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Litigating Emancipation: Slavery's Legal Afterlife, 1865-1877

By

Giuliana Perrone

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

History

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Rebecca M. McLennan, Chair
Professor Robin L. Einhorn
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Abstract

Litigating Emancipation: Slavery's Legal Afterlife, 1865-1877

by

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Doctor of Philosophy in History

University of California, Berkeley

Professor Rebecca McLennan, Chair

When litigants entered Southern courtrooms after the end of the Civil War, they encountered a tangled morass of unexpected legal questions related to the end of slavery. Though the need to face such problems was ubiquitous across the former slaveholding republic, each state contended with such matters uniquely, producing a series of different solutions to the same fundamental problems. Principal among them: Why were there so many legacies of slavery contested in court? How should the law treat slavery and former slaves after the supposed end of the peculiar institution? In what ways did litigants themselves help to shape the meaning of freedom? How complete was the abolition of slavery if the institution itself remained open to ongoing litigation?

State courts and individual petitioners were forced to confront the altered legal terrain of the post-Civil War South and negotiate the precise meanings of the Thirteenth Amendment, the end of slavery, the transformation of the former slave states, and ultimately, the reunification of the United States. Evaluating the many responses to these issues exposes legal Reconstruction's many possibilities; some would become the road not taken, while others set the standard for managing slavery's remaining legal quandaries. In some courtrooms, jurists were committed to a total eradication of slavery and the laws that had once supported it, revealing Reconstruction's fleeting potential to secure true freedom for four million former slaves. The outcomes of other cases reveal judges clinging to assumptions about race, law, and Southern society that reflected the antebellum past. As this dissertation shows, the more conservative route ultimately became the prevailing legal paradigm, but it took nearly ten years to arrive at this conclusion, challenging the notion that there was ever a fixed meaning or moment of emancipation.

TABLE OF CONTENTS

Acknowledgements…………………………………………………………………………..ii

Introduction…………………………………………………………………………………1
"Legal Reconstruction" in Post-Emancipation Southern Courts

Chapter One………………………………………………………………………………. 13
Transformations of Southern Law

Chapter Two……………………………………………………………………………….33
Thenceforward and Forever Free: Determining the Date of Emancipation in the Courts of the Former Slave South

Chapter Three…………………………………………………………………………….. 58
The Ties that Bound: Exposing the Social Practice of Slavery in Post-Bellum Courts

Chapter Four………………………………………………………………………………94
The Price of Defeat: The Inherent Risk of Emancipation

Chapter Five………………………………………………………………………….... 129
The Problem of Emancipation in the Age of Slavery: The United States Supreme Court and the End of Legal Reconstruction

Epilogue…………………………………………………………………………………...150
Slavery's Legal Afterlife

Bibliography………………………………………………………………………… 154

Appendix A……………………………………………………………………………..168
Additional Cases Related to the Date of Emancipation

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Upon reflection, it is clear that working on this dissertation has not been nearly as solitary as it sometimes seemed. Indeed, this work has been a wonderfully collaborative effort. I received support and kindness from people across UC Berkeley, around the country, and across the ocean. To all of them, I am tremendously grateful.

I owe a special thank you to my committee members at UC Berkeley. Robin Einhorn helped launch this project. When I was searching for a seminar paper topic many years ago, she encouraged me to read some slave cases, and "see what I could find." When I found what I didn't know I was looking for, she helped me – at every step of the way – transform it into dissertation worth writing. Bryan Wagner invited me into his class on Reconstruction literature, and let me stick around the English department for three more years. When I got stuck or hopelessly frustrated, a trip to Wheeler Hall was all it took to get back on track. Harry Scheiber opened the doors to the law school, and welcomed me in. He gave me the confidence and the reading recommendations necessary to write a legal history without a law degree. Rebecca McLennan, the chair of my committee, never let good enough be good enough. She taught my very first graduate class at Berkeley, and she has been pushing me to do better ever since. It is this work ethic, coupled with her unwavering support, that keeps me working to the eleventh hour. There is, after all, always one more revision to do after the last one.

The Berkeley community is a rich and supportive one, and many other people have encouraged me during my time here. In the History Department Mark Peterson, Waldo Martin, and Brian DeLay always had just the right thing to say at just the right moment. The students and faculty of the Jurisprudence and Social Policy program have been similarly instrumental. David Lieberman's course on legal history changed the way I thought about the relationship between law and history, and his continued support of my work has meant a great deal to me. The students and faculty who participated in the Center for Law and Society's BELS fellowship program in 202-2013 read a draft of the first chapter I wrote. Their comments and suggestions were not only incredibly useful, they also reassured me that the project was actually a good one. Similarly, I owe my gratitude to the members of the Berkeley Legal History Workshop who read and commented enthusiastically on an early chapter draft. When Christopher Tomlins offered a course on slavery and the law, I leapt at the chance to take it. In addition to providing a wonderful forum for discussing an important body of literature, Chris and my fellow graduate students – Aaron Hall, Franklin Sammons, and Alexandra Havrylyshyn, especially – inspired, encouraged, and offered me excellent advice as I wrote the first draft of my final chapter.

I spent two summers driving around the South to collect archival materials for this dissertation, which would have been impossible without the assistance of outstanding librarians and archivists. The Texas State Archive spoiled me. The archivists pulled all the records I needed, and some I didn't even know I needed, and had them waiting for me before I arrived. Joe Leiziear worked tirelessly to find the records from the Maryland Court of Appeals. It took three trips to Annapolis, but he delivered. Ben Almoite and Gail Warren gave me an entire conference room at the Virginia State Law Library, and managed to calm my fears when the tornado alarm went off in the building. Jerome Reel, the Clemson University historian, saved me the trouble of searching the University Collection finding aid, because he already knew which boxes I would need. The librarians at the University of Richmond granted me access to their rare books collections without delay because they knew it was my last day in the city. The archivists at the State Archive of North Carolina and Tennessee State Archive took a great interest in my work, and helped me find exactly what I needed.

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In many ways, this dissertation is for Mimi. She didn't live quite long enough to see it completed, but it was her support and unwavering certainty that I was "doing everything right" that often kept me going. There is no better gift than that.

Introduction
"Legal Reconstruction" in Post-Emancipation Southern Courts

On November 25, 1864, just weeks after Abraham Lincoln won his second presidential election, the Maryland Court of Appeals issued its ruling in *Morsell v. Baden*. The case concerned the manumission of two of Baden's slaves. One year prior to his death in July of 1834, Jeremiah M. Baden executed deeds of manumission for his slaves Caroline and Solomon. However, James S. Morsell, the administrator of Baden's estate, claimed that the estate was insolvent at the time of Baden's death. As such, he set aside the deeds of manumission so that Caroline and Solomon could be sold to cover some of the outstanding debts. Selling slaves to cover such costs was common practice in the antebellum South, and it sometimes meant that slaves who had been promised their freedom faced the heartbreaking consequences of their masters' financial woes. Yet, in this particular instance, Jeremiah Baden's children along with Caroline and Solomon themselves, appealed the administrator's decision not to honor the deeds of manumission. Ultimately, the litigants asked the court a simple question: whether or not the original deeds of manumission that were executed by Jeremiah Baden were legally valid.[1]

By the time Maryland's highest court ruled *Morsell v. Baden*, the case, the state, and the nation had changed much. The antebellum era had given way to the convulsions of Civil War, and Maryland found itself in the midst of wartime Reconstruction. On November 1, 1864, Maryland adopted a new state constitution that both reflected these new circumstances and anticipated the adoption of the Thirteenth Amendment. Article 24 of the document banned slavery in the state. Thus, after a protracted legal affair that had lasted 30 years, Caroline and Solomon no longer needed the Maryland Court of Appeals to enforce the deeds of manumission their owner had executed in 1833; the highest law in the state had secured their freedom, along with the freedom of every other slave in Maryland. The judges of the court remarked, "It is scarcely necessary to say, that under the existing Constitution, the particular relief sought by this bill cannot now be granted. … [Caroline and Solomon] have been declared free by the organic law of the State."[2]

This could have been the end of the case; the question before the court had been answered by circumstance and a change in Maryland's highest law. Instead, the court still thought "it proper to express in brief, our opinion of the case, as it stood upon the law when it was argued."[3] To that end, Judge Silas Morris Cochran delivered the opinion of the court *as if* slavery had not been abolished in Maryland, reflecting conditions that may have existed when the case was initiated, but no longer mattered when the court ruled. Why did the Court of Appeals do this? What possible purpose could it have served? Slavery ceased to be a legal institution, the former slaves in question had become free persons, and by late 1864, there was every indication that slavery would soon be dead everywhere. Moreover, given the change in state law, manumission cases were unlikely to reappear on the court's docket. Nonetheless, the court believed that "the question of costs" raised in the case demanded they render a verdict and write an opinion that did not take the slaves' emancipation fully into account. In so doing, the justices permitted and participated in the continued litigation of matters related to slavery.

