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ABSTRACT

In his opinion for the majority, Chief Justice Roger B. Taney eliminates Dred Scott the man from the text and divests Scott of a body, thereby transforming him into a sort of incorporeal ghost that signals the traces and tropes of slavery. Subsequent historians, journalists, and politicians have made Scott even more inaccessible by either relying on Taney's text, which erases Scott, or by failing to recover Scott's narrative. Taney's opinion codified "the facts" of the case as official or authoritative despite a lack of reference to their human subject. Later writers relied on this received version despite its obvious gaps. In order to reconstruct Scott—to "recorporealize" him, so to speak—one must turn to the original Missouri court documents, the earliest and most detailed accounts of Scott available. This article considers these documents in conjunction with a particular N.Y. Times article, which seems to confirm that Irene Emerson, whom Scott sued, was not involved with Scott as a co-conspirator. This article also shows how historians, forced to imagine or allegorize Scott's history, treated Scott as a ghost whose incomplete form was synecdochic of slavery itself. Their treatments inadvertently employ literary devices common in Gothic literature—allegory, the fantastic, confusion of the known and unknown—moving Gothicism beyond the bounds of genre and launching it from symbolic expression to actual historiography. The current version of Scott the man "signifies" very little—i.e., has no clear referent—and so Scott remains hauntingly absent, even ghostlike, in American memory.

Disremembered and unaccounted for, she cannot be lost because no one is looking for her, and even if they were, how can they call her if they don't know her name? Although she has claim, she is not claimed.

—from Beloved, Toni Morrison

Slavery is officially dead; but somehow its emaciated ghosts keep roaming our world.

—Christian Moraru

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INTRODUCTION

According to Jack M. Balkin and Sanford Levinson, "We continue to be haunted, even 150 years later, by the linkages among race, status, citizenship and community that Dred Scott described." Like haunting ghosts, the gaps in the history preceding the Dred Scott decision mark where actual history should be. Moreover, like haunting ghosts, these gaps signify something unverifiable (the facts of the case), something threatening (to the national narrative of inclusion and equality), and something that can take on the shape of its container (the text of the opinion or the culture of a community) without actually being seen (the surprising absence of information draws attention to its presence elsewhere). The ghosts of Toni Morrison's fiction negotiate and even constitute the brutal, violent, and disorienting legacies of slavery; the Dred Scott decision is like the character Sethe's house before the (re)corporalization of the ghost—the Black body—of the daughter she murdered: haunted by something we know is there but cannot locate. It is no wonder Alexander Bickel calls the case a "ghastly error," or that Kenneth C. Kaufman calls Dred Scott a "shadowy figure." Likewise, Paul Finkelman refers to the case as "dreadful." Such ghostly terminology signals "a way of maintaining the salience of social analysis as bounded by its social context, as in history, which is anything but dead and over, while avoiding simple reflectionism." Perhaps the most haunting lacunae in the case concerns Scott the man, the body, and the story. Eliminating Scott from the text of the opinion by failing to discuss Scott's narrative (who he was, what happened to him, and why he filed suit), Chief Justice Roger B. Taney divests Scott of a body and transforms him into a sort of ghost whose incorporeal form and missing story signal the traces and tropes of Slavery. The loss of story is also the loss of agency because the contested background of the case points to the probability that Scott, like many narrators of nineteenth-century African-American autobiography, was a "trickster." In literary studies, the term "trickster" refers to a subversive, roguish character who upsets power relations with deception and cunning while feigning stupidity and ignorance.

4. In this decision, the Supreme Court held, among other things, that Congress did not have the power to create citizenship for slaves; that free slaves were not citizens as contemplated by the Federal or State (Missouri) Constitution; that the Missouri Compromise was unconstitutional; and that the right of property in slaves is affirmed in the Federal Constitution. Dred Scott v. Sandford, 60 U.S. 393 (1856). See Part II of this article, infra, for a fuller description.
5. Morrison, supra note 1. Sethe kills her child to save the child from the traumas and evils of Slavery. Beloved the character presumably is the reincarnation of Sethe's murdered daughter. Sethe becomes obsessed with Beloved, who seduces Sethe's lover, Paul D. At the end of the novel, Beloved vanishes, leaving the other characters to deal with their repressed memories of Slavery. Id.
10. According to Sunday Ogbonna Arozie,
So little is known about Scott that Carl Brent Swisher declares, “Scott remains largely a shadow in the history of the famous case which bears his name.” Similarly, B.H. Nelson submits, “After nearly a century of research and debate the problem [of determining what led to Scott’s case] is not yet satisfactorily resolved.” Sadly, these statements, made in 1952, remain true. Some historians have looked no further than Chief Justice Taney’s opinion to find Scott; others have looked to Missouri state and court records, the earliest and perhaps most detailed accounts of Scott available. All historians have failed to “recorporalize” Scott by telling his story; if anything, they have precipitated and reinforced distorted meanings of the case by creating ghosts of Slavery with their omissions. Avery Gordon describes “haunting” and “ghosts” as follows: “If haunting describes how that which appears to be not there is often a seething presence, acting on and often meddling with taken-for-granted realities, the ghost is just the sign (or the empirical evidence if you like) that tells you a haunting is taking place.” In Gordon’s view—which is central to our understanding of Scott—the “postmodern, late-capitalist, postcolonial world represses and projects its ghosts or phantoms in similar intensities, if not entirely in the same forms, as the older world did.”

The aim of this article is, in part, to make sense of the failure to secure Scott’s story and, without resorting to negative (ideological) hermeneutics, to investigate the correlation between the formal conventions of gothic literature and the shoddy, haunting historiography emanating from the Dred Scott decision. Part I introduces the main characters of the Dred Scott narrative. Part II describes the events giving rise to the Supreme Court decision, calling attention to the fact that the Scott family may not have been physically abused. Part III suggests that the case became a site for contending narratives about North-South relations and the Civil War. Part IV examines the case’s disorienting historiography, which created layers of historical untruths that buried the true narrative beyond recognition. This historiography “recorporalized” Scott by making his narrative inaccessible. Part V addresses the possibility that

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It is generally assumed that the character who plays the trickster in African and Afro-American tales assumes his unique and powerful role by virtue of his crossing and violating boundaries. He gives, or he takes away, by trickery or guile. In most Afro-American tales he is a power broker. It is he who has the power to deceive, for either his own benefit or that of others.


13. Gordon, supra note 9, at 8.
14. Id. at 12.
15. Gordon says,

Haunting is a constituent element of modern social life. It is neither premodern superstition nor individual psychosis; it is a generalizable social phenomenon of great import. To study social life one must confront the ghostly aspects of it. This confrontation requires (or produces) a fundamental change in the way we know and make knowledge, in our mode of production.

Id. at 7.
Scott was a trickster who used cunning to subvert White Supremacy. Part VI suggests that Scott's filing in federal court may amount to "tricksterism." Part VII argues that the Missouri court documents fail to clarify what happened to Scott and his family. These Missouri documents reveal that the Supreme Court probably mischaracterized the facts of the case. Part VIII interrogates a *N.Y. Times* article that countermands the common claim that Irene Emerson conspired with Scott to bring suit. Part IX suggests that synthesizing historical information about Scott is difficult if not impossible. Part X theorizes about the erasure of Scott's narrative. This erasure "decorporealized" Scott into a ghostly memory that haunts contemporary America. Like nineteenth-century Gothic literature, which has a "haunting" effect on readers because of ghostly imagery and metaphor, the *Dred Scott* decision has a haunting effect because its erasure of Scott transforms him into a ghostly figure. Scott's haunting is even more disturbing because his story actually happened whereas Gothic literature is fiction. Finally, the Conclusion submits that we should study slavery and its legacies lest we erase other harsh realities before we have had a chance to understand them.

Chief Justice Taney delivered his holding amid an outpouring of gothic literature described by Teresa Goddu not as "gateways to other, distant worlds of fantasy," but as "stories...intimately connected to the culture that produces them."16 Because of its intimate connection to slave-owning culture, Taney's opinion remains, like Gothicism, an eerie aspect of American history. Only by recorporealizing the decision—by combing through and comparing histories of Scott's narrative—may we, like the characters in *Beloved*, confront the embodied spirit of slavery that the case represents. Throughout this article I prefer to mention the integrity of individuals, if at all, only so far as I can deduce from their writings or speeches. I do not presume access to their thoughts or feelings; nor do I mean to quote them selectively. I have tried not to resort to condemnatory righteousness. To that end, I disclaim any access to absolute truth or reality, not because I believe truth and reality do not exist, but because I believe their existence to be out of my reach.

Saying that Scott's personal sufferings are never completely accessible is not the same as saying they should not be accessed. Understanding this man might bring about a wider appreciation not only for the problems shaping his world, but also for the problems shaping ours. By attending directly to Scott, this article breaks from a tradition of scholarship "made without reference to Scott, or to any injury, real or supposed, which might concern him."17 It seeks to reconstruct Scott the man by reconstructing *Dred Scott* the narrative, even if in the end, so much bad precedent has "disfigured" the narrative that we are left with a "shadowy" version, which continues to haunt us. America lives with the consequences of the *Dred Scott* decision; the wounds of Slavery have not gone away. A reconstitution of Scott's narrative, however, will begin the process of recognition, inclusion, and healing.

I. The People

Around 1830, Dr. John Emerson, an army surgeon, purchased Scott when Scott’s former master, Peter Blow, died unexpectedly.\(^1\) John transported his new “property” to Illinois, a free state, and then to the Wisconsin Territory, where Scott met Harriet Robinson, whom he married.\(^2\) When the army transferred John to St. Louis, Missouri, he left Mr. and Mrs. Scott behind and hired them out to various clients. He did so illegally, for the Missouri Compromise forbade Slavery in the territories.

John moved to Fort Jessup, Louisiana, and there married Irene Marie Sanford;\(^3\) he then summoned his slaves, the Scotts, who boated down the Mississippi to meet their master. When John finally returned to St. Louis in 1838, he was a more prominent figure, his belongings now befitting a distinguished gentleman.

The Seminole War tore John from his freshly formed family and forced Irene to attend to John’s property, including his slaves. John returned to St. Louis after a few months, collected Irene and his belongings, and made for Iowa, all but abandoning the Scotts in St. Louis. John died suddenly in 1843, and Irene returned to St. Louis to manage the day-to-day affairs of his estate, although Irene’s brother, John F. A. Sanford, a New Yorker, carried out the legal terms of the will. Meanwhile, Irene rented out the Scotts for three years before Dred Scott tried to purchase his freedom, thus precipitating the initial cause of action.

II. The Case(s)

The case began in Missouri in 1846, the year the Scotts petitioned for freedom in a suit that was dismissed because of Scott’s failure to comply with the judge’s orders.\(^4\) Undeterred, the Scotts brought a second suit against Irene and triumphed; the state trial court held that Dred Scott obtained freedom when John transported him to

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19. For more on slaves gaining freedom through transit in a free state, see Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 150–54 (1981). Also, according to George M. Stroud, “In voluntary sales . . . the wife or husband . . . though expressly retained by the seller, pass by the same conveyance to the purchaser, and may be claimed by him without any additional price.” Stroud’s Slave Laws: A Sketch of the Laws Relating to Slavery in the Several States of the United States of America 83 (Philadelphia, L. Johnson and Co. 1856).

