

## New directions in the historiography of African Americans and the law in the antebellum United States

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**New Directions in the Historiography of African Americans and the Law in  
the Antebellum United States**

*Birthright Citizens: A History of Race and Rights in Antebellum America.* Martha S. Jones. Cambridge: Cambridge University Press, 2018. xix, 248pp. \$110.00 and \$27.99. ISBN 9781316604724.

*Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857.* Anne Twitty. New York: Cambridge University Press, 2016. xiii, 285pp. \$51.99 and \$31.99. ISBN 9781107112063.

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During the past three years, a number of new books examining African Americans' experiences with civil law in antebellum America have dramatically refashioned our understanding of free and enslaved black Americans' interactions with the law during the decades before the Civil War. Books focused on freedom suits, such as Anne Twitty's *Before Dred Scott*, Kelly M. Kennington's *In the Shadow of Dred Scott*, and Loren Schweninger's *Appealing for Liberty*, reshape our understanding of how much enslaved African Americans understood about

civil law and how they used these understandings in legal action. Other books, such as Kimberly M. Welch's *Black Litigants in the Antebellum American South*, reveal a wide range of civil suits litigated by free and enslaved African Americans, as well as a gap between slaves' formal legal rights and what they actually did in the court room. Several books explore, as well, African Americans' interactions with lawyers, studying not only how white lawyers shaped African Americans' understandings of the law but how African Americans worked with lawyers to influence their own suits. At times, this legal action had significance not only for the parties involved, but for the locality or nation. Martha S. Jones' *Birthright Citizens* puts the legal actions of free African Americans in Baltimore, Maryland, squarely in the middle of the debate over citizenship at the time. Similarly, Kennington's *In the Shadow of Dred Scott* discusses how African Americans' freedom suits played a part in local and national political debates over slavery. This new scholarship at times also complicates the boundaries of slavery and freedom in legal action by examining cases in the North and in border states. Hendrik Hartog's *The Trouble with Minna* examines a New Jersey case during the era of gradual emancipation to explore a legal landscape in which slavery and freedom remained deeply contested while Twitty considers the ways in which fluid understandings of slavery in the American Midwest influenced freedom suits.<sup>1</sup>

These books point the way forward for a newly imagined scholarship of African Americans and the law in nineteenth-century America that gives far more agency to African American litigants, showing them not just as parties acted upon within the legal system but as significant legal actors in their own right. Together, these books also provide a more nuanced vision of an antebellum legal system in which local and national understandings of law as well as the actions of African Americans and whites collided. Two books, in particular, Martha Jones' *Birthright Citizens* and Anne Twitty's *Before Dred Scott*, offer a wealth of ways to explore enslaved and free people of color's negotiations with the courts. Jones' book focuses on a range of civil litigation participated in by free black Baltimoreans in the decades before the Civil War, arguing that black litigants not only exercised significant legal knowledge and savvy but also reinforced their own claims to citizenship and played a part in the larger national debate over black citizenship through their legal action. Meanwhile, Twitty's book draws from 282 freedom suits in the St. Louis circuit court from 1814 to 1860 to contend that black litigants obtained significant knowledge of formal law which they used to shape their freedom suits in pragmatic ways. Both books are framed by the infamous case of *Scott v. Sandford*, each ending with a chapter on the case. Drawing on these books, as well as other recently published studies, this essay sets out the new direction of the historiography of race, slavery, and the law.

Despite a more in-depth focus on black agency in the courtroom, there is some diversity of approaches in the new scholarship. Several books, including both *Before Dred Scott* and *Birthright Citizens*, focus deeply on a few cases or one case. Twitty explains that she chose to focus on a limited number of cases to reconstruct “entire stories” and unearth cases’ “deeper truths” (Twitty, 20). This microhistory approach allows Jones and Twitty to explore the legal actions of those involved both inside and outside of the courtroom and consider the contexts of the cases more carefully. In contrast, Schwenger casts a wide-ranging eye across over two thousand cases scattered across fifteen states and Kennington draws from 287 circuit court cases in St. Louis and over 800 appellate suits across the South. This approach has significant value, too, providing insight into the broader trends taking place across localities and across time. The authors also vary in their use of statistics. Some books, such as those of Welch and Jones, make largely qualitative arguments. Others, such as Kennington and Schwenger, rely on statistical analysis of cases to analyze the kinds of suits litigated before different courts and the cases’ outcomes. Schwenger, in particular, bases his book on a long-term study of freedom suits that generated a range of statistics which he uses to frame his conclusions.