Instead of letting the case die along with the peculiar institution, the Maryland Court of Appeals kept it on life support. Perhaps the justices felt compelled by the obligations of their

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[1] *Morsell v. Baden,* 22 Md. 391 (1864).
[2] *Morsell v. Baden,* 22 Md. 391 (1864), 396-397.
[3] *Morsell v. Baden,* 22 Md. 391 (1864), 397.

position to render a substantive verdict. Perhaps they remained committed to resolving the Baden debt with absolute legal finality, despite the fact that their ruling could have at best limited effect; the former slaves could not be sold to cover the estate's residual debt. Or, perhaps the judges simply did not know how else to proceed when they found themselves ruling in this revolutionary moment. There had been no planned end to slavery; Maryland's new constitution was a mere three weeks old. They delivered an opinion that reflected the antebellum past because, still in the midst of war, the future of the slave South had not yet been determined, and the very notion of a 'post-emancipation slave case' was an utter novelty that defied comprehension – judicial or otherwise.

As for the opinion ultimately delivered in *Morsell*, the court determined that the deeds of manumission executed on behalf of Caroline and Solomon had indeed been legal after all. The tribunal had essentially settled with finality a matter of no importance; slavery was no longer legal practice, and Solomon and Caroline did not depend on deeds of manumission for their freedom. Nonetheless, the ruling implied that in Maryland, even after emancipation, slavery would remain a part of legal proceedings, thereby opening the courthouse doors to other post-emancipation slave cases. It would seem that courts still had a role to play in resolving matters of slavery, despite the fact that slaves themselves had been freed from bondage.

This case serves the opening salvo of what would become *legal* Reconstruction. It was among the first to present an issue related to slavery in a state that had supposedly abolished the peculiar institution. But it would not be the last. Rather, *Morsell v. Baden* portended the flood of similar post-emancipation slave cases that would fill the dockets of state courts across the former slave South. It also presaged the dilemmas that would surface in such cases. Singular among them: Could slavery still be litigated after emancipation? The Maryland court said yes, but in 1864 it was only responding to a change in the state's constitution. Other states would have to make similar evaluations after the Thirteenth Amendment irrevocably altered the Constitution of the United States. The hundreds of decisions rendered in such slave cases decided after emancipation constitute legal Reconstruction.

What I call "legal Reconstruction" is the process by which all Southerners, including former slaves, litigated emancipation itself, by confronting and addressing the tangled morass of otherwise unexpected legal issues related to the end of slavery that were presented in courts during the turbulent period immediately following the American Civil War. This dissertation tells the story of these cases, explains why they emerged, and shows why their resolutions were critical to the reconstruction of Southern society and to American law more broadly. It is because of cases like *Morsell* that such a project is necessary. Between December 5, 1865 – the date the Thirteenth Amendment was adopted to the Constitution – and the end of Reconstruction in 1877, Southern state supreme courts ruled on approximately 700 cases that were related to slavery or the meaning of black freedom in some way. I refer to them as "post-emancipation slave cases" to signify their distinction from other types of litigation heard in state courts during the same period, and to bring attention to the very important fact that slavery – as a legal institution and as a social practice – remained omnipresent in Southern courtrooms well after it had supposedly ended.

Indeed, this project began in response to the very existence of such cases. Why were slave cases litigated *after* slavery ended? In short, slave cases were litigated throughout the Reconstruction period precisely because slavery had no firm ending and emancipation had no precise legal meaning. Rather, it was through the resolutions of post-emancipation cases that jurists and litigants – both black and white – began addressing the unanticipated legal questions that had been raised as a result of emancipation secured by the sword. Principal among them:

How should the law treat slavery and former slaves after the supposed end of the peculiar institution? Who would bear the financial cost of emancipation? In what ways did antebellum understandings of Southern law and legal culture remain relevant during Reconstruction? How central were state courts to the larger Reconstruction project?

The answers to these questions defy prevailing scholarly opinions about the end of slavery and force us to reconsider our approach to the study of Reconstruction and emancipation. This dissertation demonstrates that in the courts, the Thirteenth Amendment was never a clear line of demarcation; it neither ended the social conventions and assumptions that evolved alongside the peculiar institution, nor eradicated slavery fully from American law. Rather, matters related to slavery and slave law remained relevant and deeply contentious in post-bellum courtrooms and in Southern society more broadly. Each state contended with such matters uniquely, producing a series of different solutions to the same fundamental problems. Evaluating these approaches exposes legal Reconstruction's many possibilities; some would ultimately become the road not taken, while others set the standard for managing slavery's remaining legal quandaries. Nonetheless, the collective resolutions to post-emancipation slave cases profoundly shaped the politics of Reconstruction, the Southern society that would be constructed in the wake of emancipation, and the future of Southern law. As this dissertation argues, it was in Southern courtrooms where much of the fate of Reconstruction and its ultimate potential for success was determined. If peace were truly to be just as well as lasting, Southern judiciaries would need to play a substantive role in framing it.

From Dunning to Du Bois, and Woodward to Foner, the historiography of Reconstruction is nearly as fraught and full as the era itself. Scholars have repeatedly wrestled with complicated issues such as the role of African Americans in the remaking of the South, the collapse (or failure) of the Republican vision, and the changing relationship between the states and the federal government. Nonetheless, for the past quarter of a century, Eric Foner's *Reconstruction* has remained the foundational text on the period, and for good reason. Its thorough and vivid account of the politics of Reconstruction at both the state and federal levels remains indispensible, including to this dissertation.[4] Coupled with other essential works, such as Leon Litwack's splendid social history *Been in the Storm So Long*, which provides vibrant individual stories of those who experienced Reconstruction in local communities, existing historical scholarship offers much.[5] However, it leaves Reconstruction's legal history largely untouched.[6] Adding this critical component undoubtedly complicates the conclusions drawn by these and other foundational works on the history of the period.[7]

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[4] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: HarperCollins, 1988).

[5] Leon Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (New York: Random House, 1979).

[6] The notable exceptions are the treatment of Freedmen's Bureau courts and the discussion of major Supreme Court cases that shaped the era, such as *United States v. Cruikshank*. Inclusion of this material serves to support arguments about the social problems and onset of racialized violence during Reconstruction, not as part of an investigation of legal Reconstruction.

[7] More recent and other noteworthy work on Reconstruction includes: Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Chicago: University of Illinois Press, 1997). Edwards explores the interconnection between race and gender and definitions of power and civil rights in Reconstruction-era North Carolina. In particular, Edwards claims that gender shaped Reconstruction precisely because emancipation destroyed the foundation of Southern society: the household. Legal and civil identities of Southerners – men and women, slave or free – were defined by ones position in the household. Douglas R. Egerton, *The Wars of Reconstruction: The Brief, Violent History of America's Most Progressive Era* (New York: Bloomsbury Press, 2014). Egerton, who wishes claims to challenge the notion that Reconstruction was a failure, focuses on local

Legal scholars who have studied Reconstruction have traditionally done so in an effort to explain doctrinal changes and explore transformations in Constitutional interpretation, especially in matters related to the Fourteenth Amendment. For instance, Harold Hyman's classic work *A More Perfect Union* highlights the necessity of significant Constitutional change in order to realize the vision of black freedom that Abraham Lincoln and his Republican counterparts in Congress began articulating during the Civil War. Other legal scholars focus their attention on the major cases decided by the Supreme Court during the Reconstruction period, including the *Slaughterhouse Cases* and *United States v. Cruikshank*, and the Supreme Court justices who shaped the era, such as Salmon P. Chase and Stephen J. Field.[8] This literature also provides useful context for this study, as the decisions made by the US Supreme Court loomed large for outcomes in post-emancipation slave cases decided at the state level.

In recent years especially, historians and legal scholars of Reconstruction have begun realizing the potential of blending the traditional historical and legal approaches. The existing literature of this kind can best be described as piecemeal, not as comprehensive, but it remains critical for expanding our understanding of the period. This work has not only informed this dissertation, but also shown why a systematic study of post-emancipation slave cases is needed. For example, in *Final Freedom,* Michael Vorenberg, chronicles the Congressional debates over the Thirteenth Amendment, and explains why and how that political process required the reconciliation of several ideological views (e.g. Radical Republican, Moderate Republican, Northern Democratic) on the meaning of the Civil War and the place of emancipated slaves in

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instead of national politics to show the ways in which black and white activists and officeholders resisted the violent overthrow of Reconstruction. Michael W. Fitzgerald, *Splendid Failure: Postwar Reconstruction in the American South* (Chicago: Ivan R. Dee, 2007). Like Foner, Fitzgerald's work is a synthesis of Reconstruction. Also like Foner, he focuses on the role of African Americans, who struggled mightily throughout the period, only to come up woefully short in their efforts to achieve true equality. Fitzgerald intervenes in the standard narrative by arguing that Republicans, both white and black, were responsible for their own political demise. Financial miscalculations and problems with governance promoted Northern weariness and, ultimately, acquiescence to Redemption and white supremacy. In addition, the new synthesis incorporates more recent work on gender, labor, and geography in ways that Foner's work does not. Michael Perman, *Reunion Without Compromise: The South and Reconstruction: 1865-1868* (New York: Cambridge University Press, 1973). Rather than explore the political fight over Reconstruction between President Andrew Johnson and Congress, Perman explores the role played by Southerners in confounding efforts at national reunion. He argues that both Congress and the President sought to conciliate the South, but these efforts failed when faced with Southern resistance and intransigence. Heather Cox Richardson, *West from Appomattox: The Reconstruction of America After the Civil War* (New Haven, CT: Yale University Press, 2007). Richardson reorients our thinking about Reconstruction by approaching the period geographically. She argues that Reconstruction's primary project – the redefinition of the individual to the government – was intertwined with Western conquest. The West was the only location that had not been tainted by the Civil War, and could thus be a place where both Northerners and Southerners could project their own ideals and find common ground. It was also, critically, a space where the power and renewed purpose of the federal government could be explicitly demonstrated, as the United States military cleared the land of its native inhabitants.