20. In the Supreme Court documents, the name Sanford is misspelled as “Sandford.” This mistake explains the disjuncture between spellings in my article as well as in the articles I cite.

21. See Dred Scott’s Petition to Sue for Freedom, Dred Scott Collection, Washington University in St. Louis, available at http://library.wustl.edu/vlib/dredscott/new_exhibits/ds01.html. This link makes available all existing original documents from the initial trial. At this point, John Emerson is dead and the suit is brought against Irene.
Fort Armstrong. Irene appealed to the Missouri State Supreme Court, which reversed, reasoning that John’s travels in free territory were not voluntary because the military had summoned him there. The Scotts brought a third suit in federal court, this time against Irene’s brother, Sanford, alleging physical abuse against the Scott family, including their children. Whether anyone actually abused the Scott family is debatable.

The First Circuit Court of Missouri ruled against the Scotts, who appealed to the U.S. Supreme Court. Writing for the majority, Chief Justice Taney dismissed the case for lack of jurisdiction, reasoning that Scott was a slave of African descent and therefore not a citizen of Missouri—nor of any place. He reached this conclusion by excluding slaves or any individuals of African descent from being a citizen of the U.S. or a citizen of the states, thereby establishing that any such individual fell outside the protection of the Constitution. Taney maintained that not only was Scott a noncitizen, he was also a nonperson: nothing more than property. Furthermore, Taney held that Scott had not attained freedom by traveling through “free” territories because Congress’ power to regulate (i.e., to declare certain states “free” or “slave”) extended only to territories belonging to the U.S. in 1787; thus, the Missouri Compromise was, in part, unconstitutional. Chief Justice Taney reversed and remanded the case with an order to dismiss for lack of jurisdiction.

III. AFTERMATH

Chief Justice Taney’s opinion unleashed virulent nationalism on both sides of the Mason-Dixon line. American antebellum civilization, already burdened by agonizing social and political conflicts, lost all semblance of sectional unity when the opinion became common knowledge. For decades after, writings on the case mixed
urgent social critique with factual contestation. Because the decision was pivotal for North-South relations, perhaps even the cause of the Civil War—a tall claim, to be sure—it was also a source of justification, with both sides vying over who would control the story and determine what version would be passed down.\textsuperscript{31} For that reason, one cannot fully trust the early histories of the case. Not far enough removed from the conflict, these accounts are overtly political and shamelessly malicious.

Yet later historians have analyzed these accounts and also taken sides. One might classify the projects of these historians as "historicist." In a recent book, Mark A. Graber challenges historicist assumptions about and mythologies of the Dred Scott decision.\textsuperscript{32} Without digressing too much into Graber's somewhat controversial argument, it is sufficient to say that historians have now reached a point in time when they can evaluate the case with more distance and objectivity.\textsuperscript{33} On the other hand, they may be so distant that their evaluations and projects are less reliable.

IV. FILLING IN THE GAPS

Historical treatment of the Dred Scott case is fraught with disparity. On the one hand, over 500 books have been written about the case. On the other hand, the case is mostly absent from law school education and from the most conventional treatments of legal history.\textsuperscript{34} The 500 or more books written about the case mostly delve into the opinion of the U.S. Supreme Court, but to look only to the highest court is

was necessary to dictate slavery policy in the South." Mark A. Graber, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 92 (2006).

\textsuperscript{31} Regarding the Dred Scott decision as a cause of the Civil War, Weinberg says the following:

Although it is the near-universal view that slavery was the cause of the Civil War, I think most historians would also agree that it was slavery in the territories rather than slavery in the South that was the acute issue in the 1850s. The territories problem was at the heart of the increasingly angry sectional dispute; it was the very wellspring of the coming crisis. Why this should have been so is still the subject of disagreement, but it is substantially undisputed that it was this expansion issue, rather than slavery itself, that came to a head in the election of 1860 [won by Abraham Lincoln], and that drew the nation into civil war.

Weinberg, supra note 30, at 98.

\textsuperscript{32} Graber, supra note 30, at 46-76.


\textsuperscript{34} Sanford Levinson criticizes the lack of cases about slavery in the "canon" of Constitutional law; he explains that four of the major constitutional law text books used in law schools are grossly inadequate. He says,

I think it only slightly hyperbolic to say that any students whose knowledge of American constitutional history will be derived from their immersion in any of the first four of these texts will have only the dimmest realization that the United States ever included a system of chattel slavery or, just as importantly, that its implications pervaded every single aspect of constitutional law (and constitutional interpretation)."

Sanford Levinson, Slavery in the Canon of Constitutional Law, in SLAVERY & THE LAW 91 (Paul Finkelman, ed., 2002).
to overlook factual material that brought about the case in the first place.\textsuperscript{35} Thomas B. Russell warns of scholars' tendency to privilege constitutional or national questions about Slavery over local ones. Russell maintains that constitutional law is more abstract than local law and that local law, unlike constitutional law, affected the everyday lives of slaves.\textsuperscript{36} Because one cannot fully understand Chief Justice Taney's opinion without recovering or relearning material at the local level, one must look to the records of the State of Missouri generally and to the Missouri Circuit Court in particular.\textsuperscript{37} One must also remember that the \textit{Dred Scott} case is itself a representation: a series of texts (the factual background created by lower courts) leading to an authoritative text (the Supreme Court decision) that has inspired another series of texts (the 500 or more books). With that in mind, one cannot possibly account for the complex series of interrelated texts in a single article, but instead must grapple with a representative sampling.

Historians who mulled over the Missouri documents have produced histories that are contradictory, incoherent, and inaccurate. Their false claims about Scott and their inability to recover Scott's story have made Scott even more invisible or ghost-like. "Error has been a conspicuous feature of the \textit{Dred Scott} story from the begin-

\textsuperscript{35} David Thomas Konig makes this very point:

Thought deemed lesser in our canon of legal history, and of statistically little significance for a Missouri slave population approaching 115,000 by the time the Scotts lost their final appeal, these more mundane cases reveal dimensions of the antislavery struggle overlooked when research is limited to the examination of a sample of trials or to appellate cases alone. The rules and procedures of the law contained in the full archive of motions and depositions allow us insights not easily gained from a simple of trial case or appellate opinions. They make clear that although—and, equally, because—the law can operate as a closed system of rules, the ways that rules are applied and procedures are chosen reveal deliberate choices about morality, power, communal norms, and ideology.


\textsuperscript{36} Thomas D. Russell, \textit{Slave Auctions on the Courthouse Steps: Court Sales of Slaves in Antebellum South Carolina}, in \textit{SLAVERY & THE LAW} 91 (Paul Finkelman ed., 2002). In a sense, this critique is also a broader one about the Langdellian method of legal education.

Langdell, and the faculty he hired to modernize legal education at Harvard, taught that the resolution of legal questions should be through a logical and apolitical elaboration of abstract legal principles into concrete legal rules. The abstract legal principles that provided the premises of legal reasoning were themselves analytically determinable through an inductive study of appellate court case reports. Langdellian legal science taught not only "that law is a science," but "that all the available materials of that science are contained in printed books." According to this theory, law libraries were to jurists what "laboratories . . . [were] to the chemists and the physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."


\textsuperscript{37} Knowledge is lacking about the case even at the Supreme Court level:

Scholars know relatively little about what the members of the Dred Scott Court thought they were doing in handing down their decision and even less about the particular constraints that shaped the Justices' actions. Without more research into those issues, scholars will have only a partial knowledge of the origins and significance of \textit{Dred Scott} and, consequently, may never develop satisfactory answers for the questions to which the decision is relevant.

ning," explains Don E. Fehrenbacher, who points to the misspelling of the defendant's name in the title and official report of the case, as well as to the "Agreed Statement of Facts" on which counsel based their arguments. Fehrenbacher adds that "[m]istakes are common in most historical writings on the subject," as evidenced by "an influential article published many years ago by the distinguished scholar Edward S. Corwin." In Corwin's article, there are "four factual errors in one paragraph summarizing the background of the case; and a similar summary in a recently published book on the American judicial system contains five such errors." Some might argue, the author of this article included, that these blunders have only exacerbated the ambiguity of an already ambiguous case.

Much of the confusion arises from primary sources: the documents from the Missouri state records and the Missouri Circuit Court. As mentioned, this article compares various treatments of these documents, focusing in particular on some significant commentaries by historians and journalists. These treatments are often at odds with one another and cannot be taken together to form a coherent narrative. All they offer are pieces of a story and a dismembered or ghostlike depiction of Dred Scott.

Writing about lower court activities would seem painless but for the lack of case records at the lower court level. As Walter Ehrlich laments, "[r]eportedly 'lost,' the 'missing' papers contained the key information: the points of law and arguments raised by counsel." But, in a stunning moment of reversal, he proudly announces, "[t]he paper was finally found by this author," referring of course to himself. These uncovered documents satisfy Ehrlich because "the only issue involved in the 'original' Dred Scott case was freedom for the slave and his family." In other words, the remedy in the balance is personal or practical but not ideological or political. Focusing on the issue at stake in the original documents, Ehrlich's intent is to discredit those who claim the case is solely about conspiracy or the politics of Slavery. Despite his landmark achievement, Ehrlich acknowledges that many questions remain: "Why was [the suit] filed when it was filed, and not earlier or later?" "What precipitated it?" "How did an illiterate slave who could not even sign his name know that he had a legal basis for freedom?"

38. Fehrenbacher, supra note 18, at ix.
39. Id.
40. Id.
41. For an extensive treatment of Dred Scott's freedom suit at the trial court level, see Konig, supra note 33. Konig points out that "Between 1806 and 1857 the St. Louis Circuit Court heard more than 280 freedom suits, whose range of human experience reveals the complexity of a uniquely American struggle." Id. at 53.
42. One of my law professors shared a similar experience that she had in Memphis when she helped search cities in the South for records showing resistance to desegregation post-Brown v. Board.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 35.
sue, how could he obtain counsel and finance such a suit?” In the end, Ehrlich admits that most of these questions are unanswerable.

The Supreme Court treats the physical abuse of Scott and his family as the operative fact of the case. The first two sentences of the Court’s opinion announce that “this case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri,” and that “it was an action of trespass *vi et armis*” instituted in the Circuit Court by Scott against Sandford. Scott alleges the use of force in three counts: 1) “that Sandford had assaulted the plaintiff,” 2) “that [Sandford] had assaulted Harriet Scott, his wife,” and 3) “that [Sandford] had assaulted Eliza Scott and Lizzie Scott, his children.” Inasmuch as “assault” is a vague term, referring to any number of possible actions, the opinion clarifies that Sandford, “laid his hands upon said plaintiff; Harriet, Eliza, and Lizzie, and imprisoned them,” doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.” The Court then assumes that Sandford attacked and imprisoned Scott and his family. One may infer that each Supreme Court Justice shared this impression, as their opinions rely unconditionally on this statement of fact.

Historian Elbert William Robinson Ewing disputes the allegations relied on by the Supreme Court. Ewing alleges that, in fact, the trespass action “has misled some authors [historians and journalists] to state that Scott had been whipped,” and that “[n]othing in any record anywhere indicates that Scott or any of his family was ever struck.” In other words, Ewing contradicts the facts that the Supreme Court uncritically accepted. If he is correct and no one beat Scott or his family, then what enabled Scott to bring this cause of action? Put another way, how do we explain Ewing’s contradiction of the Supreme Court’s version of the facts?