In other ways, the approaches of this new scholarship converge. Much of the new scholarship has a strong sense of place and focuses on local cases in a certain area, continuing a trend in recent legal scholarship. Jones’ *Birthright*

*Citizens* is particularly imbued by its location of Baltimore, Maryland, which was home to a large free black community before the Civil War. In part, Jones creates this sharp sense of location by focusing on the specific legal culture of free black people in Baltimore and their concerns and legal battles. Similarly, Twitty traces the history of the location where her book is set, a region encompassing parts of modern-day Ohio, Indiana, Illinois, Kentucky, and Missouri. She then shows how the fluidity and placement of this region led to an ambiguity in both slave and free status for African Americans. The local focus of Jones' and Twitty's books add depth to their discussion of the Dred Scott case. Twitty's in-depth examination of other cases before the St. Louis circuit court, where the Dred Scott case began, allows her to conclude that in many ways the Scott case was similar to other freedom suits before that court. Like plaintiffs in other suits claiming freedom in the St. Louis court, she explains, Scott had significant legal knowledge and filed freedom suits on multiple occasions in various jurisdictions. In contrast, Jones' focus on the free black community in Baltimore enables her to highlight the responses of free black Baltimoreans to the Supreme Court decision and their experiences in local courtrooms in the wake of the decision. Even books that examine a wider range of locations pay close attention to place. Schweninger's magisterial and broad-ranging *Appealing for Liberty* still clearly delineates differences across time and place. While at times sacrificing some breadth, the

sensitivity to location across this scholarship provides a richness of detail and an illumination of how law operates differently in varying locations.

The books' largely local perspectives allow scholars to contrast what was happening nationally with what was happening on the state and local level. Thus, continuing another direction of legal scholarship, Jones, Welch, and Schweninger consider the differences between state and national law and how litigation played out on the ground in specific localities and local courtrooms.<sup>2</sup> Jones notes, for instance, that after the *Scott v. Sandford* decision denied Dred Scott's citizenship as a free person of color, free black Baltimoreans continued to exercise the legal rights of citizens, bringing "disputes to court, much as they had before Dred Scott" (Jones, 137). Several scholars also highlight the messiness of the law in practice, including the ambiguity in legal contests and the ways in which law was often subverted or not carried out. Schweninger, for one, gives many examples of times in which African Americans' efforts to gain their freedom were thwarted, despite the legal basis of their claims. In addition, *The Trouble with Minna* addresses the ways that the formal law of slavery and freedom itself remained contested in contrasting decisions and acts by legislatures. Hartog analyzes the multiple interpretations that judges could take of the New Jersey law surrounding slavery and gradual emancipation and how their decisions shifted over time.

This new scholarship also expands the idea of who we consider to be legal actors, and what kind of legal action these parties took. Scholars such as Laura

Edwards and Ariela Gross have shown how enslaved African Americans operated in law-saturated environments and the ways in which their daily lives were influenced by the law and legal understanding. Almost of all these new books carry this one step further, recognizing African Americans as savvy negotiators of legal processes within the courtroom, as well as participants in informal legal cultures or parties acted upon by the law, as earlier legal scholarship has often emphasized.<sup>3</sup> Kennington, for one, explores the different ways in which enslaved people found lawyers and initiated legal action. Similarly, Twitty, characterizes black litigants as frequently “play[ing] a meaningful role in the prosecution of their suits” by tracking down witnesses, bringing cases against sham defendants, building their legal claims through travel to free states and coordinating with their attorneys (Twitty, 75). Women of color also play a key role in many of the suits under examination. While Jones’ book focuses on male protagonists, the work of Twitty, Welch, Kennington, and Schweninger all pays close attention to the litigation of black women as well as black men.

In addition to tracing African Americans’ participation in the legal process, several of these books depict black litigants as significantly more able to negotiate antebellum southern courtrooms than scholars have generally previously acknowledged. Welch, for one, demonstrates how black litigants in the Natchez district of Mississippi and Louisiana presented themselves and their suits in carefully crafted ways during their legal action to sway the courts’ decisions. In



particular, she shows how black litigants drew on the language of property and created persuasive narratives that entered the legal record in their lawyers' petitions and in questions to witnesses. Further, Welch argues that these stories told by black litigants influenced the outcome of their suits, playing a part in a number of favorable decisions for African Americans in white-dominated southern courts.

To provide context for African Americans' negotiation of the legal process, several of these scholars explore the legal cultures in which black men and women operated. According to Kennington, a legal culture is "the constellation of attitudes and experiences concerning law in a particular time and place."<sup>4</sup> Thus, some of this new scholarship considers African Americans' attitude toward the courts in the location examined, and why they may have chosen to initiate litigation. Twitty notes, for instance, that plaintiffs often viewed their chances in a white-dominated legal system clearly, seeing litigation as "a calculated venture, an assessment rendered after carefully weighing all the potential costs" (Twitty, 18).

