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Slaves as Plaintiffs

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SLAVES AS PLAINTIFFS

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REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT. By *Lea VanderVelde*. New York: Oxford University Press. 2014. Pp. xii, 210. $31.95.

INTRODUCTION

Lea VanderVelde's *Redemption Songs: Suing for Freedom Before Dred Scott*[1] tells the story of about 300 suits filed in St. Louis—in the forty years before the Civil War—by people held as slaves who were claiming they were free. The book poses bold challenges to several broad themes in American legal history. First, VanderVelde concentrates on enslaved peoples' arguments about their freedom, reframing our understanding of those who count as interpreters and remakers of the law. This approach gives significant credit to enslaved people for promoting freedom and turns attention away from the judges, slave owners, and politicians who are so frequently the focus of legal history.[2] Related to this, VanderVelde suggests that the enslaved could draw powerful slave owners into court and thus upend traditional power structures (pp. 1–8). This resurrects a world of African American history where those frequently treated as objects of law and regulation become wielders of power.

Redemption Songs is one of the finest of several recent studies that are causing us to rather dramatically rethink the legal history of free people of African descent in the South during the years of slavery.[3] It is part of a wholesale rethinking of Southern and African American history. *Redemption Songs* has implications for legal historians' assessment of the ways that the law of race operated in the South, and just how much statutes, dictates of judges and local law enforcement, community norms, and interpersonal

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1. Lea VanderVelde is the Josephine R. Witte Professor of Law, University of Iowa College of Law.

2. *See, e.g.*, ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY (1985); G. EDWARD WHITE, 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835 (2010).

3. *See, e.g.*, KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS (2014); KIRT VON DAACKE, FREEDOM HAS A FACE: RACE, IDENTITY, AND COMMUNITY IN JEFFERSON'S VIRGINIA (2012).

dealings worked for those in the twilight zone between slavery and freedom. Therein lies a story.

Much literature on African American slavery emphasizes the brutality of slavery.[4] Recently, that literature has also emphasized how economic interests shaped the law of slavery to promote the interests of the slave-owning classes.[5] A parallel literature on proslavery ideology, especially in the judiciary,[6] details slave owners' and Southern legal leaders' harsh ideas. That literature links the brutality of slavery to the legal system.[7] Yet other works emphasize very different pieces of the African American experience with slavery. For instance, Annette Gordon-Reed's *The Hemingses of Monticello* focuses on the lives and ideas of enslaved people independent of slavery, while also acknowledging the brutality and inhumanity of slavery as an important subtheme.[8]

A number of studies, including *Redemption Songs*, focus on the legal system as it relates to African Americans in the Old South. They suggest—rather counterintuitively, given Justice Taney's statement in *Dred Scott*[9]—that African Americans *did* have some rights that white men (and courts) were obligated to respect. One of the first works to begin this bold reinterpretation was Melvin Ely's *Israel on the Appomattox*, a study of a community of free people in Prince Edward County, Virginia, in the pre–Civil War era.[10] Ely based his study of the hundreds of free people largely on land records, wills, and the occasional civil suit or criminal prosecution. The community prospered even as slavery persisted all around.[11] Other more recent work has developed the theme of the economic, social, and property options of free people in Virginia—and their ability to maintain a life despite Virginia laws that required both registration of free people and removal of recently freed

4. *E.g.*, Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market (1999).

5. *See, e.g.*, Edward E. Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism (2014); Sven Beckert, Empire of Cotton: A New History of Global Capitalism (2014).

6. *See, e.g.*, Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865, at 13–15 (2010); Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C. L. Rev. 1817 (2013).

7. See, e.g., Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. Rev. 799 (2009) (discussing Justice Thomas Ruffin's proslavery jurisprudence); Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 Am. J. Legal Hist. 93 (1985) (discussing the release of owners from liability for abuse of enslaved people).

8. Annette Gordon-Reed, The Hemingses of Monticello: An American Family (2008).

9. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

10. Melvin Patrick Ely, Israel on the Appomattox: A Southern Experiment in Black Freedom from the 1790s Through the Civil War (2004).

11. *See, e.g.*, Brophy, *supra* note 6, at 1829 n.93, 1830–35 (discussing slavery in Southampton County, which was near Prince Edward County).

people.[12] In 2012, Kirt von Daacke expanded Ely's analysis of the role of free people of color in pre–Civil War Virginia to Albemarle County: the home of the University of Virginia.[13] His revealingly titled book, *Freedom Has a Face*, turned to legal records to detail the involvement of free people of color in the county's economic and social life.[14]

Although Gordon-Reed, Ely, and von Daacke relied heavily on legal records, the operation of the law was not central to their books.[15] Others have turned more explicitly to the operation of the legal system to depict greater rights for free people—and those claiming to be free—than we might expect. For the states in the "Deep" North, like Massachusetts, the use of courts to secure freedom is perhaps unsurprising.[16] Emily Blanck is one of the most recent of a series of scholars who depict how Massachusetts judges ended slavery in the state beginning around 1780.[17] Important to Blanck's story, as well as to VanderVelde's, is that the enslaved people combined action—such as running away and disappearing into the African American community—with court challenges to gain freedom.[18] The story that emerges is one where humble enslaved people—those with so seemingly little power—use multiple strategies to make their freedom a reality. Sometimes the strategies involved appeals to law; and when they did, those appeals were sometimes successful, in part, because the enslaved people advanced a theory that appealed to the court. Massachusetts was primed in 1780 to find that the principles of liberty behind the Revolution encompassed the state's enslaved people as well.[19]

The more surprising story comes from southern and western states. Martha Jones has a series of articles detailing the participation of enslaved and free African Americans in the legal system, often as plaintiffs.[20] Running

12. *See, e.g.*, Michael L. Nicholls, *Creating Identity: Free Blacks and the Law*, 35 Slavery & Abolition 214 (2014).

13. von Daacke, *supra* note 3.

14. *See id.* at 211–43.

15. *See* Ely, *supra* note 10; Gordon-Reed, *supra* note 8; von Daacke, *supra* note 3.

16. *See, e.g.*, C.S. Manegold, Ten Hills Farm: The Forgotten History of Slavery in the North 234–35 (2010) (describing two instances in the 1780s where slaves in Massachusetts used the state's constitution to successfully sue for their emancipation).

17. Emily Blanck, Tyrannicide: Forging an American Law of Slavery in Revolutionary South Carolina and Massachusetts 116–31 (2014).

18. *See, e.g.*, pp. 195–96 (discussing the fact that women were more likely to sue for their freedom than men, who were alternatively more inclined to physically flee their owners illegally); Blanck, *supra* note 17, at 116–27 (discussing freedom suits in post-Revolutionary Massachusetts).

19. *See* Blanck, *supra* note 17, at 123–27 (discussing Quock Walker suits and emancipation in Massachusetts in wake of Revolution); Alfred L. Brophy, *Introduction to Law*, *in* The Encyclopedia of New England 889, 893–94 (Burt Feintuch & David H. Watters eds., 2005) (same).

