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Hughes v. Jackson: Race and Rights beyond Dred Scott

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HUGHES V. JACKSON: RACE AND RIGHTS BEYOND *DRED SCOTT*[*]

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With its focus on race and rights in Maryland, this Article opens a new chapter in the history of black citizenship before the Civil War. Evidence from Maryland's courts, legislature, and local courthouses establishes that free black Americans were not the people with "no rights" that Roger Taney imagined them to be. Nor, however, were they citizens in an unqualified sense. Appearing before state officials, free black Americans were able to assemble a bundle of rights—to travel, to bear arms, to make and enforce contracts, to freely exercise religion, and, central to this Article, to sue and be sued. They waged contests over, and sometimes won, the very rights that by 1866 came to be termed "civil rights" and with the Fourteenth Amendment would come to be the substance of birthright citizenship.

From high court deliberations into the lives of free black Americans, this Article examines the story of Samuel Jackson and reveals that debates over race and rights were not the matters of abstract reasoning or an end unto themselves. Samuel Jackson, this Article shows, may have won the right to sue and be sued for himself and for free black Marylanders generally. He did not, however, succeed in obtaining custody of his children. The liberty of free black Americans, and hence the integrity of Jackson's family, would come only in the wake of the Civil War and the state constitution's abolition of slavery. Thus, the meaning of rights remained constrained if they did not also provide a means to a more just end.

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INTRODUCTION

Samuel Jackson's confrontation with *Dred Scott v. Sandford*[1] began, not in a Supreme Court reporter, but instead in his local courthouse. There, in Dorchester County, Maryland, Jackson told a story that began in March of 1851.[2] Two free African American farmers, Josiah and William Hughes, had "forcibly and violently" seized Jackson's five minor children: Lilly, Ellen, Theodore, Dennis, and Mary.[3] A free African American laborer, Jackson did not hesitate for long. He appeared before the clerk of the circuit court and swore out a bill of complaint.[4] The charges included trespass, assault and battery, breaking and entering, the misappropriation of property (his children), and $1,000 in damages.[5] Initially, the case languished, and it seems the parties attempted a settlement.[6] However, with matters still at an impasse in April of 1856, the circuit judge empanelled a jury.[7] After a brief trial, they found in favor of Jackson.[8] He and his family were awarded $750 for the wrongs committed against them.[9]

The matter could have ended here. However, Josiah Hughes appealed the local court's ruling to the Maryland Court of Appeals, the state's high court, transforming Samuel Jackson's grievances from

1. 60 U.S. (19 How.) 393 (1857).

2. Hughes v. Jackson, 12 Md. 450, 450 (1858). The Article's analysis of *Hughes v. Jackson* is drawn from the text of the Maryland Court of Appeals 1858 decision, the records of the court, including Jackson's manuscript brief, Briefs, Maryland Court of Appeals, S375-21, Maryland State Archives, Annapolis, Maryland [hereinafter Records of the Court], and the case file in *Samuel Jackson v. Denwood Hughes, William Hughes, and Alward Johnson*, Dorchester County Circuit Court, Equity Papers., T2318-3, Maryland State Archives, Annapolis, Maryland [hereinafter Case File]. The sources entitled Records of the Court, also cited in note 3, and Case File, also cited in notes 3–4, 120–21, 144–66, are archival in nature, and the *North Carolina Law Review* was unable to review them for substantive support. The author has viewed the sources in person and vouches for the accuracy of the textual assertions they support.

3. *Hughes*, 12 Md. at 450; Case File, *supra* note 2; Records of the Court, *supra* note 2.

4. Case File, *supra* note 2.

5. *Hughes*, 12 Md. at 450–51.

6. *See id.*; Case File, *supra* note 2.

7. *Hughes*, 12 Md. at 451.

8. *Id.*

9. *Id.*

a highly contested local matter into an occasion for testing the reach of the *Dred Scott* decision. In that 1857 landmark case, the United States Supreme Court had deemed all black Americans to be non-citizens of the United States and thus without any claim before the federal government.[10] Chief Justice Roger Taney's majority opinion turned, in part, on the history of race and rights in the individual states, with Taney infamously asserting that, at the nation's founding, black men and women had "no rights which the white man was bound to respect."[11] This view defined the status of black Americans with respect to the Federal Constitution, Taney concluded.[12] *Hughes v. Jackson*[13] posed a similar question to the State of Maryland: What was the status of free black Marylanders and what rights, if any, did they possess before the law?

Free black Americans presented a thorny legal puzzle that had produced a muddled history of constitutional provisions, legislative schemes, and everyday practices in Maryland. In the founding era, property-owning free black men had exercised basic civil rights: voting, suing and being sued, and contracting.[14] It was in 1802 that a constitutional amendment limited the franchise in Maryland to the "free white male citizen."[15] Black laws were gradually set in place during the early republic era, and by the antebellum decades, Maryland had a wide-ranging scheme of restrictions.[16] A bright-line distinction emerged between the legal status of free black versus free white people, drawn by laws that set unique terms for African American gun and dog ownership, travel, vocation, public assembly, and punishments for criminal convictions. Still, state-supported

10. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857).

11. *Id.* at 407.

12. *See id.* at 405.

13. 12 Md. 450.

14. David Skillen Bogen, *The Maryland Context of* Dred Scott*: The Decline in the Legal Status of Maryland Free Blacks 1776–1810*, 34 AM. J. LEGAL HIST. 381, 387 (1990).

15. *See* David S. Bogen, *The Annapolis Poll Books of 1800 and 1804: African American Voting in the Early Republic*, 86 MD. HIST. MAG. 57, 62–63 (1991) (offering the 1801–02 Maryland constitutional amendment as an example of the disenfranchisement of African Americans during this time period).

16. For an overview of black laws, see generally STEPHEN MIDDLETON, THE BLACK LAWS: RACE AND THE LEGAL PROCESS IN EARLY OHIO (2005) (detailing Ohio's use of "legal principles to abridge civil and natural rights of racial minorities" during the nineteenth century, *id.* at 2). For a summary of black laws in Maryland, see generally CHRISTOPHER PHILLIPS, FREEDOM'S PORT: THE AFRICAN AMERICAN COMMUNITY OF BALTIMORE 1790–1860 (1997) (recounting the development of Baltimore's black community "from a transient aggregate of migrant freedpeople ... to a strong overwhelmingly free community" and describing the impact of black laws on this community, *id.* at 2).

colonization projects remained voluntary, and proposals to re-enslave free African Americans failed, suggesting a fragile but discernible distinction between free and enslaved black Marylanders.[17]

By 1850, a statewide convention contemplated a new constitution and the status of free black Marylanders generated a prolonged and contentious debate. Some delegates insisted upon a distinction between "citizen" and "freeman," suggesting that the former clearly excluded free African Americans from legal protections since they were non-citizens.[18] Others argued that free black people were mere "denizens" in the sense that they were legitimate residents of the state but without the same rights and privileges of citizens.[19] Some suggested that it was imprudent to put free people of color outside the "pale of [the constitution's legal] protection," while others took the view that the convention could only refuse them legal protection "[i]f they distutb [sic] the peace."[20] William Blakistone, a former Speaker of the State Assembly, argued that once "a human being, native, or foreigner, white or black, bond or free, sets his foot upon [state] soil, he is under the protection of the laws of the State."[21] In this view, the law must guarantee to free African Americans security in their persons and property.[22] In the end, the convention could not arrive at a consensus and passed the question on to legislators and local officials. Whether free black Marylanders were denizens, citizens, or something else remained an unsettled question.

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17. For a compilation of Maryland's black laws, see JEFFERY R. BRACKETT, THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY 66–72 (Books for Libraries Press 1969) (1889).

18. *See* 1 MD. REFORM CONVENTION, DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 194 (1851) (noting that one delegate moved to amend an article by replacing "freeman" with "citizen," indicating that these were not always viewed as interchangeable words).

19. *Id.* at 196 ("Under the old Constitution there seems to have been no difference in the quality of citizenship between freemen of whatever color; but in 1809 the political power of the State was vested in free white male citizens only, and the whole subsequent history of our legislation, demonstrates that the free colored population have been regarded as denizens only, who are entitled to no other privilege, or domicil, than such as the law of the State accords.").