[8] See especially: Harold M. Hyman, *The Reconstruction Justice of Salmon P. Chase*. (Lawrence: The University of Kansas Press 1997). Harold M. Hyman and William M. Wiecek, *Equal Justice under Law*. (New York: Harper & Row Publishers 1982) chapters 8-10. William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1876," in *American Law and the Constitutional Order*, ed. Lawrence M. Friedman and Harry N. Scheiber. (Cambridge: University of Harvard Press 1988). Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism 1863-1897," in *American Law and the Constitutional Order*, ed. Lawrence M. Friedman and Harry N. Scheiber. (Cambridge: University of Harvard Press 1988). Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999). Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, Cambridge Studies on the American Constitution (New York: Cambridge University Press, 2011).

the body politic. He makes clear that the language of the revolutionary amendment was left intentionally vague to accommodate Congressional politics, which left its ultimate meaning open to a wide range of judicial and popular interpretations. Vorenberg writes,

> Those who initially approved of the amendment had diverse, competing motivations as well as disparate notions about freedom, many of which were not fully formed, or for political purposes, not explicitly stated. And even before the amendment had been approved by Congress and ratified by the states, congressmen, like all Americans, had begun to reevaluate the measure in new social, political, and legal contexts.[9]

Though not the topic of Vorengerg's study, the practical result of the amendment's multiple meanings in post-bellum courtrooms is worth considering. It helps us understand that though the Thirteenth Amendment was momentous, it could never have been a firm legal boundary for post-bellum jurists. It was significant because it ended slavery as a legal practice with constitutional finality, but the Amendment did not specify exactly what was to become of former slaves or how the law (state or federal) ought to treat them. The vagueness of the Thirteenth Amendment created the legal no man's land that characterizes the landscape in which we find post-emancipation slave cases. Judges not only had to contend with an altered Constitution, but they had little concrete direction when it came to reaching verdicts in post-bellum cases involving slavery.

In addition, scholars have started studying Reconstruction from a socio-legal perspective. Of particular note is Dylan Penningroth's *The Claims of Kinfolk*, which has begun tracing the legal curvatures of Reconstruction by examining a subset of post-emancipation slave cases that show how freedpeople used the courts to establish and protect property claims. Indeed, Penningroth has shown the potential of the post-emancipation slave cases; they reveal the limits of post-bellum American law and illuminate the function that courts played in determining the meanings of freedom. Critically, Penningroth demonstrates the ways in which former slaves used the courts to make claims about their status as freedmen in Southern society. In doing so, he addresses the change in legal culture that, during Radical Reconstruction especially, accompanied monumental changes in American law. Former slaves demanded that courts legitimize their status as citizens simply by initiating a suit, and as such, going to court was one way freedpeople could actively claim their rights as citizens and explore the possibilities those rights afforded them. Courts were thus forced to contend with freedpeople's former lives as slaves by "taking widely recognized but unwritten rules about property, marriage, work, and family and adapting them to the framework of Anglo-American law."[10]

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[9] Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (New York: Cambridge University Press, 2001), 237.

[10] Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003), 9. The most recent socio-legal history of the Reconstruction era comes from Laura Edwards. She has recently published a synthetic work on the era, in which she stresses the importance of acknowledging "the extent of change" over continuity. Her primary focus is on the development of a new framework of rights over the traditional explorations of national and institutional development. Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*, New Histories of American Law (New York: Cambridge University Press, 2015).

This theme is clearly present in post-emancipation slave cases, and it illustrates one of the fundamental problems faced by judges in courtrooms across the South: there existed a new and unique set of litigants previously considered chattel, but who nonetheless had engaged informally in activities regulated by law. As a result, in addition to wrestling with the changes to law, judges also had to contend with the legal expectations of freedpeople, which had developed out of the years of experience slaves had had with making customary arrangements with one another and with whites in their communities. We find this issue in a wide range of cases, not just those related to property. The framework that Penningroth has developed remains instrumental in understanding all of them.

While there is state-specific or subject-specific scholarship that includes discussions of some post-emancipation slave litigation, the only work that attempts to offer a comprehensive legal history of Reconstruction is Joseph Ranney's *In the Wake of Slavery*.[11] It highlights several of the complicated legal problems faced by Southern courts, shows how courts in the former slave states responded to federal policy over time, and tracks the evolution of legal ideology prominent in state courts over the course of Reconstruction, from the period of Black Codes to Redemption. However, it is a lawyer's legal history; it does not take into account the implications that state court decisions had on Southern society, politics, on the creation of a newly singular American legal tradition, nor does it explain why there were so many approaches to legal Reconstruction. It serves as a good starting point, but ultimately proves the need for expanded scholarship in this area.

In the end, despite important advances in the scholarship of Reconstruction, no historian has told the story of the nearly 700 post-emancipation slave cases that were decided in Southern state supreme courts during Reconstruction. As a consequence, we know little about the larger ramifications of these decisions, how (and if) people's relationship with the law changed, or how much Reconstruction policy was actually determined in state courts. Quite simply, existing historiography lacks a comprehensive history of legal Reconstruction that makes the connection between law and society clear. This dissertation will begin the task of creating one.

This project is primarily based on archival materials from the state supreme courts of seven Southern states: Texas, Louisiana, Tennessee, Kentucky, Maryland, Virginia, and North Carolina, along with one case from South Carolina *Calhoun v. Calhoun*. The cases from this large and diverse – though not exhaustive – group of Southern states reveal the complex legal problems Southerners faced during Reconstruction, and the different ways in which they were addressed by judges. As such, they ought to be seen as demonstrative of the problems

[11] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, (Westport: Praeger Publishers, 2006). For examples of state and subject-specific literature, see: Roberta S. Alexander. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67*. (Durham: Duke University Press, 1985), Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 1995). Randolph B. Campbell. *Grassroots Reconstruction in Texas, 2865-1880* (Baton Rouge: Louisiana State University Press, 1997). James W. Ely, ed., *A History of the Tennessee Supreme Court*, (Knoxville: University of Tennessee Press, 2002). Andrew Kull, "The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves," *70 Chi.-Kent L. Rev. 493* (1994). Melissa Milewski, "From Slave to Litigant: African Americans in Court in the Postwar South, 1865-1920," *Law and History Review 30* (Aug. 2012): 723-69. Samuel N. Pincus, *The Virginia Supreme Court, Blacks, and the Law, 1870-1902*, Distinguished Studies in American Legal and Constitutional History (New York: Garland Publishing, Inc., 1990). John W. Wertheimer. *Law and Society in the South: A History of North Carolina Cases*. (Lexington: The University Press of Kentucky, 2010).

encountered by courts throughout the South.[12] Certainly, there were thousands of other cases that would fall into the category of 'post-emancipation slave case' that were decided in lower courts without subsequent appeal. However, they fall outside the scope of this project. Admittedly, by omitting the lower court records, many compelling individual stories that played out there will, at least for a time, be left untold. Nonetheless, by focusing attention on the cases at the top levels of the Southern legal system(s), this project can address the cases that presented the issues of greatest legal importance to Reconstruction, and to the direction it would ultimately take.

Judges faced litigants who demanded resolutions to the thorniest of legal questions related to the end of slavery, which rarely had an immediately clear answer. More often than not, it was in these cases that courts resolved problems that plagued the South as a whole, not just the litigants named in individual suits, even if they did so in state-specific ways. The outcomes of these post-emancipation slave cases presumably resolved the personal issues of the individual litigants who raised them. However, given the nature and scope of the questions these cases posed, their resolutions had the potential to, and often did, shape post-bellum Southern law, society, and politics in profound ways that would contribute to the making of a New South. As such, we should also see these cases as representative of the complex legal landscape that emerged after the Civil War ended.