Because of bad historicizing, which has harmed the veracity of any received version of the case, answers to these questions are difficult, if not impossible, to come by. Unless a new generation of historians uncovers primary documents that elucidate the initial charges, one cannot know with any certainty whether Scott brought suit on legitimate grounds. “Writers about the *Dred Scott* case,” Ehrlich laments, “long have suggested a variety of motives behind the suit.” He goes on to say that some of these

50. *Id.*
51. *Id.*
52. *Vi et armis* is Latin for the phrase “with force of arms.” George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343, 358 (1925). Actions of trespass *vi et armis* date back to the 13th Century: “The typical trespass action of the late thirteenth century... is a complaint in which the plaintiff alleges that the act complained of was done *vi et armis* and against the king’s peace to the damage of the plaintiff to such an amount—of which he produces suit.” *Id.* at 343. The action *vi et armis* implies a trespass involving the use of force. *Id.* at 345.
54. *Id.* (emphasis added).
55. *Id.* at 398 (emphasis added).
56. ELBERT WILLIAM ROBINSON EWING, LEGAL AND HISTORICAL STATUS OF THE DRED SCOTT DECISION 24 (1908) (emphasis added).
57. EHRLICH, supra note 43, at 33.
suggestions have been in the form of “wild” and “unsubstantiated” accusations.\(^58\)
Although Ewing’s version of the story is not wild, it is problematic. It is worth quoting Ewing at length to avoid misrepresentation:

In July, 1847, in the State circuit court for the county of St. Louis, Missouri, an action was instituted in which it was asked that Scott be adjudged a freeman. In this suit, brought against Emerson’s widow, the administrator, and his surety, it was alleged that Emerson purchased Scott in 1835, and that from about 1836 or 1837 he had been carried by the purchaser “from the State of Missouri to Fort Snelling, under the jurisdiction of the United States and in the Territory formerly known as Louisiana, and there held in slavery in violation of the Missouri Compromise.”

In November, 1847, and while the first action was yet pending, a second suit in the same court and against the same parties was instituted. This is what is known as a trespass action . . . . In this later action it was alleged generally, being left to the trial to give specific grounds, that Scott was “a free person, and that the said defendants had held and still hold him in slavery, and other wrongs to the said plaintiff then and there did against the laws of the State of Missouri.” In April, 1847, this action was tried before a jury who rendered a verdict against Scott.\(^59\)

Ewing subsequently provides a thorough and compelling account of the procedural history of the case. A fair analysis would note that Ewing’s father was a Confederate soldier. This fact alone does not, of course, disqualify Ewing’s history. To dismiss Ewing’s reliability out of hand is rash and judgmental; but, Ewing’s failure to reference primary or secondary sources detracts from his credibility.

Stanley I. Kutler picks up on this negligence and accuses Ewing of having “less regard for scholarly detail” and of providing “a typical turn-of-the-century defense of Southern attitudes which often found it necessary to rationalize antebellum history.”\(^60\) Moreover, Kutler charges Ewing with scholarly laxity: “With no evidence whatsoever, [Ewing] contended that six justices [of the U.S. Supreme Court] believed the plea of abatement properly before them.”\(^61\) Disputing Ewing’s finer points, but not challenging Ewing’s overarching contentions, Kutler suggests that Ewing’s passions have disrupted the fineness of his legal and historical assessments. Kutler is right about Ewing’s imprecision but his indictment of Ewing, however noteworthy, is not dispositive, for Ewing’s account is the first landmark recording of the case and provides an intriguing counter-narrative to the one passed down in many journalistic texts. From Ewing’s point of view, the legacies of the case, “found in one form or another in histories and encyclopedias down to the latest, are without foundation.”

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58. Id.
59. Ewing, supra note 56, at 24-25. Ewing dedicates his book Northern Rebellion and Southern Secession to his father, a Confederate soldier: “To the Memory of Father, From Sumter to Appomattox a brave Confederate officer; until death a citizen of unblemished life, and ever devotedly loyal to the imperishable principles of the American Government.”
60. STANLEY I. KUTLER, THE DRED SCOTT DECISION 188 (1967).
61. Id.
“the decision of each question was valid and binding law,” and “the repudiation became the most pronounced nullification, more dangerous and more far-reaching than anything of the kind ever found in the South, leading to conditions destructive of domestic peace, personal security and happiness in the South.”

Vincent Hopkins identifies the correct dates of the initial filings. He identifies April 6, 1846, as the date of Scott’s petitioning Judge Krum of the St. Louis Circuit Court “for permission to bring suit for his freedom on the grounds of his residence in Illinois and in the Minnesota Territory.” The language of the original petition is as follows:

To the Hon. John M. Krum, Judge of the St. Louis Circuit Court. Dred Scott, a man of color, respectfully states to your honor, that he is claimed as a slave by one Irene Emerson, of the County of St. Louis, State of Missouri, widow of the late Dr. John Emerson, who at the time of his death was a surgeon in the United States army. That the said Dr. John Emerson purchased your petitioner in the city of St. Louis, about nine years ago, he then being a slave, from one Peter Blow, now deceased, and took petitioner with him to Rock Island in the State of Illinois, and then kept petitioner to labor and service, in attendance upon said Emerson, for about two years and six months, he the said Emerson being attached to the United States troops there stationed as surgeon. That after remaining at the place last named for about the period aforesaid, said Emerson was removed from the garrison at Rock Island aforesaid, to Fort Snelling on the St. Peters river in the territory of Iowa, and took petitioner with him, at which latter place the petitioner continued to remain in attendance upon Dr. John Emerson doing labor and service, for a period of about five years. That after the lapse of the period last named, said Emerson was ordered to Florida, and proceeding there left petitioner at Jefferson Barracks in the County of Dr. Louis aforesaid in charge of one Capt. Bainbridge, to whom said Emerson hired Petitioner—that said Emerson is now dead, and his widow the said Irene claims petitioner as a slave, and as his owner, but believing that under this state of fact, that he is entitled to his freedom, he prays your honor to allow him to sue said Irene Emerson in said Court, in order to establish his right to freedom + he will pray be.

This original petition not only confirms the date cited by Hopkins but also reveals that Ewing obscures chronology. Ewing treats the July 1847 action as the first action when, in reality, it was the second. In fact, the first action was the November action occurring in 1846, not November 1847. Moreover, Scott initiated the second suit (against Sanford) on July 1, 1847, and dropped it on July 31, 1847, because it alleged

63. For the record, Kurler claims that Hopkins’s book “offers the most complete background account of the case.” Kurler, supra note 60, at 184.
64. Hopkins, supra note 18, at 10-11.
65. Dred Scott’s Petition for Leave to Sue for Freedom, Dred Scott Collection, Washington University in St. Louis, available at http://library.wustl.edu/vlib/dredscott/new_exhibits/ds01.html. This link makes available all existing original documents from the initial trial.
66. Hopkins, supra note 18, at 10-11.
the same abuse as the still-pending first circuit case.⁶⁷ This is not to impeach Ewing’s credibility but to demonstrate that the details of the initial Missouri proceedings are hazy, especially because most of what we know about them comes from hastily composed court records.

At any rate, Kutler may be right in distrusting Ewing, who has not accurately conveyed the basic beginnings of the case. Yet one cannot ignore the possibly valid historical claims that Ewing makes. One cannot dismiss Ewing wholesale, for he could be right that Scott was not actually beaten—at least not beaten in the way Scott alleges in his complaint.⁶⁸ The assertion that Scott was not beaten does not explicitly shed light on Scott the man, but it does allow one to draw inferences about him. If Scott was not beaten, he must have been quite brave to risk his safety, indeed his life, by filing suit. Perhaps he actually was somewhat of a trickster. After all, his entire court case and hence his entire freedom may have hinged upon physical abuse that reportedly never occurred. A trickster reading would endow Scott with at least some modicum of agency, but it also risks playing into nineteenth-century White constructions of slaves as devious, unruly, or lawless.⁶⁹ As with all theories involving race in the nineteenth century (if not today), the issues raised by this reading are complicated and historically fraught. But the possibility of Dred Scott as a trickster begs further explanation, especially as it implicates both negative and positive indications of trickery.

V. DRED SCOTT, THE TRICKSTER?

In the 1840s, slaves rarely sued masters for freedom because they often were not aware of their right to sue, and when they were, they often did not want to assert that right for fear of punishment. It was not expected that courts would aid or vindicate slaves.⁷⁰ Most of all, slaves feared that their masters would sell them further South after trial.⁷¹ Those who attained freedom through judicial processes were treated harshly, more so than those who remained slaves, partly because of community backlash and partly because they no longer had the “protection” of a master.⁷² Such

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⁶⁷. New Second Suit Filed Against Sanford, Emerson, and Russell, supra note 24.

⁶⁸. Like Scott, the plaintiff in Ralph, a man of color v. Coleman Duncan, 3 Mo. 194 (1833), also a Missouri case, filed suit for freedom with an action vi et armis. This action, like Scott’s, alleged physical abuse. It is conceivable that Scott’s action—in phrasology, structure, and allegations—mimicked Ralph’s.

⁶⁹. George Fredrickson writes that, according to stereotypes and commonplace race theory of the time, “the Negro was by nature a savage brute. Under slavery, however, he was ‘domesticated’ or, to a limited degree, ‘civilized.’ Hence docility was not so much his natural character as an artificial creation of slavery.” GEORGE FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 53-54 (1987). The crux of this racist theory is that unruly or savage slaves must submit to the guiding and civilizing hands of their masters. The stereotype of the slave-in-need-of-control stands in contradistinction to that of the “contented” or “happy” slave. For further analysis of slave stereotypes, see generally ROSE L. H. FINKENSTAEDT, FACE TO FACE (1994).


⁷¹. Id.

⁷². Id.
deterrents made suits for freedom unlikely; slaves generally sued only if unthreatened by the possibility of being sold away from their families.\textsuperscript{73}

Scott was therefore extraordinary in his willingness to sue his master, Irene Sanford. He was not only willing to sue his master, but possibly willing to sue upon fabricated incidents. Assuming the latter possibility, one could argue that Scott either realized he needed standing in order to bring suit (and thus needed to charge Emerson's brother, a New Yorker, with physical abuse), or he was told that he needed standing by abolitionist-leaning lawyers. Even if antislavery lawyers helped Scott, it would not diminish Scott's clever role in bringing suit: Scott would have had to "perform the part" regardless. Historians have been "less willing to credit Scott himself with the idea [to maintain a lawsuit]" and have been "swayed by the common depiction of Scott in history books as a 'stupid' and 'shiftless' Black slave and therefore incapable of sufficient initiative to seek his own freedom in the courts."\textsuperscript{74} These historians' views contrast wildly with the view of Scott as clever or shifty.