20. *See id.* at 259.

21. *Id.*

22. *See id.* at 259–60 (reciting Blakistone's comments regarding "the protection of the laws of the States" in light of a proposal to amend "the twenty-first article of the Bill of Rights"). The article on which Blakistone was commenting stated "[t]hat no freeman ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." *Id.* at 194.

From the perspective of black Marylanders, the *Dred Scott* decision offered only one answer among many to questions about race and rights. The decision came in 1857, late in what was already a long-standing debate about the legal status and standing of free African Americans.[23] A remarkable range of conflicts preceded that case; free black citizenship was not a matter of first impression in 1857. Black Marylanders had long been navigating a complex and shifting legal terrain in which lawmakers seemed unable to agree upon or fix their status. Free black activists asserted they were citizens, forcing courts and state legislatures to grapple with their claims.[24]

While they decried the decision, few black Marylanders felt the impact of *Dred Scott*. Only a short list of disabilities flowed from Roger Taney's conclusion; as non-citizens of the United States, free African Americans were barred from federal courts in civil cases, denied passports, and excluded from federal employment.[25] To declare black Americans to be non-citizens of the United States did not reach, however, to the core of their juridical lives. Legal status was only occasionally determined by way of federal law. In the United States of the 1850s, state and local courts heard, tried, and decided matters from freedom suits and trials of racial determination to ordinary civil and criminal matters.[26] State and local self-governance were at the core of antebellum legal culture.[27] The legal

23. In an 1838 treatise, African American legal commentator William Yates recounted much of this debate. *See generally* WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP AND TRIAL BY JURY: BEING A BOOK OF FACTS, ARGUMENTS AND AUTHORITIES, HISTORICAL NOTICES AND SKETCHES OF DEBATES—WITH NOTES (1838) ("The object of this book is to call to mind, from the records of the past, some of many testimonies to be found of the rights and services of colored men." *Id.* at iii.).

24. *See* MARTIN ROBISON DELANY, THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES 48–51 (1968).

25. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 429–31 (1978).

26. *See* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 22–46 (2000); ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 3–4, 30–39 (2008); GLENN MCNAIR, CRIMINAL INJUSTICE: SLAVES AND FREE BLACKS IN GEORGIA'S CRIMINAL JUSTICE SYSTEM 44–45, 53–54 (2009); JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846–1862, at 15, 59, 72–74 (2003); CHRISTOPHER WALDREP, ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817–80, at 30–36 (1998).

27. *See* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 12–16 (2009); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1–2 (1996).

questions that ran through the lives of free black Marylanders were almost exclusively governed by state laws. Indeed, when examining the dockets of the state's federal district courts, one sees that even before *Dred Scott*, free African Americans rarely sought out federal courts as a venue.[28] The contrast with scenes from state courts is striking. There, black Americans were regular, if not ordinary, participants in legal culture.[29] The story of race and rights before the Civil War played out, not in federal courts, but in state and local venues.

This Article, with its focus on race and rights in Maryland, examines in a new light this history of citizenship before the Civil War. Evidence from the state's courts, legislature, and local courthouses establishes that free black Americans were not the people with "no rights" that Roger Taney imagined them to be.[30] Nor, however, were they citizens in an unqualified sense. Appearing before state officials, free black Americans were able to assemble a bundle of rights—to travel, to bear arms, to make and enforce contracts, to freely exercise religion, and, as explored in this Article, to sue and be sued. They waged contests over, and sometimes won, the very rights that by 1866 came to be termed "civil rights" and with the Fourteenth Amendment would come to be the substance of birthright citizenship.[31] Finally, following the story of *Hughes v. Jackson* from high court deliberations into the lives of Josiah Hughes and Samuel Jackson reveals that debates over race and rights were not the matters of abstract reasoning or an end unto themselves. Samuel Jackson, this Article discovers, may have won the right to sue and be sued for himself and for free black Marylanders generally. He did not, however, win custody of his children. Their liberty, and hence the integrity of Jackson's family, would come only in the wake of the Civil War and the abolition of slavery through the state's new 1864 constitution. The meaning of rights remained constrained if they did not also provide a means to a more just end.

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28. Records of District Courts of the United States, Record Group 21, United States National Archives and Records Administration Philadelphia Regional Archives, Philadelphia, Pennsylvania [hereinafter Records of U.S. District Courts]. This source, also cited in note 88, is archival in nature, and the *North Carolina Law Review* was unable to review it for substantive support. The author has viewed the source in person and vouches for the accuracy of the textual assertions it supports.

29. *See* 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, 55–56 (Manisha Sinha & Penny Von Eschen eds., 2007).

30. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857); *infra* Part II.

31. *See* Jones, *supra* note 29, at 55, 60.

This Article proceeds in four parts. Part I examines how the Maryland Court of Appeals assessed the implications of *Dred Scott* for the individual states and then rejected its logic and affirmed the right of free black people to sue and be sued in the state's courts. Part II examines the broader debate over *Dred Scott*, explaining how federal and state courts limited the decision's reach. Part III moves away from high courts and *Dred Scott* to reexamine *Hughes* in the context of the local courthouse. It uncovers how the interests of free black litigants were part of the fabric of local legal culture with lawyers and judges as essential participants in scenes of claims-making. *Hughes* did not begin as a claim for "rights." Instead, it began as a dispute over one party's claim of family integrity and another's claim of property in persons. Part IV retells the case from the lived experience of Hughes and Jackson. While Jackson ultimately won the right to sue and be sued in Maryland for himself and all free black claimants, he lost in his effort to secure control and protect the well-being of his children.

I. THE APPEAL

Dissatisfied with the jury's conclusions and failing to win a new trial at the circuit court level, Josiah Hughes appealed to the Maryland Court of Appeals.[32] His claims were, in one sense, routine. Hughes sought to overturn the verdict or otherwise have it set aside for a number of technical defects.[33] For example, Jackson had failed to indicate that he was a "free" negro in his initial pleadings, inviting the presumption that he was a slave and thus incapable of bringing suit.[34] Hughes also asserted a more novel position. The year was 1858, and he argued that the United States Supreme Court's logic in *Dred Scott* should decide the matter.[35] Arguing before a three-judge panel,

32. *See* Hughes v. Jackson, 12 Md. 450, 451 (1858).

33. *See id.* at 451, 462–63.

34. *See id.* at 462 (describing the question presented to the court as "whether a negro can maintain an action in this State, without first averring in his pleadings, and establishing by proof, his freedom").

35. *See id.* at 455. The literature on the Dred Scott case is voluminous. *See, e.g.*, AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT* CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857 (2006); FEHRENBACHER, *supra* note 25; MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); VINCENT C. HOPKINS, S.J., DRED SCOTT'S CASE (1951); KENNETH C. KAUFMAN, DRED SCOTT'S ADVOCATE: A BIOGRAPHY OF ROSWELL M. FIELD (1996). However, remarkably little written about the *Dred Scott* era has examined how the decision may have shaped the experience of legal personhood and citizenship for free African Americans. In subsequent literature, scholars have remained close to the text of the case and its prominent actors. For example, Taney has been scrutinized, from Don Fehrenbacher's suggestion of a pro-

Hughes's attorney, Elias Griswold, asserted that Samuel Jackson (and, by curious implication, his own client), as a free black Marylander, was without standing before the state court, as had been