Post-emancipation slave cases can be divided into two basic groups: cases that originated before or during the Civil War, and those that were initiated after Confederate defeat. The cases that arose prior to emancipation remained unresolved for many reasons. Some had simply taken many years to reach appellate courts. In other instances, the Civil War put antebellum cases on hold. Some state courts were closed during part or all of the war years. For example, the Supreme Court of Mississippi heard no cases related to slavery between 1861 and 1866.[13] In

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[12] I constructed a database of post-emancipation slave cases from all slave states in order to identify patterns, and begin understanding the issues presented in them. The cases in this database come primarily from the Carnegie Institute's *Judicial Cases Concerning American Slavery and the Negro*, which is an index of all cases related to slavery organized by state. In addition, I have included cases I discovered in state archives from court dockets or that were presented in secondary material. Helen Tunnicliff Catterall, ed., *Judicial Cases Concerning American Slavery and the Negro*, 5 vols. (Washington DC: Carnegie Institute of Washington, 1926). While the database includes all slave states, I chose the seven states for in-depth in order to provide a representative cross-section of the region and its legal concerns. Texas was a borderland state that had only recently joined the Union before the Civil War erupted, and because it experienced almost no wartime disruption, slavery remained fully intact there. Louisiana's appeal was threefold: it was the center of both the cotton and slave economies, had a unique legal tradition, and began wartime Reconstruction. Tennessee was a border state that did secede. Kentucky did not secede, but nonetheless had a sizeable slave population and significant ties to the Confederacy. Maryland also a border state that remained in the Union, underwent wartime Reconstruction, and abolished slavery prior to the adoption of the Thirteenth Amendment. Virginia had the most developed legal culture in the antebellum South, and it was also central to Southern and Confederate identity. North Carolina was one of the last states to secede and had a population divided on the matter. It also had a judiciary that remained intact from the antebellum period through Reconstruction. Though I had hoped to include archival material from South Carolina, the Supreme Court's records were reportedly destroyed by a water main break in the early twentieth century.

[13] The Mississippi legislature suspended most civil actions and civil litigation during the war, and as a result the Supreme Court of the state heard few if any cases of any kind. "[A]l laws for the collection of debts and liabilities, on bonds, promissory notes, bills of exchange, open accounts, or contracts for the payment of money, are hereby suspended until twelve month after the close of the present war…" An Act to Modify the Collection Laws of this State § 1, July 1861 Mississippi Laws, 74. This action would be deemed unconstitutional in 1866 in *Coffman v. The Bank of Kentucky* 40 Miss. 2 (1866). The ruling held that suspending civil actions violated the right of access to the courts. The opinion stated that the state legislature "has not power to suspend the rights of person and of property guarantied to the citizen in the declaration of rights, and required by the constitution to be enforced at stated times;

Georgia, some cases had been dismissed "because one of the parties had become an enemy alien in 1861," but the cases were put back on the docket when the "old courts" reconvened in the summer and fall of 1865.[14]

In Virginia, the situation was especially dire. The Supreme Court of Virginia was threatened by war during the Peninsula Campaign in 1862, and again during the Siege of Richmond in the spring of 1865. In the months immediately following the war, Virginia Governor Pierpont corresponded regularly with military officials and civilians about the poor condition of state courts. In one letter to the governor, Magistrate B.F. Francis from Clover Station in Halifax County, Virginia wrote, "I respectfully ask that you will order an election of justices of the peace for this county," so that legal business could resume in the town.[15] The governor himself implored Union General Alfred Terry to assist in another county, writing,

> I desire to call your attention to the ocupation [sic] of the court house of Elizabeth City, County of Hampton. At the commencement of the war, the town was burnt. The court house shared in part of the fate of the town. Some repairs have been made by the government or by other persons and the building is now being ocupied [sic] for colored people's schools. The county officers are elected and ready to hold their courts and they naturally look to the old court house which belongs to the county and is the place fixed by law for holding the courts. May I ask the favor that some arrangements be made for moving the schools and returning the house to the county authorities on such terms as shall be equitable.[16]

In Hampton County, it was clear that the legal needs of the area were not being met, and those in traditional positions of power found themselves wholly unable to attend to the problems they faced in their war-torn states. The unresolved legal business that remained as a result of these and other closures would make up a great deal of the caseload judges faced during Reconstruction.

The very act of opening state courthouses to cases that helped settle issues related to emancipation was itself a crucial part of maintaining law and order in the former Confederacy during the years immediately following the Civil War. It was not simply that litigants could resolve their disputes in ways that felt familiar; rather, it was also important that litigants and jurists could begin to work out what emancipation meant for them in a traditionally peaceful arena, which stood in stark contrast to four years of brutal and bloody war. Going to court provided a way of leaving the extreme violence of the war in the past, and gave Southerners an opportunity to consider their futures. In other words, the destruction of slavery was the most significant consequence of the Civil War, but making legal sense of it during the post-bellum years was equally important precisely because it determined the New South's pathway forward.

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for that would be to suspend the constitution." Michael H. Hoffheimer. "Mississippi Courts 1790-1868." 65 Miss. L.J. 99-170 (1995).

[14] Erwin C. Surrency, "The Legal Effects of the Civil War," *The American Journal of Legal History* 5, no. 2 (April 1961): 146.

[15] B.F. Francis, "Letter to Governor Francis H. Pierpont," July 1, 1865, Acc. #37024. Box 1, Folder 6, Governors Office Francis H. Pierpont Executive Records May 10 - July 7, 1865. Library of Virginia Archival and Information Services Division, Library of Virginia.

[16] Francis H. Pierpont, "Letter to General Alfred Terry," June 27, 1865, Acc. # 37024 Box 1, Folder 6, Governors Office Francis H. Pierpont Executive Records May 10 - July 7, 1865. Library of Virginia Archival and Information Services Division, Library of Virginia.

The ways in which pre-emancipation cases were resolved after the adoption of the Thirteenth Amendment depended upon new post-bellum circumstances, and as such must be understood as part of legal Reconstruction. For instance, some wills manumitted slaves and bequeathed money to them. Often, relocation out of the South or colonization in Africa was a condition of this inheritance. After slavery ended, the freedom of the slave in question no longer depended on the terms spelled out in the testator's will. Could the former slaves inherit without relocating, as was stipulated in the original bequest? Such questions had to be figured out in court in ways that reflected and accounted for the end of the peculiar institution.

Cases that began prior to emancipation usually included only white litigants. However, during Reconstruction, courthouse doors were open to black litigants for the first time, and many freedpeople turned to state courts to resolve disputes that arose with both whites and blacks in the years following the Civil War. It was the first time that blacks and whites could face one another as supposed equals. Certainly, they had crossed paths in antebellum courtrooms, but they had never done so with any parity in legal standing. With the onset of Radical Reconstruction, the Adoption of the Civil Rights Act of 1866, and the ratification of the Fourteenth Amendment, any official barriers to legal access had been obliterated.[17] This immediate and forceful reordering of official space should be seen as an attempt by newly freed blacks to resolve personal disputes, but also as an effort to fully claim their legal personhood, transform customary practice into legitimate existence, exercise their rights as citizens, and challenge the traditional Southern social and legal order.[18] African Americans in the post-bellum South had clear ideas about the rights to which they believed they were entitled and the ways in which they ought to be protected, and they used state courts to realize them. Black litigants often presented legal questions related to the ambiguity of their rights as freed persons, such as the legitimacy of marriages, parental rights and custody, or inheritance, all of which were complicated by the customary – but not legally sanctioned or protected – status of former slave families.

Despite the emergence of black litigants, a majority of post-emancipation slave cases still involved white parties only.[19] For example, in Virginia, 89% (42 of 47 cases) of post-emancipation slave cases were disputes between white litigants. In North Carolina, 80% of cases (54 of 67 cases) involved only white litigants. These statistics should not diminish the role of African American litigants in post-emancipation slave cases; rather, they result from the fact that many of the cases arose out of antebellum circumstances in which former slaves had no specific stake. Primarily, these cases included disputes over slave sale or hire contracts and wills that included slaves as bequests or as part of the estate under administration. Such cases required a reckoning with the slave property that had become legal persons, but they did not require the direct involvement of the former slave at the center of the dispute.

Among the nearly 700 post-emancipation slave cases, many different legal matters were litigated. Yet ultimately, it is clear that some issues were of greater legal importance, and raised more profound social questions, and prompted more litigation than others. For example, cases

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[17] Black Codes passed in the immediate aftermath of the Civil War may have barred freedpeople's access to state courts. However, these prohibitions were rejected by Radicals who began directing the course of Reconstruction in 1867.

[18] For a more expansive discussion on the way freed slaves used courtrooms to seize citizenship rights, see Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South*.

[19] A great majority of the scholarship that discusses post-emancipation slave litigation focuses on cases that included African American litigants. While these cases certainly deserve attention, I seek to place them in the larger context of legal Reconstruction in order to demonstrate the multiplicity of legal problems faced by state courts during the post-bellum period.

regarding slave contracts accounted for 41% of all cases, more than any other type, while wills were the subject of 23% of cases.[20]

In the end, much of the litigation of post-emancipation slave cases focused on a series of knotty legal questions that transcended location, type of case, or class of litigant. Consequently, this dissertation is organized around these queries.[21] How influential was antebellum law to post-bellum verdicts? Why did every Southern court struggle with determining the date of emancipation, and why was it important that they do so? Why were the antebellum relationships between former slaves and their masters still relevant in the years following the Civil War? Why did so many cases related to the personal finances of white Southerners become debates over emancipation?