20. *See, e.g.*, Martha S. Jones, *Leave of Court: African American Claims-Making in the Era of* Dred Scott v. Sandford, *in* Contested Democracy: Freedom, Race, and Power in American History 54 (Manisha Sinha & Penny Von Eschen eds., 2007); Martha S. Jones, *The Case of* Jean Baptiste, un Créole de Saint-Domingue*: Narrating Slavery, Freedom, and the Haitian*

parallel to that work, Jones has also discussed how African American women wielded sophisticated ideas about law and legal thought.[21]

A series of scholars who, like VanderVelde, have focused on St. Louis freedom suits, have found greater flexibility in slavery in the Old South than we are accustomed to hearing about.[22] Their scholarship focuses on the blurred lines between slavery and freedom along the Mississippi River and the ways that slaves challenged their bondage, often by escaping along the River, but sometimes by filing lawsuits.[23] To be sure, there has been some literature on freedom suits in other parts of the country. Judith Schafer[24] and, more recently, Kenneth Aslakson[25] have uncovered freedom suits in New Orleans. Recently, Judson Crump and I have recovered the story of a child kidnapped in Philadelphia and sold into slavery in Alabama, who was then freed in Tuscaloosa, Alabama, in 1827.[26] Together, these stories suggest there were legal processes allowing free people—and those claiming to be free—some access to courts in the Old South. Yet, in the 1840s and 1850s, legislatures and courts were tightening the opportunities for freedom suits.[27]

A parallel literature examines the role of outsider intellectuals as they challenged slave law.[28] Those studies look to formerly enslaved people like

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Revolution in Baltimore City, *in* The American South and the Atlantic World 104 (Brian Ward et al. eds., 2013); Martha S. Jones, Hughes v. Jackson*: Race and Rights Beyond* Dred Scott, 91 N.C. L. Rev. 1757 (2013).

21. *See* Martha S. Jones, All Bound Up Together: The Woman Question in African American Public Culture, 1830–1900 (2007).

22. *See, e.g.*, Kelly Marie Kennington, *Law, Geography, and Mobility: Suing for Freedom in Antebellum St. Louis*, 80 J.S. Hist. 575 (2014) (focusing on the mobility made possible by the Mississippi River as a key explanation of the number of freedom suits); David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. Rev. 53, 58–73 (2006). Legal historians have also carried this story of African American agency into the post-Civil War era. *See, e.g.*, Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 Law & Hist. Rev. 723 (2012).

23. *E.g.*, Anne Twitty, Before *Dred Scott*: Slavery and Legal Cultures in the American Confluence, 1787–1857 (2016).

24. Judith Kelleher Schafer, Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846–1862 (2003).

25. Aslakson, *supra* note 3, at 165–80.

26. Judson Crump & Alfred L. Brophy, *Twenty-One Months a Slave: Cornelius Sinclair's Odyssey*, 86 Miss. L.J. (forthcoming 2017) (describing the lawsuit filed by local ministers on behalf of Sinclair, which resulted in his return to freedom and, ultimately, to Philadelphia, where he participated in the prosecution of one of his kidnappers).

27. *See* Kennington, *supra* note 22, at 584 (suggesting that a change in Missouri law in 1840s discouraged lawsuits challenging slavery); Michael Schoeppner, *Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South*, 31 Law & Hist. Rev. 559, 562 (2013) (detailing the limited rights of free people of color in Southern port cities, and how the laws "'happened' in the antebellum South"). An 1845 Missouri statute permitted slaves to challenge their owners in court, but allowed the court to impose security for "all costs that may be adjudged against" the petitioner. *See* Mo. Rev. Stat. ch. 69, § 2 (1845); *cf. id.* § 12 (presuming that an African American person was a slave).

28. *See generally* Caleb Smith, The Oracle and the Curse: A Poetics of Justice from the Revolution to the Civil War (2013).

Frederick Douglass,[29] antislavery women like Harriet Beecher Stowe,[30] philosophers like Henry David Thoreau,[31] and antislavery lawyers like William Goodell.[32] That is, as scholars have explored the social and legal history of slaves' challenges to slavery, they have also developed a sophisticated literature that explores how outsider intellectuals—black and white, female and male—challenged the American law of slavery. There is, of course, a continuous strain of legal–historical writing that focuses on the limitations of the legal system in the Old South.

I. Interpreting Slaves as Plaintiffs in St. Louis

This is where Lea VanderVelde's work on lawsuits filed by people held in slavery in St. Louis, Missouri, enters the debate. More than a decade ago, VanderVelde uncovered these suits with the help of archivists in Missouri.[33] A handful of these cases were known because the Missouri Supreme Court had heard them and decided many in favor of freedom.[34] Historians had also known about some of the lower court cases for decades.[35] In one improbable interpretation, Allen Johnson of Yale University's Department of History concluded in 1921 that border states like Missouri treated petitioners fairly.[36] Now we know that there were many times more suits than even he was aware of. Many of those suits were successful,[37] others were unsuccessful, and some had unrecorded results.

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29. *See, e.g.*, Jeannine Marie DeLombard, Slavery on Trial: Law, Abolitionism, and Print Culture (2007).

30. *See, e.g.*, Sarah N. Roth, Gender and Race in Antebellum Popular Culture (2014).

31. *See, e.g.*, Smith, *supra* note 28, at 2–6; Albert J. Von Frank, The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston 281–85 (1998).

32. *E.g.*, Alfred L. Brophy, *Antislavery Women and the Origins of American Jurisprudence*, 94 Tex. L. Rev. 115, 120 (2015) (reviewing Roth, *supra* note 30).

33. *See* pp. ix–xii. See *Freedom Suits Case Files, 1814–1860*, St. Louis Circuit Court Historical Records Project, http://www.stlcourtrecords.wustl.edu/about-freedom-suits-series.php [http://perma.cc/E9JE-VL47], for an online version of these petitions.

34. *See, e.g.*, Wilson v. Melvin, 4 Mo. 592 (1837); Rachael v. Walker, 4 Mo. 350 (1836); Meechum v. Judy, 4 Mo. 361 (1836); Marguerite v. Chouteau, 3 Mo. 540 (1834); Hay v. Dunky, 3 Mo. 588 (1834); Julia v. McKinney, 3 Mo. 270 (1833); Ralph v. Duncan, 3 Mo. 194 (1833); Tramell v. Adam, 2 Mo. 155 (1829); La Grange v. Chouteau, 2 Mo. 20 (1828); Milly v. Smith, 2 Mo. 36 (1828); Winny v. Whitesides, 1 Mo. 472 (1824). A change in judicial attitude was brewing as early as the 1830s, but it was most pronounced in 1852 when the Missouri Supreme Court decided against Dred Scott's freedom suit in *Scott v. Emerson*. 15 Mo. 576 (1852). *See also* Davis v. Evans, 18 Mo. 249 (1853); Sylvia v. Kirby, 17 Mo. 434 (1853); Calvert v. Steamboat Timoleon, 15 Mo. 595 (1852).

35. *See* Harrison Anthony Trexler, Slavery in Missouri, 1804–1865, at 212–18 (1914) (discussing trial court opinions in St. Louis's court archives).

36. Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 Yale L.J. 161, 181 (1921) ("From a cursory examination of the session laws of the border slave States . . . the writer is persuaded that substantial justice was on the whole accorded to the negro claiming his freedom.").

37. *See supra* note 34.

It is VanderVelde who had the wisdom to use these cases to reveal calls for freedom. *Redemption Songs* develops the metaphor of enslaved people "singing" songs of redemption by filing lawsuits to claim their freedom in Missouri courts.[38] Missouri law allowed people held in slavery to file suit challenging their owners' rights to hold them.[39] Early on, Missouri law provided for the appointment of a lawyer for indigent slaves, and even allowed them to remain free during the pending litigation.[40] Later, the legislature tightened the laws so that a court could require the slaves themselves to post a bond in case they lost their suit.[41]

The next twelve chapters of *Redemption Songs* focus on specific cases where slaves sued in Missouri, mostly successfully, for their freedom.[42] VanderVelde tells the story of some of the better-known (though by no means well-known) cases, such as Winny, a slave born in the Carolinas, who was later held for a few years in slavery in the free territory of Illinois.[43] With a petition filed around 1818, Winny successfully called her "owner" and the owners of her children to account.[44] Her claim was that she was held in territory that the Northwest Ordinance made free—and she and her children were thus free (p. 61). This set the precedent for those with similar claims for several decades. Other plaintiffs, such as Lydia Titus, successfully used the courts to assert freedom based on her service in a free territory before arriving in Missouri (pp. 67–69). Titus, who won her freedom in Illinois territory around 1807, successfully sued in Missouri to reclaim her children, who had been captured on charges of being runaways in the early 1830s (pp. 70–75). And VanderVelde tells the story of a Canadienne Rose, whose children challenged being held in bondage by one of the St. Louis's most affluent families—one that faced frequent challenges from freedom suits brought by their slaves (p. 177). The children based their claim on Rose's time in free territory back in the eighteenth century.[45] The litigation wound its way up and down the Missouri courts for fifteen years, and the children were eventually freed in 1862, during the Civil War (pp. 192–93).

38. Chapter 1 (developing "[a] [m]etaphor for the [v]oices of the [s]ubordinate [b]uried in [h]istory").

39. Mo. Rev. Stat. 285, § 1 (1835).

40. *See id.* § 2 (permitting suit without mentioning bond).

41. While the 1845 Act continued to allow slaves to sue "as a poor person," Mo. Rev. Stat. ch. 69, § 1 (1845), the 1845 Act tightened the law, which had earlier permitted slaves to sue without bond, *id.* § 16.

42. Ten of those twelve chapters deal with the redemption song of one family each (chapters 2–9, 11, 13). Chapter Ten expands to two, unrelated claimants—both enslaved women—whose cases were complicated by the fact that their partners (in one case a white man and in the other case a black man) had sold them. In each case, they won their freedom suits. And Chapter Twelve deals with a series of suits by slaves owned by one person, Milton Duty. Those suits took place as part of the litigation of Duty's estate, for his will had promised freedom to the slaves, but creditors of the estate claimed they needed to be satisfied first.

43. *See* chapter 4.

44. *See* p. 61.

45. *See* p. 186.

The final chapter puts this data together to explain what factors triggered suits, discussing why some slaves chose to file suit while others ran away (Chapter Fourteen). VanderVelde examines the meaning of the rule of law in a time when juries decided so much about slaves' fate (pp. 202–03). She concludes with the unsuccessful litigation in *Dred Scott*, in which the Missouri Supreme Court and then the U.S. Supreme Court worked to deny the Scott family their freedom (pp. 205–10). VanderVelde puts the *Dred Scott* case into context—she shows that the Scott family's claim was one of many claims made by people who believed they were free.[46] In some cases, those claims to freedom rested, like the Scott family's claim, on having traveled to a free state.[47] In other cases, the plaintiffs complained that they had been promised freedom, had received it via will but were kept in slavery, or had been born to a free mother but wrongfully kept in slavery.

VanderVelde asks: What do these improbable cases mean? Part of the story is that those cases tell us about how humble people used the court system, how they obtained lawyers, and how on occasion they brought the mighty to account (pp. 17–22). *Redemption Songs* presents a legal analog to the past several generations of outstanding work on the social history of slavery—work which looks at the world from the perspective of the enslaved.[48] The cases reveal how the enslaved litigated, what they did when their cases were pending, and how the rule of law could be turned to the slave's advantage. And the cases may hold the potential for wholesale changes in how we practice legal history, as well as whose stories we tell and how. VanderVelde views these suits from the perspective of the petitioners who staked out legal claims and brought the powerful (their owners) to account in court. As VanderVelde demonstrates, the enslaved litigants developed theories within the legal tradition, argued about their rights, and took action to free themselves. She reveals how people used legal technology to set the enslaved free in a slave state, in the dark depths of slavery.

The results are surprising; I would even be tempted to say shocking. One would not think that slaves would ever have an opportunity to bring their putative owners into court. Solomon Northup's narrative, *Twelve Years a Slave*, testifies to the extraordinary difficulty of challenging slavery in the midst of the plantation South.[49] Part of the story may be that in VanderVelde's account, the claims for freedom were filed in St. Louis, rather than the Red River district of Louisiana. But even in the relative freedom of St. Louis, it is impressive and astonishing that people held in slavery had the resources and temerity to try to bring their "owners" to account. On this

46. *See* pp. 205–10.

47. Lea VanderVelde, Mrs. Dred Scott: A Life on Slavery's Frontier 231–32 (2009).

48. *See, e.g.*, Vincent Brown, The Reaper's Garden: Death and Power in the World of Atlantic Slavery (2008); Richard S. Dunn, A Tale of Two Plantations: Slave Life and Labor in Jamaica and Virginia (2014); Leslie M. Harris, In the Shadow of Slavery: African Americans in New York City, 1626–1863 (2003).

49. Solomon Northup, Twelve Years a Slave (Dover Publ'ns, Inc. 2000) (1853).

issue, *Redemption Songs* is an excellent contribution to a trend in recent history that focuses on the rights of free people in the Old South. It is an important story of how enslaved people saw the world and tried to mobilize. VanderVelde's focus is on enslaved people who have been ignored for far, far too long and about whom she has substantial new insights. On those issues, this is a transformative book that uses new data and asks new questions. It is substantively and methodologically very important.