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Southern bias to Mark Graber's vision of a disciplined judge whose views were consistent with "the mainstream of antebellum constitutional thought." *Compare* FEHRENBACHER, *supra* note 25, at 557–58, *with* GRABER, *supra*, at 28–30. Austin Allen has tried to reconcile Taney's record, explaining that his decision sought to both protect slavery and the interests of corporations. ALLEN, *supra*, at 161. Perspectives on Taney court dissenters John McLean and Benjamin Curtis provided a counter-point to Taney's conclusions. *See generally* Justin Buckley Dyer, *Lincolnian Natural Right,* Dred Scott, *and the Jurisprudence of John McLean*, 41 POLITY 63 (2009) (arguing that the harsh treatment of Justice McLean's dissenting opinion is ill-founded); Lucas E. Morel, *The* Dred Scott *Dissents: McLean, Curtis, Lincoln, and the Public Mind*, 32 J. SUP. CT. HIST. 133 (2007) (summarizing the dissenting opinions in the case and Lincoln's perspective on the case). Figures from Missouri's legal culture have helped explain early developments in the case; Supreme Court Judge Hamilton Gamble and Dred Scott's attorney, Roswell Field, have been the subjects of biography-length treatments. *See generally* DENNIS K. BOWMAN, LINCOLN'S RESOLUTE UNIONIST: HAMILTON GAMBLE, *DRED SCOTT* DISSENTER AND MISSOURI'S CIVIL WAR GOVERNOR (2006) (offering an in-depth perspective on Justice Gamble's life and beliefs); KAUFMAN, *supra* (discussing the life and advocacy of the attorney that represented Dred Scott). Some legal historians have tried to displace *Dred Scott* altogether by offering cases like *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), as more important to the understanding of slavery and federal power in antebellum legal culture. *See* Paul Finkelman, Prigg v. Pennsylvania*: Understanding Justice Story's Proslavery Nationalism*, 22 J. SUP. CT. HIST. 51, 54 (1997); Michael J. C. Taylor, *"A More Perfect Union":* Abelman v. Booth *and the Culmination of Federal Sovereignty*, 28 J. SUP. CT. HIST. 101, 113 (2003). *Dred Scott* has also served as a touchstone for social and cultural historians of race and citizenship. Walter Ehrlich's careful study of the Scott family's legal challenges ushered in studies of freedom suits in Missouri and other jurisdictions. *See, e.g.*, Austin Allen, *The Political Economy of Blackness: Citizenship, Corporations, and Race in* Dred Scott, 50 CIV. WAR HIST. 229, 235–36 (2004) (describing a Kentucky freedom suit); William E. Foley, *Slave Freedom Suits Before Dred Scott: The Case of Marie Jean Scypion's Descendants*, 79 MO. HIST. REV. 1, 2–22 (1984) (recounting a family's multi-generational attempts to obtain freedom). *See generally* WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979) (detailing the Scott family's cases both in state and federal courts). Likewise, a great deal is known about the effect of the case on Scott and his family members, including his wife, Harriet. *See* LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER 236–39 (2009). Reactions to the case have been brought to light: Catholics, free black Americans, and political leaders such as Abraham Lincoln, have all weighed in. *See* Patrick W. Carey, *Political Atheism: Dred Scott, Roger Brooke Taney, and Orestes A. Brownson*, 88 CATH. HIST. REV. 207, 209, 213–19 (2002); Gary J. Jacobsohn, *Abraham Lincoln "On this Question of Judicial Authority": The Theory of Constitutional Aspiration*, 36 POL. RES. Q. 52, 53 (1983); Todd F. McDorman, *Challenging Constitutional Authority: African American Responses to* Scott v. Sandford, 83 Q. J. SPEECH 192, 200–01 (1997). Literary historians have explained how the decision shaped literature from Martin Delany's *Blake* to the works of Henry James. *See* Sara B. Blair, *Changing the Subject: Henry James,* Dred Scott, *and Fictions of Identity*, 4 AM. LITERARY HIST. 28, 35–36 (1992); Gregg D. Crane, *The Lexicon of Rights, Power, and Community in* Blake*: Martin R. Delany's Dissent from* Dred Scott, 68 AM. LITERATURE 527, 529–30 (1996).

Dred Scott before the federal court.[36] Even if the court concluded that Jackson's pleadings could be properly amended, Griswold urged, no black person, enslaved or free, had standing to sue in the state. Jackson's case, he thus insisted, must be dismissed.[37]

Hughes provided Maryland's high court its first opportunity to consider the implications of *Dred Scott*. In *Dred Scott*, Chief Justice Roger Taney held that people of African descent, be they enslaved or free, were not citizens of the United States.[38] Black people had not been citizens of the individual states at the time the Constitution was ratified, Taney asserted, and thus were not included among the citizens of the new United States.[39] They were without standing before federal courts, where diversity jurisdiction extended standing to citizens alone.[40] Griswold suggested that, in Maryland, legal remedies for Jackson were similarly out of reach.[41] His argument was not tightly woven. Griswold did not rely upon specific citizenship language in the Maryland State Constitution, nor did he elaborate upon some necessary relationship between federal citizenship, which had been Taney's subject, and the state citizenship that might have been relevant in the *Jackson* case. Instead, Griswold made a vague but cunning cultural-legal argument that might have inclined the court to bend toward the interests of white supremacy.[42] He referred to the "opinion of Chief Justice Taney in [] *Dred Scott*" to support the view that if Jackson was without standing to sue, the court itself was without jurisdiction.[43] Then, without elaboration, Griswold declared that if no law extended civil rights to black Marylanders, "the plaintiff in this case had no right to sue."[44]

Jackson's attorneys, James Wallace and Charles Goldsborough, confronted the problem of *Dred Scott* directly, arguing that Maryland should take a distinct position on the question of African American standing to sue and be sued.[45] Their argument relied upon an alternative view of history. Since the latter decades of the eighteenth century, Jackson's attorneys explained, African Americans "going at

36. *Hughes*, 12 Md. at 451–55.
37. *See id.* at 452–55.
38. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857).
39. *Id.*
40. *See Hughes*, 12 Md. at 452–55.
41. *See id.*
42. *See id.*
43. *Id.* at 455.
44. *Id.*
45. *See id.* at 459.

large and acting as free" had been viewed as free men.[46] When the United States Constitution was ratified, they had given evidence in court and performed other acts such as voting that only subsequently had been reserved to white men in the State of Maryland.[47] A free African American occupied an "anomalous position, having more rights than a stranger, yet not the same as an heir. He [could] sue and be sued in [the] courts, hold property and enjoy the fullest protection of [the] laws."[48] Jackson's counsel carefully distinguished the United States citizenship that was the subject of *Dred Scott* from citizenship in the State of Maryland, arguing that even if Jackson was disqualified under the Federal Constitution, "[h]e might still [have been] a citizen of a State, and as such a free man."[49]

Dred Scott did not carry the day in Maryland. Samuel Jackson was entitled to his day in court, explained Chief Justice John Carroll LeGrand in writing for the court of appeals.[50] In Maryland, there were only two instances in which black people were presumed, by their color, to stand apart from white Americans in legal culture.[51] Blackness barred African Americans from testifying as witnesses against white people, and in freedom suits, blackness raised the rebuttable presumption that they were slaves.[52] Otherwise, black Marylanders enjoyed a broad right to sue and be sued.[53] The court addressed the relevance of *Dred Scott* through Taney's own approach—a history of race and rights. "From the earliest history of the colony," LeGrand explained, "free negroes have been allowed to sue in our courts and to hold property, both real and personal, and at one time, they having the necessary qualifications, were permitted to exercise the elective franchise."[54]

In Justice LeGrand's view, race had never served as an absolute bar to rights in Maryland.[55] This was consistent with the state's interests:

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 464. For an overview of LeGrand's tenure on the Maryland Court of Appeals, see CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND: A HISTORY 153–61 (1928).
51. *Hughes*, 12 Md. at 463.
52. *Id.*
53. *See id.* at 463–64.
54. *Id.*
55. *See id.*

> To deny to them the right of suing and being sued, would be in point of fact to deprive them of the means of defending their possessions, and this, too, without subserving any good purpose .... Neither the policy of our law, nor the well-being of this part of our population, demands the principle of exclusion contended for by the appellant.[56]

LeGrand looked ahead and suggested, "[S]o long as free negroes remain in our midst a wholesome system induces incentives to thrift and respectability, and none more effective could be suggested than the protection of their earnings."[57] Maryland's high court rejected Taney's view of both the history and the status of free black Americans. Justice LeGrand laid out for black Marylanders a bundle of rights.[58] It was an imperfect, partial, but still potent, bundle of rights: to sue and be sued, to hold real and personal property, to defend possessions and earnings, and in some cases, to vote.[59] Justice LeGrand concluded by affirming the lower court judgment.[60] Samuel Jackson was entitled to his children and his $750.