Each chapter of this dissertation addresses one of these thorny legal questions. Chapter One assesses the ways in which antebellum law and the make up of Southern courts influenced decisions in post-emancipation slave cases. Chapter Two addresses the nearly ubiquitous task of figuring out exactly when emancipation happened in each state and explains why deciding such a date was so crucial to rulings in any number of other cases. Though rarely considered in this way, there was no single moment of emancipation, and no universal standard by which courts determined the date of emancipation in their respective states. Chapter Three examines the lingering role that slavery and the social conventions related to it continued to play in the post-emancipation South. As such, it discusses the most intimate of matters, including interracial relationships, marriages, the custody of children born to enslaved mothers, and the legacies masters left to slaves in their wills. Here, we find the complicated personal relationships between Southern whites and former slaves influencing Southern jurisprudence because it was no longer clear how these relationships ought to be understood. Chapter Four considers the economic crisis occasioned by emancipation, and explores the effects this had on the personal finances of Southern whites. The individual concerns of the litigants introduced in this chapter were often just as great as those in Chapter Three; both types of cases were ultimately about the preservation of family and the shape of post-bellum Southern society. However, it is in the cases presented in Chapter Four that we find Southern whites confronting the astronomical cost of their failed Confederate gamble.

The fifth chapter departs from the post-emancipation slave cases heard in state courts, and turns its attention to those cases that were decided by the United States Supreme Court. Slavery and its troubling aftermath remained central to these cases, and many, such as *White v. Hart*, had come directly from state courts for final resolution. As such, they necessarily fall within the parameters of this study and demand our attention. The cases decided in the nation's highest court ultimately determined the final direction of legal Reconstruction, and put an end to the different approaches to abolition undertaken at the state level. Ultimately, it is in this final chapter that we see how large a role the federal court played in determining the ultimate outcome of legal reconstruction.

Each of these chapters draws a distinction between emancipation and abolition; they are fundamentally different concepts that ought not be confused or muddled. The terms are not synonymous, and conflating them obscures our understanding of what was needed to completely

[20] These statistics include data from all former slave states, not just those states specifically examined this dissertation. In addition, because so many cases involved more than one issue, these statistics do, in some instances, count the same case in more than one category.
[21] Additional questions that fall outside the scope of this dissertation will be discussed briefly in the epilogue.

eradicate the peculiar institution from American law and society. 'Emancipation' denotes the moment that enslavement – the ownership of one human being by another – became illegal.[22] Put another way, the act of liberation destroyed the property interest in the slave. 'Abolition,' on the other hand, is far more capacious in scope and meaning than 'emancipation;' it signifies the long process of dismantling the institutional elements of slavery – the laws, social conventions, and political advantages – that had permeated the American South and had been supported by American law for generations. I use 'emancipation' to describe a precise moment, or as we will see in the following chapter, *moments*, when slaves became free persons. Conversely, I use 'abolition' to signify the long process of eliminating all of slavery's remnants from the tangled web of law, society, and politics, that informed Southern – and sometimes Northern – culture.[23] Complete abolition would be necessary for freedpeople to become persons with fully and equally protected legal identities. I include the assumption of legal personhood, the granting of citizenship, the acquisition of civil rights, and the creation of legitimate black families as constitutive of abolition.

In contrast to the momentary emancipation, abolition took careful consideration and a great deal of time. The attendant legal elements of slavery and the social assumptions that whites held about slaves would not simply cease because Union victory in the Civil War had secured the freedom of four million slaves; it was *abolition* that had the potential to give meaning to an otherwise undefined freedom. Emancipation did not guarantee abolition. Nonetheless, both concepts play a role in the story of legal Reconstruction, and both were litigated in a variety of ways. Approaching post-emancipation slave cases with clarified comprehension of these concepts will aid us as we make sense of the complicated issues that unfold in them.

In addition, each chapter grapples with the multitude of approaches adopted by each state court. Though the need for a legal Reconstruction was the same across the former slave South, each state charted its own unique path when addressing the problems that arose from the unanticipated end of slavery. This effectively created "many legalities" of Reconstruction jurisprudence. 'Legalities,' according to Christopher Tomlins and Bruce Mann are "social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale, call the result rule, custom, tradition, folkway, or pastime, popular belief, or protest," and each one is dependent upon those who make, deploy, and use the law in distinct and numerous ways. The concept helps capture the diversity of approaches to post-bellum legal problems related to the end of slavery, and provides a useful framework for understanding the

[22] There are many ways to define and describe emancipation, as recent scholarship has made clear. Ira Berlin for example, describes black freedom as something seized by intrepid slaves who were willing to cross battle lines and brave extreme risks to secure their release from bondage. In other words, slaves freed themselves. Scholars interested in examining the role that Lincoln played in freeing the slaves stress the Emancipation Proclamation as the key to breaking the chains of slavery. Historians such as Michael Vorenberg place the focus on the adoption of the Thirteenth Amendment as the permanent end of the peculiar institution in American society and law. To be sure, all of these approaches add to our understanding of how slavery ended in America. They confirm that the end of slavery came as a result of a multi-pronged, though often uncoordinated, attack. They end in triumph, with black freedom, but they do not address the long and complicated process that eradicated slavery's legacies from American law and society. Ira Berlin et. al., *Slaves No More*, (Cambridge: Cambridge University Press, 1992). Eric Foner, *The Fiery Trial*, (New York: W.W. Norton & Company, 2010). Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*.

[23] For more on the ways in which slavery and emancipation influenced the North, see especially Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie 1850-1896* (New York: Cambridge University Press, 2003) and Leon Litwack, *North of Slavery*, (Chicago: University of Chicago Press 1965).

variety of judicial expressions that reflected the people who made, interpreted, and appealed to law and legal institutions during Reconstruction.[24]

Given the existing literature on the legal history of antebellum slavery, which will be explored in Chapter One, this should not necessarily be surprising. In short, when it came to matters of slavery, there was no universal legal standard; each state had different slave codes, and local judges rarely followed them to the letter.[25] Moreover, much of the law that supported slavery came from common law that was not slavery-specific (e.g. contract or property law, master-servant rule). As a consequence, the simple nullification of laws specifically related to slavery would not suffice in eradicating the peculiar institution from Southern law. There could be no political solution to the problem because there was no discrete body of slave law to invalidate. Without an easy answer to how to manage the disestablishment of the peculiar institution, judges took the opportunities presented to them in court to determine how their states would dismantle slavery. The result was a burst of legal experimentation, in which jurists considered the future development of law and society in their respective states and ruled accordingly. Though no two states were identical in their responses to this problem, the former slave states can be roughly categorized into three categories: Radical, moderate, and conservative. Where a state fell on this spectrum depended largely on its antebellum legal traditions and wartime history, which will be detailed further in the chapter that follows. Whatever trajectory a state followed, and however antebellum law was or was not applied, it is clear that political Reconstruction and legal Reconstruction were distinct processes.

In the wake of slavery's destruction, Southerners, white and black, struggled to make sense of the dramatic changes wrought by a bloody Civil War, the end of slavery, and a significant Constitutional revision. A considerable part of that struggle played out in Southern courtrooms. The following chapters explore some of the central problems that litigants asked judges to solve. Their ultimate resolutions reveal the uncertainty of the era, the many legal approaches with which courts experimented to address them, and in the end, the overwhelming resistance to interpreting Constitutional revision as Constitutional revolution. What follows is the history of Reconstruction from a new vantage – from the inside of the courtroom out.

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[24] Christopher L. Tomlins and Bruce H. Mann, *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001).

[25] See especially, Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009) and Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: The University of North Carolina Press, 1996).

Chapter One
Transformations of Southern Law

Had the Civil War produced a break, or breach, in federal and state law or would the antebellum past remain a continuously influential part of Southern law? Judges, forced by litigants to decide, would eventually answer this question. Though it would take ten years to finally answer this question, fully understanding the monumental changes occasioned by legal Reconstruction requires a reckoning with the antebellum period. The legal assumptions of whites forged during the antebellum years and the evolving views of freedom held by newly emancipated blacks included a constellation of social and cultural expectations about what the law would and could do to resolve individual cases, what rights and social conventions the law protected, who the law should favor, and how verdicts ought to be rendered in light of the consequences of war. These assumptions developed over decades of personal interaction with formal and informal law and experiences with the practice and customs of slavery. Yet, even after the adoption of the Thirteenth Amendment in December of 1865, it remained unclear whether antebellum law and legal culture would survive the Civil War or whether Southern jurisprudence would break fully from its slave past. Figuring this out was at the very heart of legal Reconstruction.

While the purpose of this dissertation is not to explore antebellum Southern law, evaluating the degree of change in Reconstruction law and legal culture demands some antebellum contextualization. Unfortunately, there is no single monograph, no "Transformations of Southern Law," that adequately provides this background.[1] Nonetheless, a careful reading of existing historiography is revealing. For instance, Timothy Huebner describes the structure of Southern court systems, and reveals tensions inherent between the formal appeals level courts, lower courts, and state legislatures. Thomas Morris provides a thorough account of the variety of formal state slave laws that operated throughout the South. Laura Edwards depicts the legal practices and legal culture that developed locally, suggesting that understandings of law were often informal, and depended largely on location. Ariela Gross paints a vivid picture of the Southern courtroom, where culture, custom, and formal law converged to meet the needs of the planter elite, while revealing the ways in which slaves entered this forbidden space, both directly and indirectly. Steven Hahn shows the ways in which slaves mimicked and employed "law" in black culture – especially in churches. Ira Berlin describes the many variations of slavery that existed across the South, and discusses the ways in which foreign legal traditions infiltrated the law of the American South. It is only by putting the work of these and other scholars in conversation with one another that a clear picture of a Southern antebellum legal tradition emerges.[2]

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[1] I refer here to Morton Horwitz's classic monograph. Morton J. Horwitz, *The Transformation of American Law 1780-1860*, vol. 10, Studies in Legal History (Cambridge: Harvard University Press, 1979).