The "trickster" protagonist, who dupes and performs to negotiate the parameters and boundaries of racist society, appears so frequently in American literature—and more specifically in the nineteenth century African-American corpus\textsuperscript{75}—that a representative sampling is not practical here. Laws policing Slavery were equally pervasive and forced slaves to resort to deceit and subversion; laws were predicated on the assumption that Blacks were unruly as a race. The laws standardized slave life (marriage, literacy, property, religious conversion) and thereby enforced racial identity. A brief look at either William Goodell's \textit{The American Slave Code in Theory and Practice} or George M. Stroud's \textit{Sketch of the Laws Regulating Slavery in the Several States of the United States of America} reveals how both federal and state law codified and condoned racism.\textsuperscript{76}

\textit{Narrative of the Life of Henry Box Brown}, an autobiography that ends with a reprinting of various slave laws, relates the ultimate trickster ploy: Brown loads himself into a box and mails himself north to freedom.\textsuperscript{77} Brown's act seems shocking, but it "was not all that singular in either its method or its daring," and indeed Brown's "full story is representative of many lives lived in enslavement."\textsuperscript{78} Equally as telling is the autobiography \textit{Running a Thousand Miles for Freedom}, or the Escape of William and Ellen Craft from Slavery, which recounts the journey of a role-reversed,

\textsuperscript{73} Id. at 408.

\textsuperscript{74} \textit{Kaufman, supra note 7}, at 137.

\textsuperscript{75} The trickster is also prevalent in Native American literature as well as in literature by authors whose identity, whether ethnic, sexual, or religious, is in some way marginalized by the dominant culture. \textit{See generally Susann Feldmann, \textit{The Storytelling Stone: Traditional Native American Myths and Tales} (1965); Paul Radin, \textit{The Trickster: A Study in American Indian Mythology} (1988); Trickster and Ambivalence: the Dance of Differentiation} (C.W. Spinks ed., Arwood 2001).

\textsuperscript{76} \textit{William Goodell, \textit{The American Slave Code in Theory and Practice} (1853); George M. Stroud, \textit{Sketch of the Laws Regulating Slavery in the Several States of the United States of America} (1827)}.


cross-dressing couple who escapes Georgia and finds freedom in Boston.\textsuperscript{79} Because of her whitish skin color, Ellen Craft performs the role of master, disguised as an ailing old man cared for by William Craft, who, ironically, performs the role of slave. This strategy of "passing" is vital to the Craft's pursuit of freedom.\textsuperscript{80} The trickster tales of Brown and the Crafts illustrate circumventions of the Fugitive Slave Act of 1850. However, most trickster tales are less "grand"—they involve the evasion of state and local laws, not federal statutes. All of this is to say that the possibility that Scott's lawsuit was contingent on trickery should not seem extraordinary because trickery was a common source of slave agency and resistance.\textsuperscript{81}

VI. JUGGLING JURISDICTION

Just as disputes over Scott's physical abuse, including whether, why, and how it occurred, remain unresolved, so do disputes over jurisdiction remain problematic, especially for their failure to "embody" Scott and to make sense of Sanford's involvement in the suit. The most worrying failures have to do with diversity jurisdiction\textsuperscript{82} on which Scott based his claim\textsuperscript{83} (perhaps wrongly). Hopkins' descriptions of Scott attend mostly to Scott's actions and not to his mental or physical attributes. Writing

\begin{quote}
To get the case into the Federal courts, Scott's lawyers relied on diversity of citizenship. They affirmed that Scott was a citizen of Missouri. The whole matter in controversy up to this point had been the freedom of Scott and his family. If they were not free, it was idle to discuss their citizenship. The plaintiff's lawyers bypassed this vital question. On the other hand, the defendant's lawyers did not plead the Scotts' servitude but the alleged fact that Scott was "a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves."
\end{quote}

\begin{quote}
HOPKINS, supra note 18, at 24. Moreover, according to Fehrenbacher, Roswell Field made the decision to file on diversity grounds: "Field therefore recommended a suit in federal court under the diverse-citizenship clause and agreed to serve as counsel." FEHRENBACKER, supra note 18, at 270-71. Fehrenbacher suggests why Scott did not simply appeal the Missouri Supreme Court decision to the U.S. Supreme Court because of the Supreme Court's recent holding in \textit{Strader v. Graham}:
\end{quote}

By all logic, the next move on behalf of Dred Scott should have been an appeal directly to the United States Supreme Court, as provided for in Section 25 of the Judiciary Act of 1879. The failure to take such action was one of those decisive choices that determine the course of subsequent events. Perhaps the change of counsel made the difference. That is, if Field and Hall had continued in charge of the case, they might possibly have elected to proceed with an appeal. But the paramount reason for not appealing may have been the expectation that the Supreme Court, with \textit{Strader v. Graham} in mind, would refuse to accept jurisdiction. To the extent that the Chief Justice spoke for the Court, this fear was well grounded.
in the passive voice, Hopkins states that at the same time Scott filed his petition, "similar papers were filed and similar proceedings took place in the interest of Harriet Scott."\textsuperscript{84} Hopkins' use of passive voice suggests that he does not know who filed the papers. Hopkins does indicate, however, that "Dred's attorney, Francis B. Murdoch, executed a bond for the costs," and that the court clerk, John Ruland, issued a summons, "which was served on Mrs. Emerson the next day, April 7, by Deputy Sheriff Henry Belt."\textsuperscript{85} Hopkins explains that George W. Goode, "a bit of a fox-hunting country squire of decided pro-slavery beliefs," appeared in circuit court shortly after John Ruland served Irene.\textsuperscript{86} Goode moved to dismiss the suit; Judge Krum denied the motion. Missouri court documents corroborate Hopkins' claims.\textsuperscript{87}

Ehrlich evaluates this initial petition with even more detail than Hopkins, arguing that the \textit{Dred Scott} case "originated... for one reason and one reason only—to obtain freedom for the slave and his family."\textsuperscript{88} Ehrlich is responding to a lawyer named Frederick Taylor, who in 1907 suggested that the \textit{Dred Scott} case was ultimately about money.\textsuperscript{89} "It is now quite clear that the case originated only to obtain freedom for the Scotts and nothing more," writes Ehrlich, adding, "If money had been the goal, the charge could have been different and the amount sought much greater, under a different statute."\textsuperscript{90}

The "untrustworthy" Ewing (recall Hopkins' criticisms) would probably agree the case was about freedom, not money. "If there had ever been hope of recovering damages against Emerson's estate," he muses, "in confirmation of which the evidence is entirely lacking, sometimes given as the early motive for the institution of the suit, this hope was abandoned in the interest of the desire entertained by Northern leaders"

\textit{Id.} at 268. Fehrenbacher concludes, in short, that appealing the Missouri decision "would have been useless." \textit{Id.} Scott certainly could have appealed the Missouri decision: "Dred Scott claimed his freedom by virtue of an operative federal law, and the claim had been denied by the Missouri court. These circumstances plainly qualified his case for appeal under Section 25 of the Judiciary Act of 1789." \textit{Id.} at 269. But Scott or his attorneys probably worried that "an appeal would be dismissed for lack of jurisdiction." \textit{Id.} He or they therefore filed under diversity jurisdiction.

\textsuperscript{84} HOPKINS, supra note 18, at 11. Lea Vandervelde and Sandhya Subramanian attempt their own sort of "recorporalization" project for Harriet Scott in their article \textit{Mrs. Dred Scott}, 106 YALE L.J. 1033 (1997).

\textsuperscript{85} HOPKINS, supra note 18, at 11.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} See Notice of Mot. to Dismiss, filed April 9, 1846, by George W. Goode, Emerson's attorney; served upon Dred Scott, April 8, 1846, Dred Scott Collection, Washington University in St. Louis, \textit{available at http://library.wustl.edu/elib/dredscott/transcripts/scott_07.pdf}.

\textsuperscript{88} EHRLICH, supra note 43, at 33.

\textsuperscript{89} Writing in 1933, Richard R. Stenberg also claims,

The case of Dred Scott, decided finally on March 6, 1857, only to become an apple of discord among the politicians, began in State Circuit Court in St. Louis County, Missouri, in July, 1847. Suit was instituted to obtain the freedom of Scott on the ground of his sojourn in the free territory of Illinois and Minnesota Territory—a suit begun for pecuniary and not political reasons." Richard R. Stenberg, \textit{Some Political Aspects of the Dred Scott Case}, 19 MISS. VALLEY HIST. REV. 571, 571 (1933) (emphasis added).

Stenberg adds, "It has been recognized that the case first assumed a political aspect at this stage, but almost nothing has been said in explanation." \textit{Id.}

\textsuperscript{90} EHRLICH, supra note 43, at 34.
to obtain some advantage against the South and the Democrats."91 Ewing would go even further than Ehrlich by accusing Scott of conspiracy.

For Ewing, Scott’s claims of diversity jurisdiction were “pure fiction” because Sanford was the brother of John Emerson’s widow and because “all parties connived for the purpose of reaching the [federal] court.”92 As Irene Emerson and Scott were both citizens of Missouri, Scott could not sue her in federal court. The parties were not “diverse”—not citizens of different states—as required for federal jurisdiction. Nonetheless, John Sanford was a citizen of New York, not Missouri, and hence Scott could sue him in federal court. That Sanford would have assaulted Scott seems too coincidental and convenient for Ewing, who calls the case a “political probe used by wily Northerners, aggressive free-soilers and Republicans,” and who accuses Scott, Sanford, and their lawyers of collusion.93 Ewing is frank in his disgust for what he thinks is a ploy: “The claim that Scott had been by Sanford heavily damaged, set up in the declaration, was, therefore, no more than a blind to hide the real purpose of the politicians.”94 Few references or citations accompany Ewing’s blanket indictments of politicians—none of whom are mentioned by name. What is more, Ewing’s agitated tone undermines his already dubious credibility. Ewing is precisely the kind of writer to whom Ehrlich, the sober non-conspiratorialist, rejoins.

Notwithstanding, other historians have echoed Ewing’s cries of conspiracy. Robert B. Shaw questions the origin of the case and lends critical substance to Ewing’s claim that the case is, at heart, a sham. Shaw calls the Dred Scott affair “a phony case, the freedom of Dred Scott, his wife Harriet and their two children, not actually being at stake.”95 All the same, Shaw, like Ewing, demonstrates his fair share of misunderstanding. He claims, for instance, that Scott belonged to John Emerson at the time litigation began, but this claim is unfounded because Scott filed suit after John’s death, when he belonged to Irene.96 Shaw is right to point out the sketchy details of Scott’s “transfer” from Irene to her brother, John Sanford: “After [Emerson’s] death in 1843 his widow remarried Dr. C. C. Chaffee, a prominent Massachusetts abolitionist. She also ‘sold’ Scott and his family to her brother and executor of her first husband’s estate, in order to bring the issue into the federal courts under the diversity clause of the Constitution.”97 The quotation marks used to set off the word “sold” may signal an ironic meaning and indeed, it would be ironic for Irene to sell Scott into further slavery the moment she married an abolitionist. All of this information leads Shaw to conclude, “Notwithstanding the outcome of the case Scott was already ‘in good hands,’ and he was not more than a passive figure in this famous case, carried on in his name.”98 In other words, Shaw seems to believe that Scott was

91. Ewing, supra note 56, at 27.
92. Id.
93. Id.
94. Id.
96. Shaw also claims that this case has an “uncomplicated background,” but as this article demonstrates, the background is extremely complicated. Id.
97. Id.
98. Id.
little more than a pawn for the movers and shakers, who viewed him as an opportunity to politick.