II. BEYOND *DRED SCOTT*

Hughes presented a matter of first impression for the Maryland Court of Appeals, placing state court judges in a remarkable position to assess Justice Taney's ideas. Had Maryland's high court adopted the Chief Justice's views on race and rights, one might not be surprised.[61] Taney was Maryland legal culture's favorite son.[62] He

56. *Id.* at 464.

57. *Id.*

58. *See id.* at 463–64. The "bundle of rights" metaphor resembles T.H. Marshall's view that citizenship cannot be reduced to any specific right and that many Americans throughout time have possessed only a partial version of citizenship. *See* T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 10–27 (1950). While the author does not share Marshall's view that citizenship rights can be characterized as progressively amassed, his metaphor displaces the view that citizenship can be reduced to a "yes or no" matter or that it can be reduced to any one right, such as those of naturalization or the franchise.

59. Legal historian David Bogen carefully examines the legal status of black Marylanders in the early republic and demonstrates that black Marylanders experienced a decline in their standing at the start of the century. *See* Bogen, *supra* note 14, at 396–411; *see also* Bogen, *supra* note 15, at 62–63 (discussing the passage of the 1802 Maryland constitutional amendment that denied black Marylanders the right to vote).

60. *See Hughes*, 12 Md. at 464.

61. For a history of the Maryland Court of Appeals, see generally Hall Hammond, *Commemoration of the Two Hundredth Anniversary of the Maryland Court of Appeals: A Short History*, 38 MD. L. REV. 229 (1978) (detailing the court's 200 year history). Notably, the court was restructured pursuant to the state's new 1851 constitution, which provided for, among other innovations, the election of Maryland Court of Appeals justices for ten-year terms. *Id.* at 235.

began his legal career practicing in Maryland and then served as a state legislator and Attorney General.[63] Throughout his years in Washington, Taney remained a keenly followed and highly regarded figure. Until the late 1850s, his family home was in Maryland.[64] He spent extended time in Baltimore, where he sat on the United States Circuit Court for the District of Maryland and, on occasion, presided over public gatherings, including local bar proceedings.[65] In rare moments of candor, when Taney sought out a sense of how *Dred Scott* was received, he turned to his close allies in Maryland.[66] Statewide, *Dred Scott* received extensive public acclaim, with some commentators deeming the decision well-reasoned and profoundly correct.[67] LeGrand likely understood Taney's concerns. Indeed, he and Taney had a great deal in common, though they were born a generation apart. Both men were raised in slaveholding households.[68] Each had practiced law in Baltimore before entering public service.[69] Taney had served as Maryland's Attorney General, while LeGrand had held the office of Secretary of State.[70] The two were also active

62. In addition to chronicling Taney's decisions and his terms on the Baltimore Circuit Court bench, local papers reported his day-to-day activities. *See Local Matters*, THE SUN, July 16, 1851, at 1 (naming Taney as one of the honored guests at St. Mary's College's commencement); *Local Matters*, THE SUN, Apr. 28, 1851, at 1 (describing how Taney was in attendance at the Archbishop Eccleston's funeral); *Married*, THE SUN, Feb. 10, 1852, at 2 (reporting the marriage of Taney's daughter, Maria, to Richard T. Allison); *Meeting of the Members of the Baltimore Bar*, THE SUN, July 12, 1853, at 1 (reporting that Taney was called from his home to preside over a memorial honoring the recently deceased Judge John Glenn); J. W., *Letter from Old Point Comfort*, THE SUN, Aug. 1, 1851, at 1 (noting Taney and his family vacationing at Old Point Comfort, Virginia).

63. *See* CARL BRENT SWISHER, ROGER B. TANEY 28–37, 114–15 (1935).

64. *See id.* at 469–72.

65. *See id.* at 353–57.

66. *See* Letter from Roger Brooke Taney to James Mason Campbell (Feb. 18, 1861) (on file with the Maryland Historical Society, Baltimore, Md.). This source is archival in nature, and the *North Carolina Law Review* was unable to review it for substantive support. The author has reviewed the sources in person and vouches for the accuracy of the textual assertions.

67. *See* FEHRENBACHER, *supra* note 25, at 2–3 (describing the reaction to the case nationwide); GRABER, *supra* note 35, at 1 (claiming that *Dred Scott* "*may* have been constitutionally correct"); *The Decision in the Supreme Court*, THE SUN, Mar. 9, 1857, at 2.

68. *See* BOND, *supra* note 50, at 153–61 (offering a brief overview of LeGrand's life); SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, LL.D., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 124–25 (1872) (regarding Taney).

69. TYLER, *supra* note 68, at 160 (regarding Taney); *The Late Hen. John C. Legrand, Chief Justice of the State of Maryland*, THE DAILY DISPATCH (Richmond), Jan. 11, 1862, at 2 (regarding LeGrand).

70. TYLER, *supra* note 68, at 163 (regarding Taney); *The Late Hen. John C. Legrand, Chief Justice of the State of Maryland*, *supra* note 69 (regarding LeGrand).

lay leaders in the city's Catholic Church.[71] Both men were moderate pro-slavery voices whose ideas reflected a paternalism that was characteristic of Maryland's pro-colonization white elites.[72]

On the rights of black people in legal culture, however, LeGrand and Taney parted ways. Despite the general admiration for Taney and their shared cultural sensibilities, LeGrand rejected the Chief Justice's reasoning and unequivocally refused to extend *Dred Scott* to the State of Maryland.[73] This disjuncture between *Dred Scott* and *Hughes* cautions against broad assumptions about the influence of *Dred Scott*. State high courts rejected the Supreme Court's brutal logic.[74]

By September 1858, Taney was uncomfortably aware that legal commentators and high court jurists were questioning his reasoning on the matter of black citizenship.[75] Highly vexed, Taney privately penned a supplemental opinion to *Dred Scott* that focused on one matter alone: the status of African Americans at the time of the Constitution's ratification.[76] As he had in *Dred Scott*, Taney engaged in an extended historical analysis to show that African Americans had enjoyed no rights from 1689, as British colonial subjects, through 1787 when the United States Constitution was ratified.[77] The supplemental opinion was no mere exercise in argumentation. Taney explained that he stood ready should the Court's docket present him with another

71. *See* TYLER, *supra* note 68, at 475–76 (regarding Taney); *The Late Chief Justice LeGrand*, THE SUN, Dec. 31, 1861, at 1 (regarding LeGrand).

72. Regarding Taney, see CARL BRENT SWISHER, ROGER B. TANEY 97–99 (1961). *See also* Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking Beyond—and Before*—Dred Scott, 97 J. AM. HIST. 17, 32–37 (2010) (describing the change in Taney's views on the institution of slavery over time). Regarding LeGrand, see Letter from John Carroll LeGrand to Hon. Reverdy Johnson (Jan. 10, 1861) (on file with the author). This source is archival in nature, and the *North Carolina Law Review* was unable to review it for substantive support. The author has reviewed the sources in person and vouches for the accuracy of the textual assertions. For an example of the pro-colonization stance of one of the prominent members of the Maryland State Colonization Society, see generally Eugene S. Vansickle, *A Transnational Vision for African Colonization: John H. B. Latrobe and the Future of Maryland in Liberia*, 1 J. TRANSATLANTIC STUD. 214 (2003).

73. Hughes v. Jackson, 12 Md. 450, 459 (1858).

74. *See* PAUL FINKELMAN, AN IMPERFECT UNION 281–82 (1981); *see also* John D. Gordan III, *The Lemmon Slave Case*, 4 JUD. NOTICE 1, 1, 8–12 (2006) (discussing *Lemmon v. People*, 20 N.Y. 562 (1860), a case in which the New York Court of Appeals, post-*Dred Scott*, upheld a New York statute, which abolished slavery in the state and caused the emancipation of Lemmon's slaves in transit from Virginia to Texas when they transferred vessels in New York).