Through her focus on enslaved plaintiffs and their lawyers, VanderVelde uncovers a story line that we have not heard before. She shows that slaves had more rights than we previously knew and that slaves used these rights to challenge slavery.[50] VanderVelde's narrative shows how humble people—on rare occasions, to be sure—challenged the institution of slavery. For far too long, this important story was not told. It is absent from works on pre–Civil War legal history,[51] even by those who write so eloquently about slave law.[52]

Partly because of the surprising nature of VanderVelde's findings, one is led to ask: Just how representative are these suits? Her research invites questions about whether the central tendency was against challenges to slavery. She catalogues 300 challenges by 239 people (p. 3). Of the ninety-one challenges that went to trial, about half were successful (p. 202). We do not know the result of many others (p. 5). This suggests how difficult it was to get any kind of hearing. One other way of conceptualizing this is that the slave population of St. Louis peaked around 1850, with around 5,000 enslaved people.[53] A small percentage of them used the legal system to challenge their servitude, although perhaps that is a high percentage of those who had a valid claim to freedom.[54]

A small number of cases might still be very revealing of the legal system. Thus, we must ask: What do these cases say about the nature of slavery and law? (pp. 17–22). This important study broaches new questions about how

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50. Pp. 17–22; *see also* Brophy, *supra* note 6, at 1858–59 (discussing the lawyers for the Nat Turner rebels).

51. The best-known works in pre–Civil War legal thought of the 1960s and 1970s paid scant attention to slavery. *See, e.g.*, PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1965). Even those that emphasized the economic analysis of law, and found a shift in the common law to promote economic growth, dealt little with slavery. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

52. *See, e.g.*, ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH (2011); TOMLINS, *supra* note 6. Mark Graber even finds the law of slavery in *Dred Scott* in the mainstream of pre–Civil War constitutional law, but does not discuss legal challenges brought by ordinary people. *See* MARK A. GRABER, *Dred Scott* and the Problem of Constitutional Evil 91–92 (2006).

53. As St. Louis's population expanded from 1830 to 1860, the percent of enslaved steadily declined. The overall population of St. Louis was 14,125 in 1830, 35,979 in 1840, 104,978 in 1850, and 190,524 in 1860. St. Louis's slave population in 1830 was 2,796 (19%), in 1840 was 4,616 (12%), in 1850 was 5,967 (5.6%), and in 1860 had declined to 4,340 (2.3%). *Historical Census Browser*, UNIV. OF VA. LIBRARY, http://mapserver.lib.virginia.edu/ [https://perma.cc/6S4D-43YN].

54. *See* pp. 7–8 (outlining the four categories of "freedom suits").

"subordinate people took the lead in pressing their legal rights in suing to establish their freedom in direct contravention of their masters' wishes" (p. 11). It raises key questions about what inspires legal change.[55] And it invites questions about the extent to which enslaved people had some minimal access to the rule of law. Some reviews of *Redemption Songs* have already identified its implications for how we think about the "rule of law" within the system of slavery, which itself was so dependent on positive law to support it.[56]

II. The Path of the [Proslavery] Law

Even though the slaves sung such eloquent and powerful "redemption songs," the law changed from an antislavery law in 1824 to the zealously proslavery law of *Scott v. Emerson* of 1852 (and later *Dred Scott v. Sandford* of 1857).[57] Legal precedent, thus, was shaped by the powerful, who wrongfully ignored the pleas of the enslaved and those held in slavery.[58]

How do we assess the impetus to the change in the law of freedom and slavery from 1824 to the Civil War? How do we account for the shift in the 1840s and 1850s, when the Missouri Supreme Court limited the rights of people held in slavery to challenge their "owners"? What, to borrow Oliver Wendell Holmes's apt imagery, was the "[p]ath of the [proslavery] [l]aw"?[59] In fact, some of the South's pre–Civil War lawyers asked those kinds of

55. For a similar point, see Michael Schoeppner, Book Review, 37 Slavery & Abolition 230, 231 (2016) (reviewing *Redemption Songs*) (questioning "the ways that demographic and economic shifts altered the political dynamics and legal culture in St. Louis").

56. Annette Gordon-Reed, Book Review, 102 J. Am. Hist. 1190 (2016) (reviewing *Redemption Songs*); Martha S. Jones, Book Review, 33 Law & Hist. Rev. 1009 (2015) (reviewing *Redemption Songs*); Loren Schweninger, Book Review, 5 J. Civ. War Era 596 (2015) (reviewing *Redemption Songs*).

57. *Compare infra* text accompanying notes 63–72 (discussing the antislavery precedent and thought that permeated various jurisdictions during the early nineteenth century), *with infra* text accompanying notes 103–108 (discussing the proslavery sentiment that began to dominate legal thought in the mid–nineteeth century).

58. *See infra* notes 109, 112. This finding is consistent with a broad set of work on Southern intellectual history and the coming of the Civil War, which focuses on the increasingly proslavery ideas that permeated Southern politics, religion, and law. *See, e.g.*, Alfred L. Brophy, University, Court, and Slave: Pro-slavery Thought in Southern Colleges and Courts and the Coming of Civil War (2016); 1 Michael O'Brien, Conjectures of Order: Intellectual Life and the American South, 1810–1860 (2004); Alfred L. Brophy, *The World Made by Laws and the Laws Made by the World of the Old South*, *in* Signposts: New Directions in Southern Legal History (Sally E. Hadden & Patricia Hagler Minter eds., 2013). There is a parallel literature that looks to the proslavery ideas and actions of Northern and Southern schools. *See, e.g.*, Craig Steven Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities (2013).

59. O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). One might think here about Holmes's predecessors among Southern treatise writers. *E.g.*, 1 Thomas R.R. Cobb, An Inquiry into the Law of Negro Slavery in the United States of America (Philadelphia, T. & J.W. Johnson & Co. 1858); George S. Sawyer, Southern Institutes (Philadelphia, J.B. Lippincott & Co. 1858); *see also* Alfred L. Brophy, *Did Formalism Never Exist?*, 92

questions: Why had earlier courts interpreted the law in an antislavery fashion, even as Southern lawyers and judges increasingly advanced an alternative—and temporarily very successful argument—that the law was actually proslavery? For instance, Thomas Cobb, the author of *An Inquiry into the Law of Negro Slavery*—the most comprehensive proslavery legal treatise ever written—argued that slavery was consistent with natural law, so that wherever a slave went the law of slavery went with her, protecting her owner's property right in her.[60] Cobb thought that many antislavery courts had allowed their sentiments for slaves to trump their legal reasoning.[61]

Before we go to why there was a shift in *Scott v. Emerson*,[62] there is a backstory about why the Missouri courts voted for freedom in the first place. Stretching back to the 1820s, Missouri had upheld claims brought by slaves arguing for their emancipation. In its first case dealing with slave freedom, *Winny v. Whitesides*,[63] Justice Tompkins of the Missouri Supreme Court cited nothing other than the Northwest Ordinance to show his preference for freedom after slaves had traveled through free states.[64]

There were legal precedents in other jurisdictions that filled out the ideology of freedom. For instance, in 1820, the Kentucky Supreme Court in *Lydia v. Rankin*[65] found that a slave who had been taken by her owner to Indiana—then a free territory—was free, even though she had been brought back to Kentucky, a slave state.[66] *Rankin* disclaimed the general principles of freedom.[67] But it rested, like *Winny* four years later, on the principle that the Northwest Ordinance prohibited slavery in the Indiana territory.[68] *Rankin*

Tex. L. Rev. 383, 406 (2013) (reviewing Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2010)) (discussing the relationship between Holmes and Cobb).