With short, matter-of-fact syntax, Ehrlich employs just three sentences to describe the events of 1846: "In March 1846 Dred and Harriet Scott were in the service of Mrs. Emerson's brother-in-law Captain Henry Bainbridge. That was when Mrs. Emerson hired them out to Samuel Russell in St. Louis. Then one month later Dred Scott and his wife Harriet sued for their freedom." The end of that final sentence marks the end of the first chapter of Ehrlich's book *They Have No Rights*. Most likely, then, Ehrlich intends the rhythm and cadence of these lines, hurried as they are by lack of punctuation within sentences, to evoke feelings of mystery and suspense. This technique calls attention to the absence of historical information. The astute reader is left wondering what happened during the month Scott worked for Russell. Did Emerson's alleged beating and imprisoning occur before or after Russell assumed responsibility for the Scotts? Primary sources, such as court documents, fail to give us the answer, perhaps because some have gone missing or else have eluded discovery. Incidentally, they also fail to recreate the drama or theater of the dispute, droning on in dry, documentary-style prose rather than in eyewitness ferment.

VII. THE INITIAL COURT FILINGS

One might expect Scott's initial court filings to offer meaningful insights into Scott the man, but they are just as misleading—if not more misleading—than the varying accounts of historians. Scott's Summons in False Imprisonment, for example, filed in the Circuit Court of St. Louis in April 1846 (the same month Scott filed his Petition for Leave to Sue for Freedom), charges Irene Emerson with assault, the same charge against John Sanford in federal court:

Dred Scott, a man of color, complains of Irene Emerson of a plea for that the said defendant . . . made an assault upon the said plaintiff . . . and then and there beat, bruised and ill treated him, the said plaintiff and then and there imprisoned him the said plaintiff, and kept and detained him in prison there, without any reasonable or probably cause whatsoever, for a long time to wit, for the space of twelve hours, there next following, contrary to the laws of the said state, and the will of said plaintiff.

This summons raises a troubling question: could both Irene and Sanford have assaulted Scott and his family? If so, and if it were the same incident, Scott probably would have sued both Irene and Sanford simultaneously. If only Emerson assaulted

100. FREDERICK TREVOR HILL, DECISIVE BATTLES OF THE LAW: NARRATIVE STUDIES OF EIGHT LEGAL CONTESTS AFFECTING THE HISTORY OF THE UNITED STATES BETWEEN THE YEARS 1800 AND 1886 (Gardner Books 2007) (1907), makes this point. A century later, Kaufman repeats Hill's point, saying, "The court reports do not tell us whether a witness became angered during his testimony or the plaintiff broke down in tears when an unfavorable verdict was read, and historians quite understandably are reluctant to fill in these unknown blank spaces." KAUFMAN, supra note 7, at 3.
Scott, then Scott's later suit against Sanford might be, as Ewing suggests, bogus. And if only Sanford assaulted Scott, the suit brought against Emerson makes little sense. Why sue the sister of the man who assaulted you and not the man himself? Regardless, the same accusation, charged against two different people living some 1,300 miles apart, in two different social and cultural environments, is striking if not peculiar, especially in light of Irene's marriage to a Northern abolitionist.

Dred Scott's attorney at the Supreme Court, Montgomery Blair, who would later serve in the cabinet of Abraham Lincoln, offers another version in his Supreme Court brief No. 137:

Dred Scott, of St. Louis, in the State of Missouri, and a citizen of the State of Missouri, complains of John F. A. Sanford, of the city of New York, and a citizen of the State of New York, in a plea of trespass, for that the defendant heretofore, to wit: on the 1st day of January, A.D. 1853, at St. Louis, in the county of St. Louis, and State of Missouri, with force and arms assaulted the plaintiff, and without law or right held him as a slave, and imprisoned him for the space of six hours and more, and then and there did threaten to beat the plaintiff, and to hold him imprisoned and restrained of his liberty, so that by means of such threats the plaintiff was put in fear and could not attend to his business, and thereby lost great gains and profits which he might have made, and otherwise would have made in the prosecution of his business...

And also for that the defendant heretofore, on the 1st day of January, A.D. 1853, with force and arms, at St. Louis aforesaid, an assault did make on Harriet Scott, then and still the wife of the plaintiff, and then and there did imprison said Harriet, and hold her as a slave, without law or right, for the space of six hours, and then and there did threaten to beat said Harriet and hold her as a slave, so that by means of the premises said Harriet was put in great fear and pain, and could not and did not attend to the plaintiff's business, and the plaintiff lost and was deprived of the society, comfort and assistance of his said wife...

Blair spells out similar charges on behalf of Eliza and Lizzy, the Scott's daughters. His description attributes all the violence to Sanford, not Emerson. If Blair is correct, Scott either lied about the violence that Emerson committed and that he sued upon in circuit court, or he told the truth about Emerson's violence but chose to maintain a suit against Sanford instead. Blair's document, however interesting, cannot be taken at face value because any text that Blair prepared would present the "facts" of the case in the light most favorable to his client—Scott—and therefore would not mention any discrepancies as to who abused whom, when, and where.

Nevertheless, the facts of Scott's case had become highly mediated by the time they reached Blair's hands, at which point the case had already become a national sensation. Kaufman points out that before the case turned into "an event leading up to the Civil War, before it became a landmark Supreme Court decision, and before it

102. Blair took on Scott's case for free.
103. Declaration in the Circuit Court of the United States for the District of Missouri at 3-4, Scott v. Sanford (1854). This allegation is similar to a loss of consortium claim making Dred the only plaintiff.
became another example of racial injustice, it was first and foremost a common legal action, not unlike hundreds of similar actions brought before the court in antebellum times.\(^{104}\) Countless stacks of paperwork must have changed hands from lawyer to lawyer, clerk to clerk, as the case progressed and evolved from its simple beginnings to national and even international prominence.

VIII. THE NEW YORK TIMES ARTICLE

One of the most revealing versions of Dred Scott’s story comes from an 1895 New York Times article that depicts Irene Emerson, now the remarried Irene Chaffee, more favorably than most historical accounts: as a sad, nearly blind old New Yorker whose role in the case was grossly misunderstood, and who, at this stage in her life, could hardly speak of the case that more or less traumatized her.\(^{105}\) Before interrogating this sympathetic depiction, I should note that Irene’s attitudes reflected consensus views about race in America at the turn of the century and that demonizing her for sharing widespread American beliefs accomplishes little in the way of reconciliation. Nevertheless, her white supremacist should not be downplayed, especially as it contributed to institutional racism that persists in American culture.

This New York Times article is more than another contending account of the case. It begins with some basic historical background, describing how Irene lived with her father in St. Louis after John Emerson’s death, and purports to tell the story—the “true” story—of Irene’s relationship with Scott. This “true” story begins with the death of Irene’s father five years after John’s death, at which point Irene moved to New York to live with her sister, Mrs. Barnes. Irene married Chaffee, the abolitionist, in 1850, the year that Scott filed his second appeal to the Missouri Supreme Court. Irene resided with Chaffee in New York for the remainder of her life.

Published on December 22, 1895, the New York Times article offers a few significant perceptions of Emerson, Scott, and racist public opinion generally (insofar as the opinions of The New York Times represented mainstream thought). “Although not, strictly speaking, an abolitionist, [Irene’s] sympathies were largely with the slaves in their efforts to be free.”\(^{106}\) The article also declares that Irene’s “fight” against Scott “was really caused by an entirely different reason than a wish to deprive him of his freedom” and, moreover, that it “put her in an unfortunate position especially as her second husband, Dr. Chaffee, was at the time of the final decision ... a Republican member of Congress.”\(^{107}\) For Chaffee, this suit was certainly embarrassing because “the fact that his wife was owner of the slave attracted unfavorable notice.”\(^{108}\) The claim that the case “was really caused by an entirely different reason than a wish to deprive [Scott] of his freedom” suggests that ulterior motives may have

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104. KAUFMAN, supra note 7, at 2.
106. Id.
107. Id.
108. Id.
prompted Emerson's behavior in the case, but the article fails to state what those motives were. They were not magnanimous because the author describes the ordeal as Emerson's "fight against Dred Scott," not her "fight for Scott." This dictio\n\n
n is telling. "Fight" implies physical violence and not just legal disputation. It also lends itself to multiple readings. One may read the "fight" against Scott—not intended to deprive Scott of his freedom—as the physical fight (the beating and imprisoning) that brought about the cause of action, or as the legal proceedings brought about by the cause of action.

Purporting to tell Irene's side of the story, the article does little to restore her good name. It actually solidifies her legacy as racist as it directly attends to the features of Scott's body: "Dred Scott, as Mrs. Chaffee [Irene] remembers him, was a small and rather insignificant looking darky of middle age at the time of the trial. . . . [He was] able to do the odds and ends of work which were expected of every negro. For the rest, he was apparently just what is known by the expression 'an ordinary nigger,'" a term left undefined. Having ridiculed Scott's physical traits, the author takes on Scott's character traits: "He was shiftless and careless to the last degree, and in addition he was fond of drink and had a passion for gambling, the last being one of his most marked characteristics. It was his love of gaming, in fact, which indirectly led to his purchase by Dr. Emerson." Here the article seems to imply that Scott is to blame for his own enslavement, essentially that if he had not loved gaming and embraced his vices, he never would have found himself owned by another person. The article further states that John purchased Scott out of sympathy, having chanced upon the young man begging "so piteously" that the doctor "finally consented" to buying him.

In addition to deriding Scott's person, the article explains why Sanford was named the defendant instead of Emerson—not because he physically abused Scott, but because he was the executor of John's estate: "John F. A. Sanford, Mrs. Chaffee's brother, was the executor of the estate, and it was in this capacity that he acted as defendant in Scott's suit, and not, as is generally stated in the histories, as Scott's owner." One wonders how "the histories" became so distorted quickly after the courts at all levels handed down their decisions. Notwithstanding, this article suggests that Scott lied in his federal court claim and that, therefore, the Dred Scott case and the notorious opinion by Chief Justice Taney never should have been. This interpretation is in keeping with Ewing's and Shaw's interpretations, except this article implies that Scott altogether lied about Irene's assault, placing her in New York at the time Scott lived and worked in St. Louis:

109. Id.
110. Id.
111. The Oxford American Dictionary defines "fight" as a verb meaning "to take part in a violent struggle involving the exchange of physical blows or the use of weapons." OXFORD AMERICAN DICTIONARY 629 (2001).
112. Famous Dred Scott, supra note 105.
113. Id.
114. Id.
115. Id.
[Mrs.] Chaffee, determining, on the death of her father, to go East to live with her sister, and considering that it would be impossible to bring the slaves with her into Massachusetts, told Scott that the only thing she asked of him was that he take care of his wife and family well. Scott supported himself by odd jobs around the city, and it was due to one of his employers that his suit was brought. This man was a young lawyer, around whose office Scott did some work, and who, on hearing the history of Scott's life, thought he saw a chance to make a paying client out of him. The suit for Scott's freedom was accordingly brought in 1848, based on some technicality, but really to secure Scott's freedom on the plea that when he had gone north of the Missouri line he had become free, and to secure pay for his services since that time.\(^{116}\)

Not only did Irene not beat Scott, according to this account, but also she wished him the best and trusted him as one would trust a free (White) man. Furthermore, the article attributes Scott's very freedom to the opportunism of one lawyer, who capitalized on an unspecified technicality—physical abuse—to bring suit. If this account is accurate, neither Sanford nor Emerson abused Scott. Instead, Scott, perhaps with the help of his lawyer, invented a story and thereby craftily negotiated the legal and social barriers that stood between him and "freedom."\(^{117}\)

The article clarifies that Irene did not drive the suit out of the goodness of her heart or with the intention of conspiracy; indeed, it casts Irene and Scott as adversaries, not collaborators. It also lionizes Irene as a kind woman who would have freed Scott but for Scott's "selfish" demand for money to cover his legal expenses. Despite this demand, the article seems to say that Irene was more than happy to settle with Scott were it not for "a peculiar occurrence, which happened to take place just before the suit was brought."\(^{118}\) The peculiar occurrence involved the escape of all slaves belonging to John Sanford's in-laws, the Chouteaus.\(^{119}\) Apparently, seventeen slaves belonging to the Chouteaus escaped to Illinois, a free state, in one night, and then fled to Canada.\(^{120}\)

The article assumes the privileged point of view that these slaves had some nerve to affront their masters in this manner, and their "insolence" justified Sanford's "fight" against Scott. "The [Chouteau] family was so angry," the author proclaims, "that its members persuaded Sandford to fight out the Scott case till the last."\(^{121}\) The implication is that disobedient slaves drove Sanford to do something he would not have done normally—and that Scott was equally at fault because he, like the runaways,

\(^{116}\) Id.