75. *See* Roger Brooke Taney, Supplement to the Dred Scott Opinion, *in* TYLER, *supra* note 68, app. at 578–79, 598–608.

76. *See id.* at 578–608.

77. *Id.* at 579–93.

opportunity to clarify and to persuade: "If the questions come before the Court again in my lifetime, it will save the trouble of again investigating and annexing the proofs."[78]

Taney defensively scoffed at reviews "adverse" to his published opinion in *Dred Scott*.[79] He suggested that his critics based their views on "misrepresentations and perversions."[80] Still, the Chief Justice could not refrain from a thinly veiled rebuttal to Horace Gray's 1857 pamphlet, *A Legal Review of the Case of Dred Scott*. Gray was the Reporter of Decisions for the Massachusetts Supreme Judicial Court, and he would later be appointed to the bench, first to the Supreme Judicial Court of Massachusetts in 1864 and then to the United States Supreme Court in 1881.[81] His thorough analysis of the opinions in *Dred Scott* led Gray to conclude: "[T]he court have [sic] not, and could not have, consistently with sound principles, decided that a free negro could not be a citizen of the United States."[82] Gray challenged Taney on doctrinal terms, but then went further to assault Taney's character.[83] The Chief Justice's opinion, according to Gray, was "by no means the ablest or soundest of the opinions" in the case.[84] Its "tone and manner of reasoning, as well as in the positions which it assumes" were "unworthy of the reputation of [Taney] that great magistrate."[85] Taney replied that Gray's volume was "a disingenuous perversion and misrepresentation of ... what the Court ha[d] decided."[86] Taney concluded his supplemental opinion on this point, urging that those "in search of truth ... [would] read the opinion," and then asserted that he would not "waste time and throw away arguments" on commentators such as Gray.[87] Contrary to his stated indifference to such criticism, Taney's tone and the lengthy supplement itself suggest that he was all too aware that *Dred Scott* was being called into serious question by well-informed legal minds.

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78. *Id.* at 578. Historian Don Fehrenbacher characterizes Taney's supplemental opinion as a "curious document." FEHRENBACHER, *supra* note 25, at 445. The opinion would remain unpublished until nearly a decade after Taney's death. *See* TYLER, *supra* note 68, at 485–86.

79. *See* Taney, *supra* note 75, app. at 607.

80. *Id.*

81. THE SUPREME COURT HISTORICAL SOC'Y, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 234 (Clare Cushman ed., 1993).

82. HORACE GRAY, A LEGAL REVIEW OF THE CASE OF *DRED SCOTT*, AS DECIDED BY THE SUPREME COURT OF THE UNITED STATES 57 (1857).

83. *See id.* at 9.

84. *Id.*

85. *Id.*

86. Taney, *supra* note 75, app. at 607.

87. *Id.* at 608.

Maryland's high court was not alone in limiting the effect of Taney's ideas about free African Americans before the law. Perhaps most stinging were those federal district courts that narrowly construed the Chief Justice's opinion.[88] Taney was clearly unsettled as he recounted how, for example, the United States Circuit Court for Indiana had held, even in the face of *Dred Scott*, that "a negro of the African race born in the United States . . . is a citizen of the United States . . . and entitled as such to sue in its courts."[89] Justice John McLean, Taney's colleague on the Supreme Court bench, had dissented from the majority opinion in *Dred Scott*.[90] When it came to narrowing the decision's effect, McLean had no small hand in the matter.[91] In July of 1857, for example, newspapers reported that McLean, while sitting on the United States Circuit Court for Illinois, had limited the scope of *Dred Scott* in the case of *Mitchell v. Lamar*.[92] Joseph Mitchell, a free African American from the State of Illinois, brought a suit against Charles Lamar, a white resident of Wisconsin.[93] Lamar had assaulted Mitchell, who sustained significant injuries and thus sought damages.[94] Did the federal court have jurisdiction? McLean concluded it did and reasoned that Mitchell, a free black man not descended from slaves, was a citizen in that he was "a freeman, who ha[d] a permanent domicile in a State, being subject to its laws in acquiring and holding property, in the payment of taxes, and in the distribution of his estate among creditors, or to his heirs on his decease."[95] McLean recognized that Mitchell did not enjoy rights equivalent to those of white men. However, McLean reasoned, "[I]t is not necessary for a man to be an elector in order to enable him to sue in a Federal Court."[96] "Such a man," McLean concluded, "is a citizen, so as to enable him to sue, as I think, in the Federal Courts."[97] The debate over African American citizenship, begun long before *Dred Scott*, continued in its wake.

88. Records of U.S. District Courts, *supra* note 28.

89. *See* Taney, *supra* note 75, app. at 578.

90. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 529–64 (1857).

91. *See* Morel, *supra* note 35, at 134–38.

92. *See Can Colored Men Sue in the Federal Courts?*, WASH. REP., July 22, 1857, at 2; *Important Decision in the U.S. Circuit Court:* James C. Mitchell vs. Charles Lamar, CHI. DAILY TRIB., July 15, 1857 [hereinafter *Important Decision*].

93. *See Can Colored Men Sue in the Federal Courts?*, *supra* note 92, at 2; *Important Decision*, *supra* note 92.

94. *A Case Under the Dred Scott Decision*, N.Y. HERALD, July 13, 1858, at 3.

95. *Important Decision*, *supra* note 92.

96. *Can Colored Men Sue in the Federal Courts?*, *supra* note 92, at 2.

97. *Important Decision*, *supra* note 93.

Maryland's Court of Appeals was not alone in calling into question the ideas expressed in *Dred Scott*. Judges in Maine and Ohio outright refused to incorporate the logic of *Dred Scott* into their determinations.[98] In Ohio, the court confronted this question when called upon to interpret the phrase "citizen of the United States" as set forth in its own state constitution.[99] Distinguishing Justice Taney's opinion as narrowly limited to descendants of slaves, the court declined to hold that a free man of mixed racial descent could never be considered a citizen.[100] At the request of Maine's legislature, the justices of Maine's high court interpreted a key provision of the state constitution which provided in pertinent part, "Every male citizen of the United States, of the age of twenty-one years and upwards ... shall be an elector for governor, senators and representatives in the town or plantation where his residence is so established."[101] The question for the court was whether free men of color could serve as electors under this provision.[102] While the law imposed no explicit barrier to enfranchisement based on race, the court admitted that a strict application of the logic of *Dred Scott*'s holding would suggest the qualification "citizen of the United States" necessarily excluded free African Americans.[103] Yet, Maine's supreme court rejected such an interpretation:

98. *See, e.g.*, Opinions of the Justices of the Supreme Judicial Court, on Question Propounded by the Senate, 44 Me. 505, 508 (1857) (declining to apply *Dred Scott* when interpreting the phrase "citizen of the United States"); Anderson v. Millikin, 9 Ohio St. 568, 577 (1859) ("The question is not, what the phrase 'citizen of the United States' means in the light of the decision in the case of *Dred Scott* v. *Sanford*, but what the framers of our [state] constitution intended by the use of that phrase, and what, in the connection in which it is found, and with the light and knowledge possessed when it was used, it was intended to mean."); *see also* Opinion of the Justices of the Supreme Judicial Court, 41 N.H. 553, 553 (1857) (affirming constitutionality of "[a]n act to secure freedom and the rights of citizenship to persons in this State," which was passed by the N.H. House of Representatives on June 26, 1857). For an example in which a local court declined to follow the reasoning in *Dred Scott* to bar an African American plaintiff from suing, see generally Richard F. Nation, *Violence and the Rights of African Americans in Civil War-Era Indiana: The Case of James Hays*, 100 IND. MAG. HIST. 215 (2004).

99. *Anderson*, 9 Ohio St. at 570. The court was required to interpret an 1851 amendment to the state's constitution, changing its requirement for electorship from "white male inhabitants" to "white male citizen of the United States." *Id.* at 569–70. The former, originally used in the state's 1802 constitution, had been widely interpreted to include not only white males but also free men of mixed-race descent whose bloodline was less than half-black. *Id.*

100. *Id.* at 572, 577.

101. *Opinions of the Justices of the Supreme Judicial Court*, 44 Me. at 507.