60. Cobb, *supra* note 59, ch. 1, §§ 1–16 (finding natural law protecting slavery based on the near ubiquity of slavery in human history); *see also* James P. Holcombe, Is Slavery Consistent with Natural Law?, An Address Delivered Before the Virginia State Agricultural Society, at the Sixth Annual Exhibition, at Petersburg (Nov. 4, 1858), *in* 27 Southern Literary Messenger 401 (1858).

61. *See, e.g.*, Cobb, *supra* note 59, ch. 10, § 229 (praising the dissenting opinion in the Connecticut Supreme Court case *Jackson v. Bulloch*, 12 Conn. 38 (1837), for protecting the rights of a slave owner who journeyed to Connecticut).

62. 15 Mo. 576 (1852).

63. 1 Mo. 472 (1824).

64. *Winny*, 1 Mo. at 474–75. The Northwest Ordinance, passed first by the Congress under the Articles of Confederation in 1787, was part of the territorial expansion of the United States. Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 Colum. L. Rev. 929, 929–30 (1995). It governed land in the "Northwest" territory—what is now Ohio, Indiana, Illinois, Michigan, and Wisconsin. *Id.* at 929 n.6. It was relevant to the discussion of freedom because it prohibited slavery in the Northwest Territory. *See id.* at 930. Thus, the St. Louis plaintiffs frequently used it to argue that they had been in a free territory. *See* Konig, *supra* note 22, at 68.

65. 9 Ky. (2 A.K. Marsh.) (1820).

66. *Rankin*, 9 Ky. (2 A.K. Marsh.) at 467.

67. *Id.* at 470.

68. *Id.* at 470–71.

supported a general right of owners to bring their slaves through free territory during temporary transit.[69] It also stood, however, for the proposition that residence in a free state or territory freed a slave—and that the slave had a right to sue for her freedom.[70] Moreover, her status as a free person remained even upon return to a slave jurisdiction.[71] Without positive law to support it, there could be no slavery. This antislavery ideology was a key tenet of thought until the 1830s.[72] *Winny* separated law and morality, but found in favor of morality.[73] The rhetoric was not robustly against slavery, but the effect was.[74]

For a while, the Missouri Supreme Court continued to follow *Winny*'s general direction. The judges' opinions in Missouri reflected the dominant idea that slavery was inconsistent with natural law and should be limited. There were some refinements (and restrictions) of *Winny*. One restriction related to the nature of the time spent in a free territory. Missouri courts began to ask whether the slave was held in slavery long enough in a free state to justify a finding of freedom. This arose in 1828, in *LaGrange v. Chouteau*.[75] In 1816, Chouteau had taken, for employment, one member of a family of slaves to Illinois (Illinois outlawed slavery), and on that basis the family claimed freedom.[76] The jury found—and Justice Wash affirmed—that temporary residence in Illinois did not automatically free a slave.[77] Where *Winny* had implied that travel in a free jurisdiction effected freedom,[78] Justice Wash suggested that freedom would only come if the slave had worked in a free jurisdiction for an extended period.[79] In this way, Justice Wash pulled back from the principle of *Winny* that there needed to be a law to support slavery.

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69. *Id.* at 477–78.

70. *Id.* at 477–79.

71. *Id.* at 475–76.

72. *See, e.g.*, Derek A. Webb, *The* Somerset *Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, 32 LAW & HIST. REV. 455 (2014); William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 118–28 (1974).

73. *See* Winny v. Whitesides, 1 Mo. 472, 475–76 (1824).

74. See *id.*

75. 2 Mo. 20, 22 (1828), *aff'd*, 29 U.S. (4 Pet.) 287 (1830).

76. *LaGrange*, 2 Mo. at 20–21.

77. *Id.* at 22.

78. *Winny*, 1 Mo. at 475.

79. *See LaGrange*, 2 Mo. at 22. In a case fifteen years later, a slave lost a claim to freedom based on time his mother had spent in the Northwest Territory. *See* Chouteau v. Pierre, 9 Mo. 3 (1845). When she was there, the territory where she was held was still under British control and, thus, the Northwest Ordinance could not have freed her. *Id.* at 9–10. *Pierre* and *LaGrange* reveal that Missouri courts scrutinized the basis for freedom along several variables—including whether the place the slave served was a free state or territory (as in *Pierre*) and whether the nature of service in the free state or territory justified freedom (as in *LaGrange*).

Yet, despite that setback, the basic doctrine—that a slave taken to a free state for an extended period could become free—still seemed to hold.[80] In 1833, in *Julia v. McKinney*,[81] Justice McGirk, for a divided court, remanded a claim by a slave who claimed she was free when she was hired out for a few days in Illinois.[82] The court found that the trial court verdict denying her freedom was against law and evidence.[83] This supported the idea that some service in a free state, even brief, effected freedom. But a dissent by Justice Wash—the author of the majority in *LaGrange*—indicated that conflicts were brewing. His opinion suggested that the proslavery position that temporary travel might not support a claim of freedom was growing in strength. Justice Wash focused on the intent of the slave owner as the measure of whether a slave had been freed by temporary service in the free state of Illinois.[84]

Nevertheless, for more than a dozen years, the Missouri Supreme Court followed the approach first articulated in *Winny*. In *Rachael v. Walker*,[85] decided by Justice McGirk in 1836, the Missouri court set the framework of freedom in a case where a slave was taken by a U.S. military officer to a free territory to serve him while he was stationed in that territory. At this point, there was still a sense that the Missouri Compromise prohibited slavery in the territories, and that even an Army officer taking slaves into the territories for his own convenience would forfeit his rights to the slave.

A second exception to the general principle of *Winny* arose when courts began to say that slave status reattached to slaves who voluntarily returned to a slave state. Though first made famous in the English admiralty case *The Slave, Grace*,[86] this doctrine had adherents in the United States, in part because of the popularity of the 1827 English decision. That case was about a slave, Grace, who was brought to England from the West Indies—and would have been free had she petitioned in England. Yet she did not sue for freedom until she returned to the West Indies. The Admiralty Court held that, on return to a slave jurisdiction, Grace's slave status reattached.[87]

Many judges adopted this reasoning. Even moderately antislavery Massachusetts Supreme Judicial Court Justice Shaw saw virtues in deference to

80. *See, e.g.*, Wilson v. Melvin, 4 Mo. 592, 596–99 (1837) (Tompkins, J.) (holding that staying for one month in Illinois, even though no slaves worked there, was enough to effect freedom); Nat v. Ruddle, 3 Mo. 400 (1834) (Tompkins, J.) (finding in favor of freedom for slave who was taken to Illinois and employed there as a slave); Milly v. Smith, 2 Mo. 36, 39 (1828) (Tompkins, J.) (holding that "slaves carried into Illinois with a view to residence, and staying there long enough to acquire the character of residents, do by virtue of such residence become free").

81. 3 Mo. 270 (1833).

82. *Julia*, 3 Mo. at 276.

83. *Id.*

84. *Id.* at 276–77.

85. 4 Mo. 350 (1836).

86. (1827) 166 Eng. Rep. 179; 2 Hagg. Adm. 94.