\(^{117}\) Life for Blacks in free states was far from free. As a case-in-point, Frederick Douglass wrote the following about his experience after reaching free territory: "Free and joyous, however, as I was, joy was not the only sensation I experienced. It was like the quick blaze, beautiful at the first, but which subsiding, leaves the building charred and desolate. I was soon taught that I was still in an enemy's land." FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 248 (Penguin Books 2003) (1855). Moreover, after Douglass "was first induced to write out the leading facts connected with [his] experience with slavery," he claimed that he "had reason to believe that an effort would be made to recapture me." Id. at 267.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.
did not know his proper place in society. "Accordingly," the author persists, "Sandford took up the matter on his own account, in a measure, and carried it on, Mrs. Chaffee not knowing much about it, and, indeed, supposing it all settled at the time when it first began to attract attention by its appeal to the United States Supreme Court." This sentence excuses Irene, who was, like all "proper" women, ignorant of the legal action, which belonged in (and to) the world of men. She could not, in other words, be morally blameworthy for events she knew nothing about.

The journalist absolves Irene by shifting responsibility of the case to John Sanford, whom the journalist also absolved. The only culpable characters left are the "ungrateful" Scott and the avaricious young lawyer. "A small suit started to make a little money for a young lawyer had roused a country," the author concludes, adding, "the lawyer got Dred Scott's little savings, and immediately after the final decision, Scott received his freedom." As final evidence of Chaffee's character, the article reveals how Harriet wrote to Chaffee after Dred Scott's death, asking for employment. Why, the article seems to ask, would Harriet have written if Irene were not the paragon of virtue, a caring and fair master? Ultimately, Chaffee did answer Harriet's letter but declined to hire her.

This New York Times article is meaningful precisely because it is an apology for and to Irene. Apologies generally portray their subjects in the most flattering, sympathetic manner possible. By today's standards at least, such a portrayal would be best accomplished by showing that Emerson conspired to free Scott or otherwise intended a political, abolitionist action in line with her husband's attitudes. But the fact that the journalist does neither is extremely revealing; it negates theories that the case was a high-minded conspiracy brought by Emerson and her abolitionist friends and colleagues. As Fehrenbacher states, "It seems utterly clear the motives of the people involved were straightforward and personal." "There is," he continues, "no evidence of underlying political purposes, or of an intent to contrive a test case." Emerson's marriage to an abolitionist, then, seems mere coincidence.

One could argue the New York Times story protected Emerson from the consequences of having the "truth" leaked. More likely, it shows that if conspiracy existed, then lawyers instead of Irene fashioned it, and that the dispute between Scott and Emerson was highly contentious even if not motivated by bodily harm. Fehrenbacher leaves open the possibility that "Dred Scott brought suit at the urging of one or two lawyers who hoped to make considerable money from the case," although he acknowledges that this explanation is "only faintly supported by evidence." Fehrenbacher's deduction is indicative of a larger problem for historians writing about

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122. Id.
123. Id.
124. Id.
125. Id.
126. FEHRENBACKER, supra note 18, at 251.
127. Id.
128. Even if neither Emerson nor Sanford beat Scott, et al., on this occasion, slaves were beaten all the time; hence, the suit may have been motivated by the violence of the slave system writ large.
129. FEHRENBACKER, supra note 18, at 252.
Scott: arriving at any “true” version is impracticable, since all versions (to date) are only faintly supported by evidence.

IX. THE SUPREME COURT

As this article indicates, synthesizing historical information in order to embody the disembodied Scott only brings about a dismembered version of Scott. But a dismembered version is better than no version at all, even if it is grotesque or, to borrow a term from Balkin and Levinson, “haunting.” 130 We may never have a complete, sustained account of Scott’s case but, in the end, only shoddy and even contradictory accounts. One wonders why the Supreme Court did not demand more factual context, or why the parties agreed on facts that were impossible. Of course, this speculation depends on an illusion that the Court ever had “true” facts. More likely, it had limited, sanitized facts already made part of the “official” record. Perhaps the carelessness of these early writers—justices, lawyers, politicians, journalists, and historians—had to do, in part, with bureaucratic inefficiencies and inundations during a disorienting moment in Supreme Court history.

Some language from the Court’s opinion points to this possibility:

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. 131

These lines imply that the Court’s business and busyness got in the way of Scott’s narrative. Indeed, the Court’s misspelling of Sanford—“Sandford”—is more evidence the Justices were overwhelmed with a heavy workload (or perhaps underwhelmed with details). Although the Court purports to give the case a more deliberate consideration, it ignores the man Dred Scott, the most important detail of the case. This dismissal is consistent with the expectations of most nineteenth-century White Americans, who considered slaves to be little more than property. 132

130. Balkin & Levinson, supra note 3.
132. Consider, for example, the following illustrative language, which comes from the “Resolutions” of Acts Passed at a General Assembly of the Commonwealth of Virginia:

That one human being may be the property of another, and that laws making him such have been recognized by the universal consent of all civilized nations, is a proposition which cannot be denied. Your committee does not recollect a solitary civilized nation of modern times which has not, within the nineteenth century, recognized slaves as property. Not to swell this report by an enumeration of other instances, your committee will refer to the case of Great Britain—a nation more fastidious, and your committee might add, more fanatical upon this subject than any of the other nations of the earth. It has only been within a few years that she has abolished slavery within her own jurisdiction; and in a late treaty with this country she recognized them as property in the most emphatic manner,
X. ANATOMICAL PIECES: CONSTITUTING GHOST

Many scholars, including Fehrenbacher, author of the Pulitzer Prize winning book The Dred Scott Case, conclude, "contemporary traces of the man Dred Scott are so scarce... that he remains a very indistinct figure." The impression one gets from reading scholarship about Scott is that scholars themselves have given up the search for Scott the body and have settled for Scott the trace of a body. If metaphorically the full form of the body signals a complete narrative, then my efforts merely repeated others' efforts by putting together a spectral or shadowy form instead of the corporeal whole. Early writers, including Chief Justice Taney, made Scott invisible (like a ghost) while they could have attended to his humanity and existence. Their failure to reconstruct Scott left subsequent scholars in the awkward epistemological position of having to speculate about Scott based on pieces of "anatomy" rather than on an entire "structure." This failure raises another interesting question: once the Court retarded and encoded "the facts," making them official and authoritative, could one ever fully access their original referent? This question, though relevant to all cases, nevertheless looms large in the context of racial prejudice, which can make mining for truth a limited exercise.

Chief Justice Taney's opinion came about in the age of gothic cultural productions and, like gothic literary texts, his opinion denies human agency and refuses to "put a face" on Scott as its subject. Gothic literature has a long history predating America. Horace Walpole's The Castle of Otranto (1764) was, according to Jerrold E.

ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 161 (Samuel Shepherd, Printer to the Commonwealth) (1840).

133. Fehrenbacher, supra note 18, at 240.
134. According to Goddu,

Identified with gothic doom and gloom, the American South serves as the nation's "other," becoming the repository for everything from which the nation wants to disassociate itself. The benighted South is able to support the irrational impulses of the gothic that the nation as a whole, born of Enlightenment ideals, cannot. America's self-mythologization as a nation of hope and harmony directly contradicts the gothic's most basic impulses.

Goddu, supra note 16, at 3-4.

135. Broadly defined, "Gothicism" in literature refers to stories involving terror, horror, mystery and, most of all, the supernatural (ghosts, of course, included). Goddu explains the general conventions of gothic literature while pointing out that any definition or categorization of Gothicism is problematic.
Hogle, “the first published work to call itself ‘A Gothic Story’.” The Gothicism that Chief Justice Taney evokes has little to do with the literary convention of antiquated spaces (castles, haunted mansions, old theatres) and mostly to do with what takes place inside those spaces: hauntings. “These hauntings can take many forms,” Hogle explains, “but they frequently assume the features of ghosts, specters, or monsters (mixing features from different realms of being, often life and death) that rise from within the antiquated space, or sometimes invade it from alien realms, to manifest unresolved crimes or conflicts that can no longer be successfully buried from view.” Ghostly vocabulary associated with the *Dred Scott* decision could signal an unwitting move on the part of commentators to depict Scott as a “specter” or “ghost” whose legacy returns to haunt us (Americans) into an accounting for our crimes (slavery and its accompanying evils). Hogle speaks of an “unconscious” that emanates from the Gothic and affects both readers and characters. In one form, the unconscious can force readers and characters “to confront what is psychologically buried in individuals or groups, including their fears of the mental unconscious itself and the desires from the past now buried in that forgotten location.” In another form, the unconscious is inextricably tied to the “deep-seated social and historical dilemmas, often of many types at once, that become more fearsome the more characters and readers attempt to cover them up or reconcile them symbolically without resolving them fundamentally.” The historicizing of the *Dred Scott* decision evokes both forms of the unconscious. Accordingly, historians are both characters and readers in this Gothic hyperreality. Dred Scott’s legacy is bound up with “buried” and “forgotten” pasts as well as social and historical dilemmas. Historians have constructed him as a partial or disembodied form. They have turned Scott and slavery

Several factors contribute to the uncertain status of the American gothic. Unlike the British gothic, which developed during a definable time period, . . . the American gothic, one of several forms that played a role in the development of the early American novel, is less easily specified in terms of a particular time period or group of authors. There was no founding period of gothic literature in America, and given the critical preference for the term *romance*, few authors were designated gothicists. Even when authors such as Edgar Allan Poe or periods such as the eighteenth-century Southern Renaissance are associated with the gothic, they reveal the difficulty of defining the genre in national terms: the American gothic is most recognizable as a regional form. Identified with gothic doom and gloom, the American South serves as the nation’s ‘other,’ becoming the repository for everything from which the nation wants to dissociate itself. The benighted South is able to support the irrational impulses of the gothic that the nation as a whole, born of Enlightenment ideals, cannot. America’s self-mythologization as a nation of hope and harmony directly contradicts the gothic’s most basic impulses."