102. *Id.*

103. *Id.* at 508.

> [W]e are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; but that the term, 'citizens of the United States,' as used in that instrument, applies as well to free colored persons of African descent as to persons descended from white ancestors.[104]

Thus, at least in some non-slave states, courts declined to afford *Dred Scott* binding weight on matters of state jurisdiction, even when United States citizenship was expressly implicated.

In at least one southern state, Mississippi, *Dred Scott*'s reasoning was deemed consistent with state law.[105] Still, that state's high court appeared to be of two minds. In the spring of 1858, the court held in *Shaw v. Brown*[106] that a free African American had standing to sue in pursuit of his claims as an heir.[107] Writing for the majority, Justice Alexander Handy explained:

> [N]egroes born in the United States, and free by the laws of the State in which they reside, are in a different condition from aliens. They are natives, and not aliens. Though not *citizens* of the State in which they reside, within the meaning of the Constitution of the United States, they are *inhabitants* and *subjects* of the State, owing allegiance to it, and entitled to protection by its laws and those of the United States; for by the common law, and the law of nations, all persons born within the dominion of the sovereign are his natural born subjects, and owe allegiance to him, and obedience to the laws, and are entitled to protection.[108]

The court acknowledged *Dred Scott* as establishing African Americans as "a subordinate and inferior class of beings," but it did not take the next step and deem them without standing to pursue their claims in the State of Mississippi.[109] However, when confronted with a similar set of facts the following spring of 1859, the court embraced *Dred Scott* and deemed free black people "*alien strangers*,

104. *Id.* at 515–16.

105. *See* Heirn v. Bridault, 37 Miss. 209, 224–25 (1859); Shaw v. Brown, 35 Miss. 246, 315–16 (1858).

106. 35 Miss. 246.

107. *See id.* at 320–21.

108. *Id.* at 315.

109. *Id.* For background on *Shaw*, manumissions, and the right of emancipated black non-residents to sue for their inheritances in Mississippi courts, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 287–90 (1981); BERNIE D. JONES, FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH 55–57 (2009).

of an inferior class, incapable of comity, with whom our government has no commercial, social, or diplomatic intercourse."[110] Justice William Harris wrote for the majority while Justice Handy, who wrote for the majority in *Shaw* just one year earlier, dissented.[111]

III. THE LOCAL COURTHOUSE

It would be a mistake, however, to dwell too long on this scene of high court decision-making. The significance of *Hughes* goes beyond questions of the competing doctrines that emerged at the end of the 1850s. This drama of race and rights had played out both in Chief Justice LeGrand's chambers and in a local courtroom. Its chief protagonists were judges and individuals such as Samuel Jackson, who swore out complaints in local courthouses. What LeGrand, a judge, and Jackson, an African American laborer, both knew was that the *Hughes* case was not an isolated instance. Yes, few cases of race and rights made their way to Maryland's Court of Appeals, but dozens more emerged each day in the state's local courthouses. There, black Marylanders had long participated in rituals of legal culture, including suing and be sued. At times, race constrained their rights, though more often race was but one factor in a more complex set of rules and rituals. For LeGrand, the inclusion of black Americans in legal culture was foremost a mechanism of social control intended to engender "thrift and respectability."[112] One might wonder if Samuel Jackson did not in fact disagree with the judge. Surely he believed that he would achieve more than his own constraint when he filed a complaint against Josiah Hughes. Surely, for Jackson, his petition was intended first and foremost to assert authority over his family. To achieve this, he enlisted legal culture's

110. *Heirn*, 37 Miss. at 224–25. The majority in *Heirn* rejected *Shaw* and its reliance on comity to hold that a free black woman from Louisiana had no right to sue for her inheritance in Mississippi, ultimately concluding, "[F]ree negroes . . . are to be regarded as alien enemies or strangers *prohibiti*, and without the pale of comity, and incapable of acquiring or maintaining property in this State which will be recognized by our courts." *Id.* at 233. For a detailed analysis of how Mississippi fit into the broader antebellum trend of states "denying blacks' legal citizenship and [] insisting on their foreignness," see Kunal M. Parker, *Citizenship and Immigration Law, 1800–1924: Resolutions of Membership and Territory*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 168, 180–81 (Michael Grossberg & Christopher Tomlins eds., 2008).

111. *See Heirn*, 37 Miss. at 234 (Handy, J., dissenting) ("[Because plaintiff was] alleged to have been a citizen of Louisiana, [] the presumption is, that her rights and capabilities as such continue. The question, then, as to her right, as a free person of color of the State of Louisiana, to take a legacy, is the same as that decided in *Shaw* v. *Brown*.").

112. Hughes v. Jackson, 12 Md. 450, 464 (1858).

rituals and rights, from the local courthouse to the Maryland Court of Appeals.

Dorchester County sat on Maryland's Eastern Shore, that portion of the state where slaveholding remained extensive and pro-slavery politics dominated the region.[113] Still, the area's proximity to the free states generated tensions. Rumors of impending slave insurrections and rising numbers of escaped slaves generated a tense solidarity among slaveholders. A convention of slaveholders in November of 1858, just months after the *Dred Scott* decision, concerned the status of the region's free black population, including men like Hughes and Jackson. Free African Americans were said to corrupt and demoralize slaves, and a final resolution concluded that "free negroism and slavery [were] incompatible."[114] Between 1850 and 1860, the Eastern Shore's free black population grew by fourteen percent.[115] Many landholders in the region depended upon free black labor.[116] These circumstances made men like Hughes and Jackson a visible and troublesome presence.[117]

What did it mean for individuals such as Jackson to sue and be sued in antebellum America? Most often, the terms of such proceedings and the meanings to be extracted from them were left to local figures. If black Marylanders indeed possessed a bundle of rights enforceable at law, the task of interpreting those rights was left to judges and lawyers, clerks and commentators, witnesses and litigants, including free African Americans like Samuel Jackson. Indeed, when examining Jackson's case and the Dorchester County Circuit Court docket more closely, one sees that neither Justice Taney's conclusion about constitutional impermissibility, nor Justice LeGrand's view of social control, fully captured the meaning of the right to sue for black Marylanders. Local court officials had assumed Jackson's right to sue. Judge Brice Goldsborough, who had sat on the trial court bench since 1835 and was a slaveholder, did not question his court's jurisdiction.[118]

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113. *See* BARBARA JEANNE FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 66–67 (1985).

114. *Convention of Slaveholders*, THE SUN, Nov. 6, 1858, at 1.

115. *See* FIELDS, *supra* note 113, at 70.

116. *See id.*

117. *See id.* (noting that by 1860, free blacks made up nineteen percent of the Eastern Shore's total population).

118. Brice Goldsborough would preside over the county court until 1851. 3 BALTIMORE: ITS HISTORY AND ITS PEOPLE 843 (1912). After turning to law practice in that year, he would later be appointed to the Maryland Court of Appeals in 1860, where he sat until his death in 1867. *Id.* at 843–44.

Nor did the clerk who accepted Jackson's complaint.[119] Similarly, local jurors, all white men, did not appear reluctant to hear and give credit to Jackson's claim.[120] It was this group of "respectable" citizens who awarded him damages of $750.[121] Courts in Maryland were accustomed to encountering black litigants.

Local lawyers might have differed on questions of race and rights, yet many built careers and reputations representing black litigants. In *Hughes*, all the attorneys ably represented African American litigants, seeming to affirm Jackson's right to sue. Yet, their arguments diverged significantly. Jackson's own attorneys rested their reputations on the right of free African Americans to bring suit. Charles F. Goldsborough was a twenty-one year old practitioner when Jackson's case began.[122] Also a slaveholder, Goldsborough was the son of the state's former Governor.[123] Goldsborough teamed with James Wallace, a somewhat more experienced practitioner who also built his reputation representing black Marylanders.[124] Josiah Hughes's attorney, local practitioner Elias Griswold, appeared to be of two minds. He represented an African American litigant, but he ultimately argued that all free black Marylanders, including his client, had no right to sue in the state's courts.[125] By 1858, when *Hughes* was

119. Clerk's Docket, Dorchester County Circuit Court, T2510, 1855–1858, Box 2, 01/41/01/002, Maryland State Archives, Annapolis, Maryland [hereinafter Clerk's Docket]. This source, also cited in note 160, is archival in nature, and the *North Carolina Law Review* was unable to review it for substantive support. The author has reviewed the sources in person and vouches for the accuracy of the textual assertions.