87. *The Slave, Grace*, 166 Eng. Rep. 179; 2 Hagg. Adm. 94.

proslavery states' policies.[88] When he freed a young slave named Med, who had been brought into Massachusetts, Justice Shaw recognized that Massachusetts had an antislavery policy, and that his state thought slavery inconsistent with natural justice. But he acknowledged that slavery was not outlawed by the law of nations and, thus, that other states could support slavery. The upshot was that Massachusetts could free a slave brought into the Commonwealth and kept there for a period, but once a slave left Massachusetts, that person could be reenslaved. That is, Massachusetts's preference for liberty could not outlaw slavery in another jurisdiction.[89]

Such reasoning appeared in Justice Story's *Conflict of Laws* treatise.[90] Story's invocation of *Grace* to show that a person could be reenslaved once she returned from a free state to a slave state reveals a pragmatic proslavery attitude. It acknowledged the reality of slavery jurisprudence as well as a judicial conservatism supporting the law of the jurisdiction where a slave was residing when she petitioned for freedom.[91] Courts increasingly invoked Story's *Conflict of Laws* to deny freedom to those seeking it.[92]

The evolution of decisions after *Rachel v. Walker* in 1836 tilted away from freedom. This was manifest in part by the addition of proslavery judges like William B. Napton to the Missouri Supreme Court.[93] The proslavery tilt was shifting—and dramatically so by the late 1840s—in particular by making it harder to claim freedom based on time a petitioner (or his or her ancestor) spent in free territory. This happened in several ways. First, Justice Napton questioned whether the slave (or his or her ancestor) was freed under the laws of another state. Justice Napton wrote the majority opinion in 1841 in *Rennick v. Chloe*, where he found that an attempt to free a slave via will could only effect freedom if the law of the state where the will was written permitted such attempts to take effect.[94] Because Kentucky limited the right of an owner to free a slave via will, there was no freedom in this

88. Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836).

89. *Id.*

90. *See* Willard v. People, 5 Ill. (4 Scam.) 461, 471 (1843).

91. *See, e.g.*, Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 Cornell L. Rev. 1086 (1993) (critiquing Justice Story's antislavery reputation without addressing the proslavery implications of his *Conflict of Laws*).

92. Joseph Story, Commentaries on the Conflict of Laws 118, 155–67 (Boston, Hilliard, Gray, & Co. 1834) (citing *The Slave, Grace*, 166 Eng. Rep. 179; 2 Hagg. Adm. 94, 113–14) (noting that status as slave may reattach when the slave returns to a jurisdiction where slavery is legal); *see also In re* Archy, 9 Cal. 147, 156, 163 (1858) (citing Story, *supra*) (holding that Archy should continue to be enslaved, despite the fact that he lived in California for several years); *Willard*, 5 Ill. (4 Scam.) at 471–72 (citing Story, *supra*) (holding that Julia should be maintained in slavery despite transit through Illinois); Graham v. Strader, 44 Ky. (5 B. Mon.) 173, 182–83 (1844) (citing Story, *supra*) (holding that a slave is still a slave when he returns from a free state to Kentucky with his master); Scott v. Emerson, 15 Mo. 576, 583 (1852) (citing Story, *supra*) ("No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws.").

93. *See* Christopher Phillips, The Making of a Southerner: William Barclay Napton's Private Civil War 54–63 (2008) (discussing Napton's proslavery jurisprudence).

94. 7 Mo. 197, 204–05 (1841).

case.[95] Five years later, Justice Napton voted with the majority that found that the Northwest Ordinance did not free the mother of a petitioner. At the time the mother was in the Northwestern territory, her area was still under British control and, thus, the Northwest Ordinance could not have freed her.[96]

In *Charlotte v. Chouteau*,[97] the Missouri Supreme Court again dealt with the question of whether a slave taken to Canada was freed by travel across the international border. The court required that the slave put forward evidence that slavery had been abolished in Canada—and ultimately concluded that a government that tolerated slavery might be enough to defeat a claim to freedom.[98] In fact, the court went so far as to say that the policy of Missouri was not in favor of freedom. The court emphasized that the statute placed the burden on the slave claiming freedom and insisted that the state should be against freedom as a general matter:

> Neither sound policy nor enlightened philanthropy should encourage, in a slaveholding State, the multiplication of a race whose condition could be neither that of freemen nor of slaves, and whose existence and increase, in this anomalous character, without promoting their individual comfort or happiness, tend only to dissatisfy and corrupt those of their own race and color remaining in a state of servitude.[99]

In other states, as well, courts pulled back from the doctrine that sojourning in free states effected freedom. In 1844, the Kentucky Supreme Court heard a claim by a slave owner whose slaves were expert musicians. The slaves were rented out—to perform as a band—to places as far away as New Orleans, and their owner received much of their profits. But they were also left largely without supervision. A ship captain on the Mississippi River hired them and took them to Cincinnati, where they promptly escaped. The owner sued the ship captain based on a Kentucky statute that prohibited bringing slaves to a free state, but the captain responded that the slaves were, in fact, free. The captain claimed that the slaves had been permitted to travel in free states and thus, relying on *Lydia v. Rankin*, were already free.[100] The

95. *Rennick*, 7 Mo. at 204–05. There was a dissent by Justice Tompkins, the author of the *Winny* opinion, suggesting that the trial court's verdict freeing the slave should have been upheld. *Id.* at 205.

96. *See* Chouteau v. Pierre, 9 Mo. 1, 3 (1845).

97. 11 Mo. 193 (1847).

98. *Charlotte*, 11 Mo. at 199–201 ("[W]here negroes were found in a state of slavery, the presumption would arise that the government recognized this condition as legal and warranted by their laws and customs, unless some law could be shown prohibiting it.").

99. *Id.* at 200–01. The Court went on to conclude that the story might be different in a state where slavery had never existed or had been abolished, because this was something distinguishing the precedents of free states on the issue of emancipation by travel in a free state. *Id.* at 201.

100. Graham v. Strader, 44 Ky. (5 B. Mon.) 173, 185–86 (1844) (finding that the jury could consider the slaves' "habits of subordination or of independence, the liberties which had been allowed to them, and the effect of all these circumstances, not only upon the value of their services, but also in generating a restlessness under restraint, and a desire of freedom, and

court rejected this argument; it found that if a slave traveled temporarily to a free state and then voluntarily to a slave state, the slave was still a slave.[101] The court did, however, find that the damages should be reduced based on the risk that unsupervised slaves could have fled anyway. That is, the damages to the slave owner were reduced because the slaves had been allowed to act on their own and thus travel to a free state themselves.[102]

III. The Counted But Not the Heard

The doctrinal evolution that made freedom suits more difficult correlated with changing political values in Missouri. In 1836, in Washington, D.C., South Carolina Senator John C. Calhoun was already advancing a robust proslavery constitutional doctrine in Congress.[103] This emerging proslavery thought in Congress had an analog in Missouri law and politics as well.[104] Missouri courts increasingly limited claims to freedom based on travel to free territories.[105] In 1845, the Missouri legislature required that those challenging slavery post a bond, making it more difficult to bring freedom suits.[106] Freedom suits dropped precipitously after 1845.[107] Moreover, in

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in affording facilities and opportunities of escape, even if they had not been taken on board the Pike").