*Id.*

136. Jerold E. Hogle, *Introduction: the Gothic in Western Culture*, in *Cambridge Companion to Gothic Fiction* I (2002). The Cambridge Companion book series are meant as general introductions for undergraduate readers. The fact that their focus is general makes my points about Hogle even more to the point: it suggests that I am working with "effects" or "traits" that apply to *most* Gothic texts. I am showing how Dred Scott evokes the mood and milieu of an entire genre and not just of select texts.

137. “[A] Gothic tale usually takes place (at least some of the time) in an antiquated or seemingly antiquated space.” *Id.* at 2.

138. *Id.*

139. *Id.*

140. *Id.*
into a ghost alienated from past reality. For those with an aversion to shame, it may seem inconvenient or uncomfortable to contemplate this past reality. But reality—in "ghostly" form—keeps coming back to haunt us.

Chief Justice Taney's text shares one major feature of gothic literature: confusion of the known and the unknown. Knowingly or otherwise, Taney leaves his subject to the imagination, relegating Scott to the role of "the Other." In spelling out the facts of the case, he could have clarified or recovered more accurate information; instead he omitted it, causing future generations to grapple with what Eric Savoy might call "the burden of a scarifying past."[144] Although Taney was not summoning the Gothic genre when he undertook the opinion, the effect of his opinion nevertheless evokes Gothicism. Savoy claims that the "gothic cannot function without a proximity of Otherness imagined as its imminent return ..."[142] Consequently, he reasons, "allegory's rhetoric of temporality—its gesturing toward what cannot be explicitly recovered—aspire to a narrative of the return of the Other's plenitude on a frontier in which 'geography' supplements the impossibilities of language, of both national and personal historiography."[143] To be clear, Taney is not writing allegory. But by divorcing Scott from his body or story—by "decorporalizing" him—the Chief Justice forces historians to allegorize: to piece together an ultimately incoherent narrative and gesture toward that which cannot be recovered. Historians have, in turn, allegorized Scott, going so far as to treat him as synecdochic of slavery itself.

It is also remarkable and perhaps not coincidental that Jack M. Balkin and Sanford Levinson refer to the Dred Scott case as "haunting," that Alexander Bickel refers to it as a "ghastly error," that Paul Finkelman refers to it as "dreadful," or that Kenneth C. Kaufman calls Dred Scott a "shadowy figure."[144] These statements are significant in light of the use of ghosts in neo-slave narratives, which also evoke Gothicism.[145] Although these scholars employ vocabulary of the fantastic, they probably do not have Gothic literature or neo-slave narratives in mind; more likely their vocabulary is a direct response to the horrible, dehumanizing characteristics of Slavery. This response veers toward an additional possibility: that the history of slavery is so disturbing as to register hauntingly or fantastically with those who recall it. This would explain why historians, and not just writers of fiction like Toni Morrison, have employed the ghost metaphor to cope with the badges and legacies of Slavery. In this respect, Gothicism explores the bounds of genre, launching from symbolic expression to actual historiography.

142. Id. at 6. Savoy is working out of the paradigms set forth by David Mogen, Scott P. Sanders, and Joanne B. Karpinski. See DAVID MORGAN ET AL., FRONTIER GOTHIC: TERROR AND WONDER AT THE FRONTIER IN AMERICAN LITERATURE (1993).
143. MARTIN & SAVOY, supra note 141, at 7.
144. See GORDON, supra note 9, at 12; KAUFMAN, supra note 7, at 3; Finkelman, supra note 8.
145. Neo-slave narratives invoke Gothicism inter alia as they "raise questions concerning the possibility for subjective knowledge within a predetermined form of writing" and "ask questions about and demonstrate the process through which a historical subject constitutes itself by employing or revising a set of ideologically charged textual structures," ASHRAF H. A. RUSHDY, NEO-SLAVE NARRATIVES 7 (1999).
Savoy captures Chief Justice Taney’s “Othering” of Scott:

A symbolic Otherness that is ‘somehow immanent,’ that must be figured forth in narrative, suggests the resonance between gothic historiography and the haunting insubstantialities of allegorical trope. Also conducive to the allegorical corollary—a mode of narrative that is organized around semiotic gaps or ‘rifts’—is their model of the historical matrix that is inhabited by the gothic. 146

The dismembered version of Scott, made up of random and even contradictory historical claims, represents the type of allegory to which Savoy refers. After all, the Dred Scott case is replete with gaps and rifts that influenced the way historians wrote about the case. The “version” of Scott we have is like an allegory that is also incomplete, haunting, and ghostly like. Furthermore, just as Taney’s text relates to frontiers and borders (between free and slave state, citizen and non-citizen, Black and White), so Savoy’s notion of “Otherness” relates to frontiers and borders—things that exclude persons (like Scott in particular) or groups (slaves in general). 147 All of this is to say that because the effects of the case were (and are) so horrible, even “spooky,” they are remembered as Gothic literature is remembered—or so the “ghostly” terminology employed by historians would suggest. The only difference is that one is fact, the other fiction. However, this article makes clear that fact and fiction are blurred in any historical account of the case. It could be that historians have found the case haunting precisely because of its haziness: because it is so like Gothicism when it should be quite the opposite—reality. By way of disembodiment, Dred Scott embodies the very nature of gothic literature: awe, terror, horror, and sublimity.

CONCLUSION

Most Americans, and hopefully every law student, can identify the holding of Brown v. Board of Education of Topeka 148 or explain the Fourteenth Amendment, Equal Protection, and desegregation. Yet Dred Scott and slave laws seem to have been consigned to historical amnesia. 149 In my three years of law school, I never read the Dred Scott decision except on my own time. I never read a single case about Slavery. These omissions reflect and perpetuate assumptions about the worth of Black bodies—both literal bodies (Scott’s) as well as bodies of case law or even literature. I would not go so far as to say they reflect the overall American law school education experience, but they are indicative of systemic failures to confront harsh realities of Slavery and its legacies. The way the case is dismissed is not unlike the way Chief Justice Taney

146. MARTIN & SAVOY, supra note 141, at 7.
147. “Cobbled together of many different forms and obsessed with transgressing boundaries, [Gothicism] represents itself not as stable but as generically impure.” GODDU, supra note 16, at 5.
149. In Noam Chomsky’s words, “Historical amnesia is a dangerous phenomenon, not only because it undermines moral and intellectual integrity, but also because it lays the groundwork for crimes that still lie ahead.” Noam Chomsky, The Torture Memos, May 24, 2009, http://www.chomsky.info/articles/20090521.htm.
disregards Dred Scott the man. In either case, the failure to address slavery on an individual level may mean overlooking newer forms that Slavery has taken on, starting with penal farms, chain gangs, and lynching, and shifting, today, to the prison power apparatus. Levinson insists, “comprehension of contemporary constitutional problems, whether of the interstate shipment of goods or of war and peace, is significantly helped by reflection on past struggles involving Slavery.” For that reason alone, scholars should continue researching and writing about the case, and professors should continue (or begin) teaching it in law school. Although scholars may never know the “true” events that brought about the decision, they should explore the case and its continued implications for American society.

150. See Levinson, supra note 34, at 91.
152. Id. at 106.
Reactions

JOEL BRAITHWAITE*

Reading Mendenhall’s article reminds me that the Supreme Court has had a prime role to play in limiting the privileges and immunities of citizenship to White persons. What may surprise you is that former slaves were not the only persons against whom “whiteness” had to be preserved. Two other cases come to mind, both of which have been excluded from history books and have largely been relegated to “ghost” status. The two ghosts worthy of recorporealization are Tako Ozawa and Bhagar Singh Thind. Their stories show that Japanese, East Indians, and many others also struggled for citizenship and inclusion.

Starting from 1790, with the passage of the first Naturalization Act, only “free [W]hite persons” were allowed the privilege of naturalization. Persons of African descent were first included in 1870. For a new immigrant to the United States seeking citizenship, one had to prove oneself to be either a “free [W]hite person” or of African descent. Let’s just say petitioning the courts to be considered African was the road less travelled. Instead, what ensued was an entire line of litigation to define which races were included in “free [W]hite persons” within the meaning of the naturalization statutes. “White person,” as construed by the Supreme Court, generally meant persons without negro blood. But was the absence of Negro blood sufficient for whiteness?

In 1922, the Supreme Court in Ozawa v. United States, 260 U.S. 178 (1922), was called upon to decide whether cultivated Japanese persons were “free [W]hite persons” and thus eligible for United States citizenship. The Ozawa Court acknowledged that an alien was denied naturalization “unless he came within the description ‘free [W]hite person.’” The Court noted that federal and state courts deciding the question of who was a “[W]hite person” had held unequivocally that “the words ‘[W]hite person’ were meant to indicate only a person of what is popularly known as the Caucasian race.” After referring to “the gradual process of judicial inclusion and exclusion” whereby previous courts had refined the definition, the Supreme Court found the Japanese were “clearly of a race which is not Caucasian.” While Ozawa was found not eligible for naturalization because he was not a “free [W]hite person,”

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1. Naturalization Act of 1790, 1 Stat. 103 (1790).
3. See generally, Scott v. Sanford, 60 U.S. 393 (1856) (holding that persons of “pure African blood,” id. at 397, are ineligible for citizenship).
5. Id. at 195.
6. Id. at 197.
7. Id. at 198.
the Court took measures to avoid "any suggestion of individual unworthiness or racial inferiority." 8

Two months after Ozawa, the Court was again called upon to determine "whiteness" in United States v. Thind. 9 Ozawa had established that, "If the applicant is a white person, within the meaning of this section, he is entitled to naturalization; otherwise not." 10 Relying on the Ozawa decision, Thind's application for citizenship was based on the ethnological classification of the high caste Hindus as part of the Caucasian race. The Thind Court rejected his argument, but was quick to remind us that "the provision [was] not that any particular class of persons shall be excluded, but...that only white persons shall be included within the privilege of the statute," 11 which granted citizenship. The Court noted that "[m]ere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor" was not the end of the inquiry. 12 Clearly: "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today..." 13 But just as in Ozawa, the Court tried to avoid any appearance of bias: "It is very far from our thought to suggest the slightest question of racial superiority or inferiority." 14 Their reasoning was circular: "Whiteness" was what other White persons determined it was. The Supreme Court was the ultimate arbiter of racial identity in "the gradual process of judicial inclusion and exclusion."

As with Scott, the ghosts of Ozawa and Thind are confined to the same issue: could one of these non-White men "become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?" 15 All three men were found to be deficient, but only Dred Scott bore the distinct burden of Slavery. Scott, Ozawa and Thind share a single legacy: the establishment, in law, of White privilege. In Scott, being White meant the right to own others deemed inferior. In Ozawa, "White" meant that despite actual skin color, if you were not Caucasian then you could never be White. In Thind, it meant that even if you were Caucasian, you were not White if you were not accepted as such by other White people. For all these "ghosts" it meant exclusion from the American society envisioned by the Framers and interpreted by the Supreme Court. America has yet to exorcise these ghosts from its dark past. As Justice Blackmun wrote, "In order to get beyond racism, we must first take account of race. There is no other way." 16 But as with all abusive relationships, the abusers are

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8. Id.
10. Id. at 207.
11. Id.
12. Id. at 208.
13. Id. at 209.
14. Id. at 215.
much more willing to forget the past than their victims. Let us not soon forget Scott, Ozawa or Thind.