[2] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (New York: Belknap Press, 2000). Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009). Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Athens, GA: University of Georgia Press, 2006). Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (New York: Belknap Press, 2005). Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890* (Athens, GA: University of Georgia Press, 1999). Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: The University of North Carolina Press, 1996).

Antebellum Southern law and legal culture were marked by particular complexities that are too easily overlooked. In many ways a byproduct of the multifaceted institution of slavery itself, legal complexity developed to allow the flexibility to handle the multifarious and complicated issues that arose in Southern slave societies. This complexity must be understood in several ways. First, Southern legal practice tended to be bifurcated between informal local arbitration conducted by low-ranking officials or person of local prominence, and the formal litigation that took place in courthouses before an appointed or elected judge.[3] This lack of institutional cohesion was the result of Southerners' inherent skepticism of the law and of formal judiciaries more broadly. To many Southerners, formal law and formal legal proceedings lacked a connection to public life, or at the very least, resided outside the view of most common people. Thus, law and formal courts were often treated with suspicion, distrust, and circumspection. For instance, after the US Supreme Court challenged Southern state authority in landmark cases like *Worcester v. Georgia* (1832), Southerners developed an increasingly "visceral distrust of appellate courts," which could only be counteracted by the presence of judiciaries that reflected and adhered to common social and cultural beliefs.[4] Tellingly, Tennessee's legislature contemplated abolishing the state supreme court altogether in 1831, and Georgia did not have a high court at all until 1845.[5]

To the contrary, informal legal proceedings reflected parochial circumstances, conditions, and beliefs. When disputes arose, especially among those persons traditionally excluded from formal courtrooms (free and enslaved blacks, women, poor whites) people could appeal to local magistrates and find resolutions to their disputes in what amounted to legally-tinged mediations. This helped maintain what Laura Edwards calls "the people's peace," which was defined by individual communities for the purpose of "keeping everyone … in their appropriate places" within the rigid social hierarchy of the antebellum South.[6] Even at higher court levels, Southern judges "usually did not hesitate to … accommodate changing social and political demands," even though they were committed to the legal formalism that came to mark Nineteenth century jurisprudence.[7] This was done in part in response to local skepticism of formal law, in order to satisfy the interest Southern elites had in slavery, maintain peaceful race relations for the region generally, support the established social hierarchy, and facilitate overall public welfare.[8] Yet, as a result of skeptical constituents, blended approaches, and resistance to legal formalism, Southern state law ultimately lacked uniformity. There was no common common law. The multiplicity of rulings rendered by local magistrates to suit the needs of local communities all but prevented one from forming. Thus, the task of many higher court rulings was to make sense of the wide range of decisions that developed in these local contexts.

When formal legal proceedings did take place in the antebellum South, they often involved slave owners, or other persons of financial means. Over the course of the antebellum

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[3] In an attempt to resolve the tension between the public and the judiciaries, and to ensure that judges reflected the will of the Southern people, Southern states initiated the trend of electing appellate judges. In 1832, Mississippi was the first to do this, but many other Southern states followed suit in the 1850s. This was one Southern tradition that would become commonplace throughout the nation so that judiciaries represented public interest. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 3.

[4] Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 3.

[5] Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 3.

[6] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, 7.

[7] Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 2.

[8] Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 8.

decades, Southern legal culture became increasingly biased toward white slave-owning men, especially after liberal individualism – marked by "private property, individual rights, and a limited but theoretically democratic government that protected those rights and encouraged individual initiative" – came to dominate Nineteenth century thought.[9] Indeed, as Ariela Gross has shown, it was in the formal space of the courtroom where traditional Southern gentlemen often displayed and reinforced the honor and privilege their status afforded them, and slave ownership itself was a constitutive element of Southern honor.[10] When a slave owner participated in a trial, the legal system commented on his position by defending publicly "what it meant to be a white man, in Southern plantation society."[11] Thus, the antebellum Southern courtroom must be understood as a complex space where many issues, not just legal ones, unfolded and were resolved simultaneously. Furthermore, it was a venue in which one's place in society could be defended or in some cases, defined.[12] During Reconstruction, Southerners would attempt to use the courtroom in the same way. Specifically, we see former slave owners seeking affirmations of their social statuses, yeomen looking for ways to advance their standing, and both seeking protection of their privilege as whites.

The second aspect of Southern law's inherent complexity can be found in slave law itself. There is no straightforward or simple way to discuss state laws of slavery because, as Thomas Morris demonstrates, there was never a discrete body of 'slave law' that was separate or distinct from Southern law more generally. There was only an "interrelationship between slavery and law," that required the application of pre-existing legal instruments to meet the evolving needs of slave owners and lawmakers who sought ways to govern the peculiar institution.[13] This often meant that any written laws regarding slavery were reactive to local pressures, and varied widely across the region. In the eighteenth century, for example, the Stono Rebellion of 1739 prompted the colonial leaders of South Carolina to enact increasingly strict laws that regulated both the relative autonomy of slaves and the rights of slave owners, who were forced to concede the ability to manumit their slaves to the colonial legislature.[14] In the nineteenth century, state legislatures across the South responded similarly after Nat Turner's rebellion in 1831. Critically, the Black Codes that were passed in the immediate aftermath of the Civil War also fit this pattern; they were responses to very real problems created by unplanned emancipation, which included a refugee population of nearly four million freedpeople, and the threat to social order perceived by white Southerners who were aghast at the world the war had made.

This element of Southern legal complexity made abolition especially difficult. There were few discrete slave codes that could simply be repealed. In the antebellum period, even categorizing slaves as a type of property (real or chattel) became confounding. As Thomas Morris shows, there was a "tendency in some places to blend the rules of real and personal property law where slaves were concerned."[15] Despite these variations, at the heart of the US

[9] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, 15.
[10] Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, 50
[11] Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, 99.
[12] Legal culture also allowed white men of the lower levels of Southern society to advance. This might happen if they were able to defeat members of the master class in court, or through participating by serving as a member of a jury. Jury service provided men of all classes an opportunity to display "acts of citizenship" that were reserved for white men. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, 54.
[13] Morris, *Southern Slavery and the Law, 1619-1860*, 3.
[14] Peter Wood, *Black Majority* (New York: W.W. Norton and Company, Inc. 1974), 324.
[15] Morris, *Southern Slavery and the Law, 1619-1860*, 78.

slave regime was the English common law concept of property.[16] The laws of slavery that ultimately developed in British North America over the course of the seventeenth, eighteenth, and nineteenth centuries were largely derived from bodies of law that were not specifically designed to regulate any formal institution of slavery. Rather, what we find in antebellum slave cases are judges substantiating their rulings by applying common law principles of property that attended to the most fundamental element of American slavery – the *ownership* of African American bodies.[17] Ultimately, Slavery could not simply be undone because it had permeated many areas of law, including property law, public law, and laws of inheritance (succession). Consequently, a careful dissection of Southern law would be necessary during the Reconstruction period if slavery were to be fully eradicated.

Economic concerns that accompanied slavery in Southern society complicated matters further. Slaves could be insured, mortgaged, and used as collateral; consequently, disconnecting the Southern – and even Northern – economy from the peculiar institution would be a herculean task.[18] Nonetheless, at the most basic level, slaves were commodities that could be bought, sold, bequeathed, and inherited, and state law developed in a way that reflected and supported the social and economic realities of this. Slavery had become intertwined in the legal intricacies of daily life as well as regional prosperity. Disentangling it, as we will see, required strenuous legal acrobatics by judges at the highest level of Southern state courts. Many would fall short of their goal.

The third element of complexity derives from the central paradox of slavery: possessing human property. In what Ariela Gross calls "double character," slaves were both persons and property, and their characterization as both mattered in legal proceedings and in law itself. Slaves could provide evidence as observers of wrongdoing, or be the evidence – the object of wrongdoing or scene of the crime – themselves. In either instance, slaves might participate in a trial, either directly by testifying in a trial, or indirectly when the voice of the slave was recounted by another witness. This legal acknowledgement of the personhood of slaves was especially problematic because it undermined the principle of inanimate property by granting certain limited 'rights' to slaves, perhaps including the right to testify.[19] But there were other types of protections that slaves might enjoy. These included the right to life and limb; some states (but not all) adopted laws that banned excessive cruelty or the murder of slaves. For example, by 1860, Maryland law dictated that a slave could be emancipated by the state if his or her master were convicted of abuse in three separate cases.[20] Though less effective, where

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[16] Morris, *Southern Slavery and the Law, 1619-1860*, chapter 2 "The Sources of Southern Slave Law." Here, Morris examines many possible sources for elements of the many laws of slavery. He considers Roman law, English chattel property law, civil law, laws of villenage, and Hebraic slavery.

[17] Morris finds that there was some inclusion of the other sources of slave law that he examined, but when judges used Roman law or civil law to substantiate their rulings, "the purpose…was more political than legal." Morris, *Southern Slavery and the Law, 1619-1860*, 52.