101. *Id.* at 182 ("[A] slave returning voluntarily with his master from a free State, is still a slave by the laws of his own country, is sustained by the opinion of eminent jurists even among those who have maintained that by an appeal to the foreign law while within its jurisdiction, the slave may obtain the benefit of the constitutional principle with prohibits the existence of slavery.").

102. Id. at 186; *see also* Matthew Axtell, *Customs of the River: Governing the Commons within a Nineteenth-Century Steamboat Economy*, 35 Law & Hist. Rev. (forthcoming 2017) (discussing role of steamboats in the pre–Civil War economy); Matthew A. Axtell, *Toward a New Legal History of Capitalism and Unfree Labor: Law, Slavery, and Emancipation in the American Marketplace*, 40 Law & Soc. Inquiry 270 (2015) (reviewing Walter Johnson, River of Dark Dreams: Slavery and Empire in the Cotton Kingdom (2013)) (arguing that a pre–Civil War capitalist regime had the potential to open "subversive possibilities" for slaves). This was partly a story of the nature of slavery along the Mississippi River. For the river permitted fast travel and thus freedom. An editorial in St. Louis's *Daily Evening Gazette* protested the employment of slaves and free people of color on river boats. Trexler, *supra* note 35, at 21. It spoke of the crews as "the profligate reckless band of slaves and free negroes . . . habitually employed as stewards, firemen, and crews on our steamboats." *Id.* (alteration in original) (quoting Daily Evening Gazette, Aug. 18, 1841).

103. William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836, at 355 (1966).

104. *See, e.g.*, Adam Arenson, The Great Heart of the Republic: St. Louis and the Cultural Civil War 33–41 (2011) (discussing Claiborne Fox Jackson's resolutions and the rift they caused in Missouri's Democrat Party); Nicole Etcheson, Bleeding Kansas: Contested Liberty in the Civil War Era 11–13 (2004) (discussing Missouri proslavery politics).

105. *See, e.g.*, Charlotte v. Chouteau, 11 Mo. 193 (1847).

106. *See* Mo. Rev. Stat. ch. 69, § 2 (1845).

107. There were 106 freedom suits filed in the 1830s. There were 68 in the first five years of the 1840s (1840–1844) and there were only 21 from 1845 to 1849. *See* St. Louis Circuit Court Historical Records Project, *supra* note 33.

1849, the Missouri legislature expressed its proslavery sentiments when the Jackson Resolutions passed overwhelmingly. The Resolutions supported slavery in the territories, severely weakening the position that slaves should be free by virtue of travel to the territories.[108]

It was in this world that the claim of Dred Scott and his wife arrived before the Missouri Supreme Court in 1852. Scott's claim was based on time that the Scotts spent in free territory (in what is now Minnesota) when their owner was stationed there with the U.S. Army. Even though the *Rachel* opinion maintained that time spent in a free territory entitled the slave to freedom, the result in Scott's case—a ruling that maintained them in slavery—should not have been surprising. *Scott v. Emerson* produced a result quite directly opposite that of *Rachel*.

The proslavery rhetoric, which had appeared in public debate and in earlier cases, appeared in the *Emerson* opinion and counsel's arguments.[109] The court concluded with a statement about the virtues of slavery for the enslaved.[110] Where abolitionists were talking about the brutality of slavery and depicting enslaved people as citizens-in-waiting, by the 1850s, proslavery writers countered with pictures of the virtues of slavery.[111] The court joined the chorus with this statement:

> There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing with them the blessings of civilized life, we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, who makes the evil passions of men subservient to His own glory, a means of placing that unhappy race within the pale of civilized nations.[112]

Looking back from the vantage of *Emerson*, we can see several key doctrinal developments beginning in the late 1820s that undid the claim for

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108. *See* J. Res., 15th Gen. Assemb., 1849 Mo. Laws 667; *see also* CONG. GLOBE, 31st Cong., 1st Sess. 97–98 (1850) (printing the Jackson Resolutions); TREXLER, *supra* note 35, at 153–55 (discussing the Jackson Resolutions). One of the key points of the Resolutions is that the United States territories should not prohibit slavery. *See* Mo. J. Res., *supra*. Thus, the Resolutions directly conflicted with petitioners who challenged slavery based on time spent in a "free" territory, for they suggested that there were no territories where slavery did not exist. It is unsurprising, then, that the Missouri Supreme Court changed direction in *Scott v. Emerson*, 15 Mo. 576 (1852).

109. Counsel told a story of the origins of the Missouri Compromise—which prohibited slavery from the territories north of Missouri's southern border—as a response to antislavery activity that "threatened the existence of the Union and the perpetuity of free institutions." *Emerson*, 15 Mo. at 580.

110. *See infra* note 112.

111. *See, e.g.*, BROPHY, *supra* note 58, at 227–43 (describing leading proslavery writer Thomas Cobb's discussion of the supposed virtues of slavery); ROTH, *supra* note 30, at 74–104, 247–83 (describing abolitionists' depictions of enslaved people as citizens in waiting).

112. *Emerson*, 15 Mo. at 587.

freedom. First, there was the question of whether temporary sojourn to a free state was sufficient to free a slave.[113] Second, there was the question of whether a jurisdiction was really antislavery.[114] This appeared first with sojourns to Canada and was later expanded to U.S. territory.[115] Third, there was the conclusion that slavery reattached upon return to Missouri.[116] And finally, in the U.S. Supreme Court decision in *Dred Scott v. Sandford*, there was the decision that that the enslaved could not even be permitted to appear in court.[117] The Taney Court thus attempted to make a fact out of the widespread belief among proslavery advocates that African Americans were inferior. The Supreme Court tried to use law to silence the enslaved as it legitimized the idea that the Constitution supported slavery in the territories.[118] This was followed in numerous cases from Mississippi[119] to California[120] in the brief period between the *Dred Scott* decision in March 1857 and the beginning of Civil War in April 1861.

VanderVelde's story is about how the humble enslaved people sought to turn the courts to their advantage. But there is a question whether their advocacy changed the outcome. Perhaps outcomes changed when the humble appealed to the powerful and the powerful reached down to help them—such as happens in paternalism.[121] Some of this may be that the petitioners held the legal system to its own procedure. That is one explanation for the civil rights movement's success in the years leading into *Brown*.[122] Some of it

113. *See supra* text accompanying notes 75–108.

114. *See supra* notes 98–99 and accompanying text.

115. *See supra* notes 98–99 and accompanying text.

116. *See supra* text accompanying notes 90–96.

117. 60 U.S. (19 How.) 393, 406 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

118. *See Dred Scott*, 60 U.S. (19 How.) at 452.