JOHN ERNEST**

Americans have always been driven by stories—moving from rags to riches at the far edges of the city on the hill, and reveling in the hard-nosed, gritty tales of those who go their own way. But behind the stories we love to tell are the more insistent stories that are the real driving forces of a nation that was structured around the system of slavery. These are stories that resist a neat outline or a clean telling, and more often than not they are stories marked by a revealing incoherence. Allen Mendenhall explores one of the most important examples of those subterranean tales, a Supreme Court case that led to a devastatingly simple conclusion—the denial of African American rights to citizenship—but a conclusion that follows from an incoherent mess of conflicting and partial stories, more than 500 books that together add up to a haunting presence in American legal, political, and cultural history. The story of slavery in the United States was grounded in a fundamental philosophical contradiction when the founders declared their independence and later established a governing constitution, and that story gave birth to and promoted the development of a corresponding story about race that was incoherent in its essential features and chaotic at its core.

Mendenhall does important work in uncovering the history surrounding and obscuring the Dred Scott decision. He reminds us that legal decisions are often the product of complex, competing, and sometimes nearly incomprehensible stories, and he demonstrates that we can learn a great deal about U.S. racial history by studying the stories told to bolster legal decisions informed by prejudice. The twisted and competing tales he discovers behind the scenes and in the aftermath of Dred Scott are revealing, but they would not be terribly surprising to African Americans of the time, who understood well both the foreground and the implications of the decision. Among the many historical and cultural factors that have combined in the shaping of African-American culture(s) and identities, we should remember that in the nineteenth century African Americans were also Black by law. What this meant varied according to locale, situation, and historical moment, but the legal definitions and enforcement of racial identity and group affiliation were everywhere a primary determinant of possibilities and pathways.

I do not mean by this simply the many and varying laws that defined what constituted non-White status, though of course such laws were important, but I mean as well the many laws and social customs that followed from such definitions. Without the imposing force of that legal structure and its corresponding social codes, one might be able to identify African-American identity purely in terms of ancestral

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heritage, inherited folkways, cultural practices, or other cultural formations that
developed among historically-affiliated people over time, connecting them back to
generally identifiable roots in Africa, Europe, and elsewhere, and identifying the
self-professed contours of a diverse group identity. But just as African religions were
both transformed by and transformative of religious practices in the United States—
precisely because diverse, established traditions encountered one another in a repres-
sive setting, leading to hybrid practices over time—so the identities of those of
African heritage, carrying the combined possibilities of a broad range of cultural
roots, were pressed into the pervasive structures and forced through the restrictive
channels of U.S. racial law. Out of this turbulent process emerged ever new iterations
of cultural life, and these iterations are central to the development of both Black and
White concepts of identity and social life in the United States.

Many Americans want to believe that U.S. racial history is simply the story of
embodiment and attitudes—the way people look and the way people think—but
Mendenhall reminds us of a haunting legal history that extends beyond and denies
the simplicities of embodiment: the racial history to be discovered when we enter
into the incoherent stories we have found ourselves telling, and examine the frac-
tured, fractal narratives that preceded and followed from the legal history that is both
the ghost in the machine and the true embodiment of race.

MICHELLE S. HITE***

Allen Mendenhall offers a compelling analysis of the Dred Scott decision, positing
Chief Justice Roger B. Taney’s initial opinion as a deathblow to Scott’s humanity
that released a haint, which would haunt all future references to the case. It is
appropriate, then, that Mendenhall cites Toni Morrison’s Beloved, a novel that imag-
ines the return of history through the body of a child dealt a deathblow by her
mother’s own hand. Consistent with Mendenhall’s interest in recorporealization, the
baby that Sethe kills returns to the present in bodily form and this has various
interpretations. For Sethe, Beloved’s return serves as evidence that understanding for
her actions exists without the need for explanations, for as she says, “[s]he come back
to me of her own free will and I don’t have to explain a thing.”1 In Sethe’s view,
Beloved’s embodiment represented the persistence of her will to remain with Sethe
despite Paul D’s attempt to exorcise her from her home when he first arrived. Sethe’s
optimism concerning her daughter’s physical return highlights her continual quest to
complicate Slavery beyond its horrors. Sethe seriously considers the possibility that
White identity is complicated, for instance, and that some White people may be
good. Such a view distinguished her from the others who were formerly enslaved—
particularly the character Ella, who also disputes the good of the past’s reembody-
dment in the present.

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College and is a member of the Toni Morrison Society. She received her Ph.D. from Emory University.
A thorough consideration of Ella's character would have complicated Mendenhall's argument because she is a reader of absence, and absence pervades the historical record of Dred Scott, but she nevertheless expresses skepticism about the value of recorporealization. Mendenhall contends that filling in the gaps of Scott's narrative would, in effect, recorporealize him. What are the consequences of recorporealization for those whom justice fails? Despite Mendenhall's claim that a "reconstitution of Scott's narrative . . . will begin the process of recognition, inclusion, and above all, healing," a serious reading of Ella's position on the return of history as flesh counters certain optimism.

Readers first meet Ella through Sethe's recollection of arriving in Ohio. Sethe is exhausted from the physical and emotional toil of fleeing, delivering a baby though near death, and entertaining the likelihood of betrayal from Amy Denver, the White girl who offers her aid. After receiving Amy Denver's help, Sethe encounters Stamp Paid, who ferries her across the Ohio River, where Ella then takes her to be reunited with her family. Through the brief, but significant exchange between Sethe and Ella, the reader comes to see Ella as an attentive observer and a perceptive listener. She perceives calls for assistance where others may find absence. Thus, she reads the open door of a sty as a sign posting an arrival and the "[W]hite rag on the post" as a message that a child is also present. She also reads the gaps left in fugitive narratives: "[S]he listened for the holes—the things the fugitives did not say; the questions they did not ask. Listened too for unnamed, unmentioned people left behind." Through this first encounter with Ella, the reader knows that she functions as a reader of absence, an interpreter of ghosts.

Ella sees her own past in the corporeal return of Beloved. Ella's recognition illuminates Beloved's return as a flash of memory that resembles what Shoshana Felman calls the "haunting claim" of history. In considering Walter Benjamin's negotiation of justice and history Felman writes:

> Life for the dead resides in a remembrance (by the living) of their story; justice for the dead resides in a remembrance (by the living) of the injustice and the outrage done to them. History is thus, above and beyond official narratives, a haunting claim the dead have on the living, whose responsibility it is not only to remember but to protect the dead from being misappropriated. . . .

History has a surprising vigor that Morrison illustrates in Beloved through the liveliness that she attributes to death. The arm of death is observable in the spitefulness of Sethe's house on Bluestone Road that littered the surroundings, scared away Sethe's sons Howard and Bugler, and physically assaulted Sethe's dog, Here Boy. Not only does death have reach beyond the grave, but in its ability to remember, it also has an added dimension of being that equally defies common understanding. Morrison's representation of the dead's ability to remember makes her characterization of histo-

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2. *Id.* at 91.
3. *Id.* at 92.
ry's "haunting claim" even more radical than Felman's. In *Beloved*, the memories of the dead and the living compete. As a result, justice becomes a right that the dead may seek to claim from the living.

Ella's skills suit the task of reconciling the claims of the past upon the present. For her, the instantiation of the past as flesh renders the "haunting claims" of the past flagrant. Such an embodiment creates a context for the reign of the house of Atreus or the rule of a circular form of justice that implicated slave owners as well as the enslaved. For example, if the community allowed Sethe to be whipped by the daughter whose head she sawed off, should it also allow the child Ella bore but did not nurse to "whip her too"? Incorporeality must be a limit the past must not transgress. It can haunt through "shaking stuff, crying, smashing and such," but taking on flesh, and wrapping itself in its own distinctive skin could overwhelm the living.

The return of an embodied past challenges Ella's sense of having overcome what went before. Despite her desire for history to remain inorganic, though perhaps agitated, the novel suggests that a sentient past continues to linger among the living. Inattention, mostly, enables such allowance. Though Ella believes that the embodied past "[c]ould be hiding in the trees waiting for another chance," most have chosen not to remember the possibility. Remembering the possibility of the past's return to embodiment would prompt undesirable changes, ones that would usher in new ways of living that were not necessarily good. To what extent has Mendenhall considered Ella's view? Does narrative recovery require recorporealization?

**TODD RUBIN****

Allen Mendenhall's piece reminds us that Slavery's existence in the United States depended on the denial of African descendants' humanity. Such a reminder is needed precisely because Slavery was so effective in obscuring this humanity. Many historians were thus largely unconcerned with the personal stories of Blacks like Scott, which may help explain the lack of a coherent historical record of the human dimension of the *Dred Scott* case.

Chief Justice Roger Taney's opinion in *Dred Scott* has been widely, and in my view, rightly condemned. His argument against Scott's ability to sue centered on the claim that because Blacks were not part of the founders' conception of "people," they were not citizens within the meaning of the Constitution. Taney, however, failed to address the possibility that Blacks were originally conceived of as second-class citizens rather than as non-citizens.

Taney leaves a glaring hole in his argument by not addressing that possibility. But

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5. *Morrison*, supra note 1, at 259.
6. *Id.* at 257.
7. *Id.* at 263.

**** © 2009, Todd Rubin. Todd Rubin is a J.D. candidate in the class of 2011 at the Georgetown University Law Center. He graduated from the University of Pennsylvania in 2008, where he majored in Philosophy, Politics and Economics, and Hispanic Studies. The ideas in this reection originated in classroom discussions in the fall 2009 Constitutional Law II class taught by Professor Randy Barnett.
it was no accident that he failed to do so. If Taney had acknowledged that the founders may have conceived of Blacks as second-class citizens rather than as non-citizens, it would have been much more difficult to deny Blacks the right to sue. Blacks could challenge their status as slaves in court, thus undermining the institution of Slavery. It was much safer for a defender of Slavery to deny the possibility that Blacks could be conceived of as possessing any level of citizenship. But here is where the criticism of Taney is itself subject to criticism: how is it that the founding generation, who itself held slaves, could have regarded Blacks as second-class citizens? Wouldn’t they too be concerned with possibly undermining Slavery and thus be incredibly unlikely to regard Blacks as citizens of any sort? This defense of Taney is weakened upon a closer examination of Slavery.

By 1800, Slavery “appeared to be on its way to extinction.”¹ However, that changed with the proliferation of the cotton gin around the same time. From then until the end of the Civil War, Slavery took on a new profitability and relevance.² Thus, for nineteenth century jurists who supported the status quo, it became more important than it had been for their eighteenth century counterparts to avoid upsetting the institution of Slavery. The founders might not have been as concerned that recognizing Blacks as second-class citizens would have undermined Slavery because the founders lived in an era in which Slavery was waning anyway. But in the nineteenth century, defenders of Slavery would have had much more hesitation in recognizing Blacks as second-class citizens rather than as non-citizens. And that may explain why the record of Scott and millions of other African slaves throughout history were left as “ghosts,” who, as Mendenhall reminds us, continue to haunt the American conscience.

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2. Id.