In addition, this scholarship evaluates African American litigants' knowledge of law. Almost all of these new books devote considerable space to a discussion of how much the African American actors in their stories understood the law and how they obtained this knowledge. Jones, for instance, shows how free black sea men learned about the law while at sea and discusses how other

free African Americans gained legal understanding through participation in political conventions and as they dealt with restrictions placed upon free black people, such as the necessity of obtaining travel permits. Twitty, in turn, highlights the way in which acquiring legal knowledge was a “collective process” for many enslaved men and women. According to her analysis, the participants in St. Louis freedom suits learned about the law from local whites, attorneys, family members, and other members of the black community, who together formed a “tangled network” of legal understanding (Twitty, 71). As a result, Twitty argues, plaintiffs in these particular freedom suits had a much more developed knowledge of formal law than historians have often appreciated.

Some books discuss, as well, the interactions between African American litigants and their almost always white lawyers and highlight a two-way exchange of information. Twitty discovered, for instance, that enslaved people often found counsel themselves and explores the various kinds of relationships that arose between black clients and their legal representatives. Schweninger, too, notes that black litigants often supplied their lawyers with key information that the lawyers used to strengthen litigants’ suits and discusses the way in which lawyers and clients worked together to select witnesses. Overall, though, black litigants’ interactions with and influence on their lawyers could be examined further. While many of these books address black litigants’ legal representatives, they often focus primarily on who the lawyers were, why lawyers took on such cases, and

how ably they represented their clients. Twitty notes, for example, that well-respected white attorneys often took on slave clients in freedom cases and that the representation black litigants in St. Louis freedom suits received was often similar in quality to the representation of those they battled in court.

In a particularly important shift, this new scholarship at times also considers the role of African Americans in shaping law and legal understandings as well as political debates. Jones' *Birthright Citizens*, in particular, shows how free black people helped to mold understandings of citizenship. According to Jones, free African Americans played a part in the larger debate over citizenship largely through their participation in the legal process, rather than through obtaining successful outcomes in their suits. As they battled laws limiting their rights and took part in cases over ordinary matters like debt relief, Jones found, free African Americans "looked more like rights-bearing people than the degraded subjects they were intended to be" (Jones, 70). Not only did they successfully obtain the support of local whites, but they answered lawyers' questions in well-thought out ways that would support their legal claims and navigated the legal system adroitly. Through this novel examination, Jones provides a path forward for scholars to investigate how participation in seemingly ordinary civil matters had larger political and legal meaning.

In addition to analyzing what occurred in the courtroom, many of these books pay close attention to what occurred outside the courts before and after

litigation. In discussing church disputes involving black Baltimore churches and their members, Jones sets out the creation of the churches, links together a series of disputes and legal encounters, and then discusses how matters played out on the ground in succeeding years. Twitty, in turn, notes the way that enslaved people's legal action went hand in hand with other actions outside of the courtroom to negotiate greater independence and better circumstances for themselves. By setting legal action firmly within a range of negotiations, these scholars help link legal history to wider histories of slavery, resistance, and the U.S. South.

There are clear limits to the sources used in these books to make these arguments. The cases black men and women litigated in antebellum courtrooms likely often involved African Americans with greater knowledge of the law than many other black people in their communities or other advantages. Indeed, Twitty acknowledges that the cases she examines are not necessarily representative of the legal experiences of slaves and free people of color overall. She argues, however, that the cases that do survive “stand in for a silent body of freedom suits that remains just offstage – cases that have not survived or were not filed in the first place” (Twitty, 21). The harsh restrictions on slaves' and free people of color's ability to testify in antebellum southern courts also limit scholars' ability to show African Americans' agency in legal action. Often, scholars must read into mediated court documents written by white lawyers, and there are dangers in

attributing too many of these lawyers' words or arguments to their black clients. Thus, a consideration of black litigants' actions in the legal system, as Jones focuses on, rather than an emphasis on the wording of legal documents, is perhaps a particularly successful way to analyze black southerners' pre-war legal experiences.