120. Case File, *supra* note 2.

121. *Id.*

122. For biographical information on Charles F. Goldsborough and the other actors in this historical drama, see generally ELIAS JONES, HISTORY OF DORCHESTER COUNTY, MARYLAND (1902).

123. *Id.* at 308.

124. Perhaps most memorably, Wallace defended Samuel Green, a free black man who was found in possession of the book *Uncle Tom's Cabin* and charged under state law with aiding fugitive slaves. *See* ARCHIVES OF MARYLAND, *Biographical Series: Samuel Green (b. 1802–d. 1877)*, MSA SC 3520-13785. Goldsborough and Griswold, as state's attorneys, were the prosecutors and Wallace's opponents. *Sam Greene and* Uncle Tom's Cabin, ANNAPOLIS GAZETTE, Sept. 2, 1858, *available at* http://www.collinsfactor.com/newspaper/samuelgreennews.htm.

125. *See* Hughes v. Jackson, 12 Md. 450, 452–53 (1858) ("A *slave* having no civil rights, cannot, in Maryland, sue or be sued in an action of trespass . . . and the court must *presume* one described in an original writ and all the proceedings in a case as a '*negro*,' to be a *slave*. . . . If he was described as a '*free negro*,' a plea to the merits would acquiesce in his description of himself, and throw upon the defendant the burden of denying his freedom and right, but in the absence of any description except '*negro*,' he is presumed to be a slave, and the whole action and proceedings are null and void." (internal citations omitted)). Griswold's arguments set a high—perhaps practically unattainable—bar for what it took to rebut the presumption of slavery:

argued before the Maryland Court of Appeals, these men had a great deal in common. Goldsborough and Griswold had served together as state's attorneys, while Wallace and Goldsborough served together in the state senate.[126] Attorneys Goldsborough and Griswold and trial Judge Brice Goldsborough were delegates to an 1858 slaveholders' convention that decried both "abolitionism from abroad, and free-negroism [from within]."[127] Zealously representing the interests of free African Americans in *Hughes*, these men stood together and argued before the state's high court over the rights of black Marylanders, but from opposite sides.

Finding the trial judge and attorneys at an 1858 slaveholders' convention is a reminder that debates over race, rights, and citizenship did not unfold only in courthouses. In political culture, lawmakers continued the debates that animated courtrooms, and these deliberations suggest the ways in which free African Americans were forcing a debate in the 1850s. Delegates to the 1858 slaveholders' convention had condemned "free negroism," deeming the presence of free black people incompatible with slavery.[128]

> Only when there is parole proof of twenty years or upwards, going at large, with pregnant circumstances otherwise of freedom. But going at large, acting as free, reputed as free, abandonment by master, are no sufficient foundation for such a presumption, much less, in the absence of all proof of freedom, will the suing as a *negro* raise a presumption of freedom.

Id. at 454. As Griswold concluded:

> The law does not commit the folly and injustice of presuming negroes free, except when the presumption is some benefit, to them in petitions for freedom. Justice, the institution of slavery, or the master, asks no such presumption when the right of the master is asserted, unless the presumption rests on the broad and proper principle that they are always considered slaves by their natures, their capabilities, their position among their superiors, by the law of the land, and by divine arrangement and revealed law, *their unfitness for civil rights*, their need of pupilage, protection and guidance.

Id. at 454–55 (emphasis added).

126. JONES, *supra* note 122, at 436, 440.

127. *Convention of Slaveholders*, *supra* note 114.

128. *Id.* In support of its conclusion, the resolution Griswold and Goldsborough both contributed to noted,

> [T]he existence among us of the present immense number of free negroes—their habits of idleness and dissipation—the very heavy cost of prosecutions against them for violations of our criminal law—the evil example and influence which they exert towards our slave population, rendering them dissatisfied with their conditions and comparatively worthless to their owners—their well-known tampering with slaves, and agency in inducing them to abscond from servitude.

Id.

However, when the same question came before a statewide convention the following year, a majority defeated a proposal to banish and/or enslave free black Marylanders.[129] United States Senator James Pearce spoke for the convention's majority when he warned against losing the critical work of free black laborers.[130] In Pearce's view, freedom itself was a "right" that free black men and women had acquired "by . . . [the] laws and the tenderness of their masters."[131] While Pearce's report was paternalistic and constrained, it did advocate that free black Marylanders should continue to be protected by law from banishment and re-enslavement.[132]

Free black activists were among those eager to explain the conference's significance in terms of citizenship. Presbyterian minister James W.C. Pennington, himself born enslaved in Maryland, declared, "[T]he latest and most brilliant victory gained has been by the free colored people of the State of Maryland."[133] This victory, Pennington explained, was the result of a "fair face to face contest,"[134] waged for decades by "the most courageous" of free black activists, who "stood like men of nerve, with hope and public faith in great principles."[135] Nothing less than a slaveholders' convention, he underscored, had affirmed that black people were Americans "at the fundamental level of economic contribution."[136] African Americans, he argued, had proven themselves citizens.

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129. J.W.C. Pennington, *The Self-Redeeming Power of the Colored Races of the World*, ANGLO-AFR. MAG. 314, 317 (1859) (describing the 1859 convention's results as an illustration of "what [their] brethren of Maryland ha[d] conquered in their conflict with the slave power of their State").

130. *See id.* at 318.

131. *Id.*

132. *Id.* at 320 (resolving that "any measure for a general removal of the free blacks from the State of Maryland [was] impolitic, inexpedient, and uncalled-for by any public exigency which could justify it"). While Senator Pearce's report advocated legal protection for free black Marylanders, it also envisioned a role for the law in controlling them, noting that "the free negro population should be well and thoroughly controlled by efficient laws, to the end that it may be orderly, industrious, and productive." *Id.* And while the convention's delegates supported protecting free blacks, they were also keen to prevent their numbers from expanding any further. The report concludes by recommending revitalizing an 1831 manumission statute to prohibit any further slave emancipations and "compel prompt removal from the State of those emancipated." *Id.*

133. *Id.* at 316.

134. *Id.*

135. *Id.* at 317. On Pennington, see generally DAVID E. SWIFT, BLACK PROPHETS OF JUSTICE: ACTIVIST CLERGY BEFORE THE CIVIL WAR (1989) (discussing the role of six pastors, including Pennington, in the Afro-American freedom movement).

136. SWIFT, *supra* note 135, at 245.

IV. THE LIMITS OF LAW

Hughes v. Jackson tells a new story about race and rights in the antebellum United States. That story turns on the extent to which free African Americans used small openings to win larger claims to rights in the slaveholding state of Maryland.[137] Samuel Jackson prevailed in his material claim when the court of appeals upheld his award of $750 in damages.[138] Furthermore, the opinion of Chief Justice LeGrand affirmed the right of free African Americans to sue and be sued in the state, a right intended to provide black Marylanders with a means of protecting their wages and property, which in turn could help to maintain the social order in a state with a large and still growing population of free black people. Still, the facts that surrounded *Hughes* also make the point that citizenship and civil rights are never quite enough, and that exercising the right to sue and be sued did not guarantee just outcomes.