119. *See, e.g.*, Mitchell v. Wells, 37 Miss. 235 (1859). In *Mitchell*, the court refused to allow an African American heir to receive property left to her by her father, a Mississippi resident. *Id.* at 264. She had been freed in Ohio, which the court found inconsistent with Mississippi's policy of slavery. *Id.*

120. *See, e.g.*, *In re* Archy, 9 Cal. 147, 150 (1858) (finding that the Constitution provided support for slavery in the territory of California). Archy, a slave brought from Mississippi to the free territory of California by his owner for a temporary sojourn, was returned to slavery. *Id.* at 147–48. In *Archy*, the court used the idea that slavery was a national institution to maintain a person in slavery who might have been freed some decades earlier. *See id.* at 150.

121. *See generally* ERSKINE CLARKE, DWELLING PLACE: A PLANTATION EPIC (2005) (discussing paternalism on the plantations); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (Vintage Books 1976) (1972) (discussing slaves' acceptance of paternalism as a way for them to implicitly reject slavery).

122. The civil rights movement presents a successful story of legal change, where local members of the African American community were agents of change. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 441 (2011) (crediting lawyers with helping activists become agents of change); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 64 (2012) (interpreting courtrooms as public spaces where African American lawyers "crossed racial lines" and where they could "disrupt the social interactions that helped define race").

may be that judges were predisposed to freedom in limited cases.[123] The lines of causation await more speculation and inquiry into the biographies of individual jurists, the arguments of counsel, and the legal, political, and social culture of the courts.[124]

But the central tendency is in another direction—and it shows the power of legal tradition and the power of vested rights. In 1823, Chief Justice Marshall recognized in *The Antelope*[125] that the power of property rights in humans was great, and that it was not constrained by questions of morality. As the calls for freedom grew louder, the reaction of the legislatures and courts went in the other direction.[126] Missouri politics were increasingly proslavery.[127] Judges, too, were increasingly proslavery.[128] The shift against freedom came as a result of the shift in the judges who were on the bench.[129] What is not fully apparent from VanderVelde's narrative is how the shift in the judiciary correlated with the shift towards increasingly proslavery ideas in Missouri and Southern politics. That is, as the enslaved people were clamoring for justice, the courts were refusing to listen. They could not—in fact, would not—hear the claims for justice. Or, in Ralph Ellison's apt phrasing about African Americans during the Jim Crow era, they were "among the counted but not among the heard."[130] *Dred Scott*, then, represented the final version of the proslavery vision that there was no law to protect the enslaved.[131]

The results link legal ideas to the shifting political character. The legal doctrine followed the increasing sense that slaves had no political identity, for it said they could not appear in court.[132] This doctrine was part of the attempt to make a legal reality out of the belief that enslaved people should not be heard or allowed to speak. Thus, *Dred Scott* is the dependent variable that follows the Southerners' ideas that slaves did not deserve the rights to challenge slavery. This rationale goes back to the ideology articulated in

123. *See* Dennis K. Boman, *The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri*, 44 Am. J. Legal His. 405, 407–09 (2000).

124. *Id.* at 422–23 (discussing Scott, Ryland, and dissenting Justice Gamble's elections to the Missouri Supreme Court); *see also* Dennis K. Boman, Abiel Leonard: Yankee Slaveholder, Eminent Jurist, and Passionate Unionist 145–58 (2002) (discussing proslavery opinions in Missouri politics).

125. 23 U.S. 66 (1825); *see also* Jonathan M. Bryant, Dark Places of the Earth: The Voyage of the Slave Ship *Antelope* xvii–xx, 229–39, 294 (2015).

126. Boman, *supra* note 123, at 408–14.

127. *Id.* at 414–17.

128. *Id.* at 417.

129. *Id.*

130. Ralph Ellison, Three Days Before the Shooting . . . 1004 (John F. Callahan & Adam Bradley eds., 2010).

131. *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 267 (1829) (releasing a slave's hirer from liability for shooting her because the obedience required of slaves requires "uncontrolled authority over the body" of the slave).

132. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452–54 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

North Carolina in 1830 in *State v. Mann*. In that case, which overturned the conviction of a man for abusing a slave in his custody, the judge wrote about the need for an owner's "uncontrolled authority over the body" of the slave.[133] *Mann* correlates with another shift in the law of slavery: states increasingly prohibited owners from using their wills to offer slaves freedom. Where owners sometimes offered freedom via will to their slaves if the slaves agreed to leave the state, some states turned against this practice because the they recognized that it would give slaves too much autonomy.[134] In every way they could, courts were attempting to create a legal reality out of the lack of rights and choices.[135] And the series of decisions surveyed above shows that courts were developing proslavery ideas decades before *Dred Scott*.

Conclusion

Lea VanderVelde's brilliant book reminds us that people who were completely forgotten still tried to claim their freedom. That the claims were not always successful—in fact, that they met with increasing opposition—does not diminish their significance as gauges of the pleas for freedom. *Redemption Songs*, thus, is an important piece of the intellectual history of protest movements.

Yet, as it recovers the claims made by the humble, *Redemption Songs* invites questions about how legal change occurs. Law was, occasionally, a technology that facilitated claims to freedom. More often, however, it was a technology that facilitated control. These cases suggest how little could be done through the legal system. They suggest that there was a demand for justice that needs to be studied. But those demands for justice were independent of what was happening in the courts. A close inspection of the central

133. *Mann*, 13 N.C. (2 Dev.) at 267.

134. *See* Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132 (1858) (denying slaves the legal capacity to choose between freedom and slavery); *see also* Jamison v. Bridge, 14 La. Ann. 31 (1859) (prohibiting a slave from suing on a will offering him freedom).

135. *Dred Scott* was based on a deep well of cultural attitudes toward racial hierarchy and white supremacy in Missouri, which appeared in both the legislature and the courts in the 1840s and 1850s. One example of this is the treatise on slavery written by Hugh A. Garland, one of the lawyers who represented Dred Scott's owner. Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 256 (1978). Garland's treatise remained uncompleted at this death in 1854 and was never published. It drew heavily upon the pseudoscientific ethnographic proslavery literature, such as Josiah C. Nott and George R. Gliddon's *Types of Mankind* (6th ed., Philadelphia, Lippincott, Grambo & Co. 1854). *See* Hugh A. Garland, *Amalgamation*, *in* 2 Treatise on Slavery 32–40 (1854) (unpublished manuscript in the Garland Family Papers, Library of Virginia) (on file with *Michigan Law Review*). Garland grimly and succinctly stated his vision of white supremacy:

> Here we have a race of people with feeble domestic and social affections, small intellect, large animal propensities, and a general cranial development largely below the standard of civilized man. This is the untameable [sic] savage that civilization cannot reform and cannot subdue; he must then recede before it. This is the inevitable course of Providence.

Id. at 35.

tendency of the American law of slavery reveals just how limited the opportunities were to challenge it. Such a study causes us to ask again, in the words of a delegate to the Virginia Constitutional Convention of 1829 and 1830, "[w]hen were men in power ever ready for reform?"[136]

136. Proceedings and Debates of the Virginia State Convention of 1829–30, at 427 (Richmond, Samuel Shepherd & Co. 1830) (quoting Philip Doddridge).