[18] Sven Beckert and others have demonstrated the ways in which Southern slavery supported the Northern economy. Northern business institutions, such as textile mills, banking and financial services, and law firms all reaped the financial rewards of slave labor. Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie 1850-1896*. Walter Johnson demonstrates the global nature of the slave economy in *River of Dark Dreams*. Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*. (Cambridge: Belknap Press, 2013).

[19] Most slave testimony was not sworn, but was still allowed according to legal custom. However, some states (e.g. Georgia and Louisiana) had statutes that permitted slave testimony because slaves could sometimes provide badly needed state's evidence, and it made prosecuting slave rebellions easier. Morris, 239

[20] Morris, *Southern Slavery and the Law, 1619-1860*, 183.

positive law of this sort did not exist, judges were free to apply master-servant common law rules to the treatment of slaves.[21] Stranger still, slave property could be put on trial for criminal offenses. In some states (e.g. North Carolina, Delaware, and Maryland), slaves were guaranteed the right to trial by jury and to representation by a lawyer. Thomas Morris notes that by 1820, some states "did attempt to apply basic procedural rules to the trials of slaves."[22] The problem of putting property on trial seemed not to matter in such states.

Yet, the experiences slaves had as human property provided opportunities for African Americans to receive lessons in law that would become critically important after emancipation. Slaves who participated in trials directly or who observed the trials of those around them developed understandings of legal procedure and what counted as a legally actionable offense. Moreover, many slaves knew that they enjoyed some legal protections, and that going to court was one way to enforce them. In some instances, slaves used local tribunals to resolve disagreements, which became not just accepted local custom, but also, in rare instances, part of common law.[23] Even outside of courtrooms or away from local magistrates, slaves formed unofficial legal bodies that replicated the official legal order. In some instances, slaves held their own informal trials to punish offenders and settle disputes.[24] Steven Hahn has shown that black churches had traditionally served as venues for justice during the antebellum period. Hahn claims that these "were the sites of the slaves' 'councils' and 'courts,' where members of the community gathered to discuss local events, resolve disputes, and dispense justice."[25] It is not surprising then, that newly freed men and women would attempt to take their customary practices of antebellum justice out of a circumscribed space and into the legitimate environment of the post-bellum courthouse.

That so many slaves had always considered themselves as possessing certain, albeit severely limited, protections makes it less surprising that freedpeople in the post-bellum years would turn to state courts for both security, and as a means to formally declare and assert the full package of rights that emancipation had bestowed upon them. Freedpeople attempted to claim fully the right to marry, own property, become literate and educated, and to keep their families intact, all of which had been denied under both the formal laws and in some instances, the informal practices of slavery. But it was their lived experiences with the law, and as objects of the law, coupled with the overwhelming desire to fully claim their legal personhood that prompted many former slaves to turn to Southern Courts to resolve their problems and prepared many freedpeople for the process of litigation itself.

The fourth element of Southern legal complexity is a byproduct of both American federalism and American expansion in the years following the Revolution. That is, each slave state had its own unique laws and customs related to slavery. As we have seen, some states had statutes prohibiting the mistreatment of slaves while others did not. In addition, some legal

[21] Morris, *Southern Slavery and the Law, 1619-1860*, 193. In 1829, Thomas Ruffin's decision in *State v. Mann* challenged the notion that slaves could possess any legal protections because they would render the master's authority over slave property imperfect. However, the ruling applied only to North Carolina. *State v. Mann* 13 N.C. 263 (1829).

[22] Morris, *Southern Slavery and the Law, 1619-1860*, 216, 223.

[23] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*. Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Vintage Books, 1976), 31.

[24] Morris, *Southern Slavery and the Law, 1619-1860*, 241.

[25] Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration*, 50.

traditions came not from British common law, but rather from the regimes that had once ruled a foreign territory. Louisiana is the best example of this. Both French and Spanish law influenced the legal culture of the Bayou State, even after it became a state in the United States. For example, while Spanish law governed Louisiana, slaves had the right to initiate and negotiate the terms of their own manumissions. Once that process began, the slave and the master were bound to the terms of their agreement. Should a master later renege, a slave had the legal right to seek a *carta de libertad* (certificate of freedom) in civil court, which ensured his or her ultimate liberation as a matter of law. In other words, Spanish courts could and did compel masters to abide by the terms of the agreements they made with their slaves. It's no wonder, then, that Ira Berlin writes of New Spain, "With no special friend at law, slave owners generally avoided official adjudication and settled out of court."[26]

In addition to the multifaceted complexity of antebellum Southern law, there is one other aspect of the era that needs attention: the concept of 'rights.' Antebellum Americans were unfamiliar with the notion of rights that would emerge during Reconstruction and would later come to define the jurisprudence of the later half of the twentieth century. Nonetheless, the passage of the Civil Rights Acts of 1866 and 1875, coupled with the adoption of the Fourteenth and Fifteenth Amendments changed much; civil rights and rights of national citizenship were articulated with the Constitutional assurance that the federal government was responsible for protecting them. Prior to this, the only right to which most Americans would have been familiar was the right to property.[27] This was due to the fact that property ownership had once been a prerequisite to voting, and because labor itself became something that one possessed, or owned, as a free person.[28] Such concepts were cemented by the adoption of universal manhood suffrage in the early decades of the Nineteenth century, where the ownership of one's labor became the standard threshold for enfranchisement. By the 1830s, white men could claim an absolute right to property and ownership of their labor, but they were also able to claim the right to the bodies and labor of their household subordinates, such as wives, children, and other dependent members of the home. In the South, this also included slaves. Critically, property was the right around which Southern society in particular revolved, because slaves were such valuable commodities that required both legal distinction and legal protection. Fiercely safeguarded property rights served that purpose, while also reinforcing the rigid social hierarchies that existed in the antebellum South.[29] Planter elites were marked by their ownership of property both real and chattel, whereas poor whites owned little or no real property. The inability for slaves to own property in any formal sense helped mark them as slaves. Property ownership had become a constitutive element of freedom.

Other 'rights' such as the right to testify in court or the right to a trial by jury (discussed above) are better understood as *privileges* of white antebellum male freedom (though they were called rights at the time); they were conditional 'rights' predicated on race, gender, and status,

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[26] Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America*, 212-213. Berlin writes that during one decade of Spanish control of Louisiana (1769-1779), 320 deeds of manumission were registered in New Orleans courts alone. This was "many times the number of issued during the entire period of French rule." The French followed the infamous *Code Noir* when it came to matters of slavery.

[27] Harold Hyman and William M. Wiecek. *Equal Justice Under Law: Constitutional Development, 1835-1875.* (New York: Harper & Row, 1982).

[28] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, 9.

[29] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, 9.

not absolute rights of citizenship protected by law. As Michael Les Benedict makes clear, except for property rights, any concept of "civil liberties" that antebellum Americans might possess was often divorced entirely from state court systems. "Except for the protection of a few property rights, Americans relied for their day-to-day freedom on the actions and self-restraint of their legislative representatives."[30] Unsurprisingly, whites continued to ask Southern courts to uphold property rights and the associated social standing that went along with them well after their slave property had ceased to be property at all. Freedpeople, on the other hand, were quick to use new Congressional formulations of rights to their immediate benefit, and turned to the courts for their protection, especially in periods – such as the Black Code years – when state legislatures failed to protect or defend black civil rights. In effect, Reconstruction-era Southern courts were simultaneously asked to protect traditional rights and to uphold new rights that had never been articulated in any meaningful way before. The burden of ruling was heavy indeed.

Neither Presidential nor Congressional Reconstruction policies could erase the assumptions and beliefs that had developed during the antebellum period. These deeply rooted and often locally specific beliefs were an ingrained part of Southern legal culture. As a consequence, jurists and litigants in Southern state courts were forced to confront and contend with these assumptions as they attempted to negotiate and define a new a legal order for themselves and their war-torn region. In the process of doing so, jurists and litigants not only resolved personal matters, they also faced challenges to traditional (antebellum) expectations about the role the legal system played in their lives, and encountered significant legal questions about how the end of slavery would alter Southern law and society.

Determining the answers to these questions depended on the state. In legal Reconstruction, Southern states fit roughly into one of three categories: Radical, moderate, and conservative. Where a state fell on this spectrum largely depends on how its courts responded to the theory of *ab initio*. Originally devised and promoted by Radicals like Charles Sumner and Thaddeus Stevens, the "conquered province," "state suicide," or "*ab initio*" doctrine was proposed as early as 1862 as a national plan for reintegrating the conquered Confederacy back into the United States.[31] According to historian Michael Les Benedict, they all meant the same thing; "southerners had succeeded *de facto* in gaining the status of belligerents under international law. Once conquered, the former southern states were no different from any other territory conquered by the United States and were completely subject to the authority of the national government."[32] Under this plan, the Southern states would have been considered US territories, placing them directly and entirely under the control of the US Congress until they reapplied for statehood and were readmitted to the union.[33] Though the plan was not adopted by Congress, some states, such as Louisiana, Georgia, and Alabama adopted all or parts of the basic premise of the theory: that Confederate states had in fact and in law left the union and thus the

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[30] Michael Les Benedict. *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006), x.

[31] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 67. Michael Les Benedict. "Preserving the Constitution: The Conservative Basis of Radical Reconstruction." *Journal of American History* 61, no.1. (1974) 69, 69n9.