In addition to redefining the field in new and exciting ways, this scholarship also suggests new avenues for further research. While many of these books show ways in which African Americans played roles in litigation, there remains room to further explore how free and enslaved people shaped the legal process, including delving deeper into their interactions with their lawyers. The local nature of many of these studies also prompts further examination of similarities and differences in black litigants' experiences across different localities. Jones' examination of how African Americans shaped understandings of citizenship could also be a model for future examinations of the role of African Americans' legal action in political and legal debates. In addition, Jones' and Welch's explorations of the many different types of suits that enslaved and free black litigants took part in reveals avenues for exploring other kinds of civil cases beyond freedom suits in greater depth. Finally, Hartog's study of a case involving slavery and freedom during the age of gradual emancipation in the North suggests the possibility for further research into cases involving African Americans and

issues of freedom in northern states, including suits in which black men and women served as litigants.

Moreover, Jones points to continuing civil actions by black Baltimoreans during Reconstruction in her conclusion. Indeed, as scholars have shown, black southerners continued their civil litigation in courts throughout the South after the Civil War. However, the range of African Americans' cases and experiences in civil action after the Civil War is only beginning to be probed.<sup>5</sup> Thus, it is in post-war courts, perhaps, that many of these insights from the scholarship of race, slavery and the law can be built on and continued. Unlike the vast majority of antebellum civil suits, African Americans frequently testified in post-war civil suits against both white and black litigants and thus their own words and courtroom narratives can be closely examined. There remain spaces as well for examinations of African Americans' legal culture in the post-war South. It would be interesting, as well, to further explore the political and legal impact of African Americans' litigation in southern courts during the period of Jim Crow. Finally, while my own research has examined how African Americans worked to shape their trials in cases that reached southern appellate courts during the post-war period, examinations of African Americans' civil suits in local courts that firmly tied the suits to their location and particular legal cultures would also advance the historiography of this later period.

Melissa Milewski

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<sup>1</sup> In addition to *Birthright Citizens* and *Before Dred Scott*, see Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South* (New York: Oxford University Press, 2018); Kelly M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: The University of Georgia Press, 2017); Kimberly M. Welch, *Black Litigants in the Antebellum American South* (Chapel Hill: University of North Carolina Press, 2018); Hendrik Hartog, *The Trouble with Minna: A Case of Slavery & Emancipation in the Antebellum North* (Chapel Hill: University of North Carolina Press, 2018).

<sup>2</sup> For a particularly important early example of this trend, see Hendrik Hartog, “Pigs and Positivism,” *Wisconsin Law Review* 4 (1985): 899-935.

<sup>3</sup> For earlier scholarship on African Americans operating in law-saturated environments and their informal participation in legal culture, see Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, NJ: Princeton University Press, 2000); Laura F. Edwards, “Status without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South,” *The American Historical Review* 112, no.2 (2007): 377-378; Laura F. Edwards, *The People and their Peace: Legal Culture and the Transformation of Inequality in the Post-*

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*Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009); Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003).

<sup>4</sup> Kennington, *In the Shadow of Dred Scott*, 4.

<sup>5</sup> Much of the initial scholarship examining civil litigation between black and white southerners during the century between 1865 and 1950 focused on issues of civil rights or race. See, for example, Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven, CT: Yale University Press, 1997); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009); Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); Julie Novkov, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* (Ann Arbor: University of Michigan Press, 2008). For studies examining a wider range of kinds of civil litigation involving African Americans, see Melissa Milewski, *Litigating Across the Color Line: Civil Cases Between Black and White Southerners from the End of Slavery to Civil Rights* (New York: Oxford University Press, 2018); Tamika Nunley, "By Stealth or Dispute: Freedwomen and the Contestation of American Citizenship," in *The Civil War and the Transformation of American Citizenship*, ed. Paul Quigley (Baton Rouge:



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Louisiana State University Press, 2018); Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (Cambridge: Cambridge University Press, 2001); Laura Edwards, *A Legal History of the Civil War and Reconstruction* (New York: Cambridge University Press, 2015); Mary Frances Berry, *The Pig Farmer's Daughter and Other Tales of American Justice: Episodes of Racism and Sexism in the Courts from 1865 to the Present* (New York: Vintage Books, 1999); Tera Hunter, *Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century* (Cambridge, Mass.: Harvard University Press, 2017); Giuliana Perrone, "'Back into the Days of Slavery': Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom," *Law & History Review*, forthcoming (draft shared with the author); Dylan C. Penningroth, "African American Divorce in Virginia and Washington DC, 1865-1930," *Journal of Family History* 33, no.1 (2008): 21-25. Dylan Penningroth is also writing a book examining African Americans' encounter with the law and the making of black legal cultures from the 1830s to the 1960s that will closely examine civil cases between black southerners. In addition, two Ph.D. students, Hollie Pich and Myisha Eatmon, are writing dissertations that discuss African Americans' civil litigation during the era of Jim Crow.