial and political gerrymandering are separate issues with separate levels of "constitutional scrutiny" (citation omitted)); Shelby County v. Holder, 570 U.S. 529, 555 (2013) (describing the Voting Rights Act as "uncommon," "not otherwise appropriate," and "extraordinary" (citation omitted)); *id.* at 556 (noting "the 'dramatic' progress since 1965," while distancing the majority from the opinion that "current levels of discrimination [are] 'flagrant,' 'widespread,' and 'pervasive'" (citations omitted)); *see also* Vann R. Newkirk II, *How* Shelby County v. Holder *Broke America*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707 [https://perma.cc/7NY5-9KFF].

142. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020).

argued that antiracist ideas are doomed if they seek realization through a U.S. institution.[143] Indeed, the executive, judiciary, and legislature are all designed to prolong and perpetuate the power of the U.S. government. Thus, asking the Supreme Court to advance an antiracist idea is a moot effort if the antiracist idea would not advance the existence of the government. Instead, Brother Malcom argued that antiracist ideas should be brought to "a world body, a world court," which would be "instrumental in obtaining those rights which belong to a human being by dint of his being a member of the human family."[144]

But it follows that if antiracist advocacy via government channels is moot, then traditional civil rights litigation is moot even where it seems to work. I agree with Brother Malcom's suggestion that racism is a human rights issue that should be adjudicated with international law; but the U.S. Constitution applies to my neighbors and I, so I also respect racism as a civil rights issue that is resolved with constitutional law. International law might be advantageous terrain, though, like grassroots organizers, international advocates are not necessarily seeking answers or permission from U.S. institutions. Dred Scott had no other option—the Supreme Court was his Hail Mary. Today, victims of racism and other forms of oppression benefit from a much more connected world. Judicial history does not have to continue the way that it has—we can support innovation, and we can support a new era of judicial antiracism. By accomplishing that goal, we advance human equality.

143. X, *supra* note 1.
144. *Id.*