Hughes had begun more than a decade earlier when William Hughes, a free African American farmer and landholder in Dorchester County, purchased two enslaved people from Catherine

137. For an illustration of the dynamics of legal claims-making in non-American contexts, see generally Alejandro de la Fuente, *Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited*, 22 LAW & HIST. REV. 339 (2004). De la Fuente focuses on the example of enslaved people in Cuba and argues that in such instances those who were structurally marginal to the law, including free people of color, were able to use cultural knowledge and skills to gain the "enforcement of . . . potentially favorable laws." *Id.* at 368. For a micro-history analysis of claims-making in a post-emancipation nineteenth century Cuban neighborhood, see generally Rebecca J. Scott, *Reclaiming Gregoria's Mule: The Meaning of Freedom in the Arimao and Caunao Valleys, Cienfuegos, Cuba, 1880–1899*, 170 PAST & PRESENT 181 (2001). Scott describes how claims-making contributed to "the achievement of freedom from chattel bondage, and the struggle for freedom from colonial rule." *Id.* at 183. For a detailed examination of the types of lawsuits that commonly arose between slaves and their masters in Buenos Aires, Argentina, see generally Lyman L. Johnson, *"A Lack of Legitimate Obedience and Respect": Slaves and Their Masters in the Courts of Late Colonial Buenos Aires*, 87 HISP. AM. HIST. REV. 631 (2007). Johnson identifies three primary litigation trends, including suits brought by "individuals held as slaves who disputed their legal status, slaves who demanded the right to purchase their freedom or the freedom of family members, and slaves who demanded the right to seek new masters because of abuses suffered at the hands of their present owners." *Id.* at 632. Finally, for an examination of litigation by former American slaves in immediate post-emancipation Mississippi, see generally Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 J. AM. HIST. 1425 (1996). While Waldrep does not explicitly adopt claims-making as an analytic framework, his study explores how "[l]egal formalism provided Blacks new access to the criminal justice system and, at the same time, undermined whites' immature confidence in law as an instrument of their domination over Blacks." *Id.* at 1425.

138. Hughes v. Jackson, 12 Md. 450, 451, 464 (1858).

S.M. Ray for the sum of $280.[139] The transaction, recorded in the county's chattel records, provided that Hughes would hold title to a "certain Mulatto woman named Mary Teackle and her infant child named Lilly."[140] Hughes was to hold Mary and her daughter only for a term of years (rather than a life term) that would commence on August 15, 1840 and end eleven years later.[141]

Hughes was head of a large household of free African Americans.[142] There is no evidence he had owned a slave prior to purchasing Mary and her daughter. It may be that Samuel Jackson had a role in this arrangement from the outset. Jackson explained to the court that sometime after Hughes purchased Mary and Lilly, the two men entered into their own contract.[143] Jackson purchased the mother and daughter for the sum of $280, the same sum Hughes had paid Ray.[144] Jackson promised that he would repay that $280 by laboring for Hughes for a period of five years.[145] Jackson explained that at that moment he took "possession" of Mary and Lilly, who then came to live with him, although he conceded that his agreement with Hughes was never recorded.[146]

Over the subsequent years, Jackson continued to work for Hughes. Samuel and Mary had five children together: Lilly, Theodore, Dennis, Ellen, and Mary.[147] Jackson termed Mary his wife, and while there is no record that they were married under law, he explained that they had lived together and borne children.[148] Mary dropped the last name Teackle and adopted the name Jackson instead.[149] The trouble began, it appears, sometime after Mary and Lilly's term of service expired, in 1851.[150] After the death of William Hughes, his sons and heirs accused Jackson of taking his family to the nearby city of Cambridge with the intent of transporting the entire

139. Dorchester County Circuit Court, Chattel Records, 1852-1860, Volume 776, page 195–96. This source, also cited in notes 140–42, is archival in nature, and the *North Carolina Law Review* was unable to review it for substantive support. The author has viewed the source in person and vouches for the accuracy of the textual assertions it supports.

140. *Id.*

141. *Id.*

142. *See* Manuscript Census Returns, Division 8, County of Dorchester, State of Maryland 29 (1840).

143. Case File, *supra* note 2.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

household to Baltimore.[151] William Hughes, it is said, followed the group to Cambridge, warning local ship captains not to let the family board.[152] He claimed them as his property and took them to his home.[153] In short order, Hughes sold three of Jackson's children—Ellen, Theodore, and Dennis—to a local white farmer, Alward Johnson.[154] The circuit court docket evidences the aggressiveness of Jackson's response. He filed six freedom suits, one for his wife Mary and one for each of his children as their next friend.[155] He also filed two actions for damages.[156] The first was against Denwood and Josiah Hughes (as executors for their late father, William) and against Alward Johnson, charging that they had conspired to deprive him of his property in his own children.[157] He filed a second damages suit, the suit that we know as *Hughes v. Jackson*, against Josiah Hughes as executor for his late father William.[158] Jackson sought $1,000 in damages.[159]

What precisely had happened here? Were the Hugheses now breaching the oral contract entered into by Jackson and William Hughes many years before? Were William Hughes's sons and heirs unaware of the agreement between Jackson and their father? Had Jackson himself breached the agreement in some material sense? Or were the Hughes brothers betting that their word as prosperous landholders might win over that of Jackson, a poor farmer and laborer who had no documentation of his story?

The court record never directly addressed these questions, but as one follows these life stories, one can surmise how the court saw them. Jackson's suit against Josiah and Denwood Hughes and Alward Johnson was discontinued in October of 1852, and Jackson paid the defendants $19.53 in costs.[160] Johnson's purchase of Ellen, Theodore, and Dennis was left to stand as valid.[161] Indeed, they remained Johnson's property until November of 1864, when they became free pursuant to the state's new constitution, which abolished slavery.[162]

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*; Clerk's docket, *supra* note 119.
160. Case File, *supra* note 2.
161. *Id.*
162. *Id.*

Samuel Jackson's wife, Mary, and their daughters, Lilly and Mary, resumed living together with him as a family.[163] Their freedom papers, recorded some years later, would say that Mary and her daughter Lilly were free pursuant to the purchase contract entered into between William Hughes and Catherine Ray.[164] Samuel Jackson's alleged contract with William Hughes was never enforced, and in the final suit for damages, Jackson received an award of $750 from the Hughes family for their having held daughters Lilly and Mary contrary to law.[165]

CONCLUSION

Samuel Jackson has left only shards of his family's story—notes in the docket books of the Dorchester County court, census returns, and freedom papers. Yet, to suggest what his reflections must have been does not take an unorthodox leap of imagination.

Hughes had established for Jackson and for other free black Marylanders a fundamental right: to sue and be sued. Nevertheless, it had not won him control over his family. The Hughes's actions seem not to have been taken recklessly; Josiah Hughes valued his reputation to some degree and likely had a pretext for seizing Jackson's children. The following year, in 1852, Josiah Hughes served as a representative to the state's colored colonization convention, and later in the 1860s, he would seek ordination to the ministry in the African Methodist Episcopal Church.[166] Jackson's first thought was likely about the integrity of his family, while the Hughes's concern may have been about their reputations as creditors and as local community leaders. And it was in their local courthouse that these men, and others like them, negotiated the terms of their lives.

Still, as previously discussed, these men disagreed in a sense about their right to sue in that very courthouse. While Jackson took

163. *Id.*

164. *Id.*

165. *Id.*

166. For details on the proceedings of the Convention of Free Colored People of the State of Maryland of 1852 and the resolutions it adopted, see generally *A Typical Colonization Convention*, 1 J. NEGRO HIST. 318 (1916). Josiah Hughes attended as a member of the Dorchester delegation and was elected co-secretary of the Convention. *See id.* at 326. However, he had to be replaced on the second day after he returned home with the majority of his co-delegates out of concern for the hostile atmosphere outside the meeting. *See id.* at 326–27. For further background on the nineteenth century colonization movement in Maryland and an insightful narrative account of the 1852 Convention, see generally C. Christopher Brown, *Maryland's First Political Convention by and for Its Colored People*, 88 MD. HIST. MAG. 324 (1993).

the view that he was entitled to sue, the Hughes brothers would ultimately take the contrary view. Was the Hughes's position a potentially self-defeating one? Certainly. After all, they sometimes used the local courthouse to pursue their own claims. It was also self-serving. The prospect of a loss to Jackson and liability for a $750 fine may have appeared far more pressing than the theoretical question of rights. Under the circumstances, arguing that one's opponent lacked standing could indeed ricochet and undermine one's own standing, but in the short run, the exercise of rights for these men was simply a means to an end. Ironically, it was Justice Taney who saw those rights as an end in themselves and was thus determined to extinguish them.