[32] Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," 69n9.

[33] Thaddeus Stevens specifically articulated that the states ought to be seen as territories. "I know of no arrangement so proper for them as territorial governments." Stevens, quoted from Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," 71. See also, *Congressional Globe*, 39 Cong., I Sess., 72 (Dec. 18, 1865).

rule of the Constitution. This became the legal basis for declaring null and void all slave contracts and transactions in Confederate currency; without Constitutional protection, contracts from the Confederate period did not need to be upheld in the courts that had been established under a new Reconstruction government.

For some, like former Confederate hardliner and ardent states' rights supporter Governor Joseph E. Brown of Georgia, accepting *ab initio* was the only logical outcome of Southern defeat in the Civil War; if one believed fully in secession and the existence of a legally distinct Confederate nation, then one necessarily had to accept that that nation had been conquered and was thus subject to the will and the law of the victors. As Joseph Ranney reports, "In Brown's view, 'the conqueror had the right to dictate the terms of the settlement' and the idea that Georgia retained its state rights was 'not only a practical absurdity, but…contrary to equity and common sense.'"[34] Moreover, adopting such a stance made it easier to adopt relief measures the state so badly needed in the immediate aftermath of war; there were fewer legal restrictions to prevent or hinder such action.

However, accepting such a position jeopardized the validity of legal arrangements made before and during the Civil War, potentially rendering them unenforceable. For Southerners accustomed to the protection that Article 1, Section 10 of the Constitution provided them, this was deeply troubling; their contracts – slave or otherwise – had always been protected by supreme law, and yet after their failed Confederate venture, they found themselves considering the ramifications of losing that ironclad protection. For many judges and politicians, this was unthinkable. Coupled with the uncompensated emancipation of slave property, the effects of accepting any part of *ab initio* would only exacerbate the already fragile post-bellum Southern economy and society.[35] Above all, the invalidation of an otherwise lawful contract was so anathema to established legal thought that many simply could not stomach it.

State supreme court justices did not necessarily agree with state governors or legislatures on matters related to *ab initio*, further illustrating that political Reconstruction did not necessarily align with legal Reconstruction. For instance, while Governor Brown supported the notion that Georgia had in fact and in law left the union, Judge Hiram Warner of the state's Supreme Court strongly disagreed because it rendered Georgia's statehood questionable.[36] Nonetheless, a majority of the justices on Georgia's court ultimately accepted Governor Brown's view of *ab initio*. These disagreements could be settled by state constitutions drafted after the war, as was the case in Louisiana, or they could fester. For example, in Texas, successive courts simply overruled one another on the matter, fostering a climate of legal instability and uncertainty throughout the Reconstruction period.[37]

Nor did state court justices necessarily agree with the United States Supreme Court. The nation's high court ultimately intervened when states failed to reach consensus on the legal problems they all encountered. For instance, the Court ruled in 1869 in *Texas v. White* that secession had not taken place as a matter of law. Yet, far from settling the matter, some state courts continued to resist the implications of such a pronouncement, and continued to deal with

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[34] Joseph E. Brown, quoted in Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 71.
[35] Critics of emancipation without compensation pointed to the Fifth Amendment's taking clause for justification. This will be explored further in Chapter Five.
[36] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 71.
[37] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 72-73.

the legal legacies of slavery in their own ways. As we will see in the final chapter, it would take a series of Supreme Court cases before the states would bend to federal will.

Louisiana, the center of the antebellum slave and cotton economies, was the most Radical state under review in this project.[38] Unlike in most other states, Reconstruction began in the Bayou State during the Civil War. In April of 1862, Union forces led by General Benjamin Butler captured New Orleans and took control of the strategically important Mississippi River, in one of the first significant successes toward suffocating the Confederacy. Louisiana became the only Deep South state to begin wartime Reconstruction. Because the state had a diverse population that included strong Unionists, foreign immigrants, free blacks, Northerners, as well as slave owners and other Confederate sympathizers, Lincoln had high hopes for the Louisiana's success.[39] While the state's ultimate Reconstruction trajectory failed to live up to these expectations, its supreme court gave every indication that Radicalism might flourish there.

Ultimately, the Radical legal trajectory charted by Louisiana's court had much to do with the justice who most influenced the state's supreme court during Reconstruction. Judge James G. Taliaferro vehemently opposed secession and did not sign the article of secession in Louisiana when he was called upon to do so at the secession convention in 1861. He held the title Associate Justice on the Louisiana Supreme Court from 1866 until his death in 1876, during which time he also served as President of the Constitutional Convention of 1868. This convention produced Louisiana's Radical Constitution, and Taliaferro ensured that the essence of one of his most important decisions, in *Wainwright v. Bridges*, would be codified by the state's new governing document. To that end, articles 127, 128, and 129 of the Louisiana state constitution of 1868 thoroughly rejected the state's rebel past by repudiating Confederate contracts, currency, and debts.[40] Ultimately, the court in the Bayou State condemned slavery as a violation of natural rights. According to Taliaferro's opinion in the case, the emancipation rendered slavery "inevitably demolished, and with it all its surroundings."[41] In short, the judge believed that emancipation had shattered any and all legal structures that had once supported slavery; thus there could be no further litigation of it. In effect, Taliaferro conceived of emancipation and abolition as one and the same. Consequently, few former slave owners emerged victorious from the Louisiana court.

Taliaferro, himself a former slave owner, refused to allow the slave past to interfere with his vision for the post-emancipation future, which he believed must include and provide for the political equality of former slaves.[42] This legal path, charted by Taliaferro and some of his fellow justices, reflects Louisiana's partial acceptance of *ab initio*. While the court did not declare Louisiana to be a conquered province, the state had in fact been conquered. In addition, the state's Radical constitution drafted under Taliaferro's leadership condemned Confederate and

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[38] For an account of this centrality, see Walter Johnson's *River of Dark Dreams* and *Soul by Soul*.

[39] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 45-49.

[40] "Bibliographical/Historical Note." Taliaferro (James G.) Family Papers. Baton Rouge: Special Collections, Hill Memorial Library, Louisiana State University Libraries, 4. http://www.lib.lsu.edu/special/findaid/1001m.pdf. Accessed March 23, 2013. Evelyn L. Wilson, "Louisiana Supreme Court Justices: Profiles of Three Reconstruction-Era Justices," *Louisiana Bar Journal* Vol. 61 No. 2 (2013): 100.

[41] *Wainwright v. Bridges,* 19 La. An. 234 (1867), 239, 240.

[42] "Bibliographical/Historical Note." Taliaferro (James G.) Family Papers. Baton Rouge: Special Collections, Hill Memorial Library, Louisiana State University Libraries, 4. http://www.lib.lsu.edu/special/findaid/1001m.pdf. Accessed March 23, 2013. Evelyn L. Wilson, "Louisiana Supreme Court Justices: Profiles of Three Reconstruction-Era Justices," *Louisiana Bar Journal* Vol. 61 No. 2 (2013): 100.

slavery-related legal relationships as invalid. The practical effect of such a move mimicked *ab initio* in all but name. Above all, this requires Louisiana to be categorized as Radical.[43]

In this project, Louisiana stands in stark relief when compared to the other states under review. It is the outlier; it serves not only to demonstrate the ways in which Radical state courts behaved during Reconstruction, but also as the primary example of the road not taken. It would be precisely this Radical pathway that the US Supreme Court would invalidate in 1871, eliminating the potential for a fully realized Radical vision. Yet, we ought think of Louisiana's legal history during Reconstruction as a partial answer to the tantalizing question: What if Reconstruction had remained Radical? Alternatively, what other shape might Reconstruction have taken if the influence of Radical-leaning courts had not been squashed? This need not be a mere counterfactual; rather, we can compare Louisiana's legal history during Reconstruction to states that chose a more conservative route and judge the outcomes respectively. In the post-emancipation slave cases decided in the Bayou State, it becomes quite clear that the process of abolition was far more aggressively pursued than in less Radical-leaning states.

The moderate states include Texas, North Carolina, and Maryland. Of the three, Texas had the rockiest Reconstruction experience. The Lone Star State may have been the youngest state in the Union when the Civil War erupted, but it was one of the strongest supporters of secession, in large part because the cotton economy had exploded between 1850 and 1860. For example, in the decade before the Civil War, cotton production increased by a staggering 643 percent and accordingly, the slave population increased by 214 percent. On the eve of war, Slaves accounted for thirty percent of the population of Texas, and at least one quarter of Texas households owned slaves.[44] Despite this, Texas did have a sizeable unionist population; the German immigrants who settled in the Hill Country after fleeing the Revolution of 1848 remained committed to the United States despite the fervent and vociferous secessionism of the slave-owning population in east Texas. Ultimately, Texas was largely spared from the destruction of the Civil War; only the coastal areas saw military action. Given its relative security during the war, some slave owners from other parts of the South moved their bondsmen to Texas to protect their property from hostilities. Though these efforts eventually came to naught, slavery remained intact throughout the war, and the continuation of slavery in Texas well after 1865 is well documented.[45] Civil War and emancipation were not enough to destroy slavery in the Lone Star State.

Texas has the distinction of hosting the final fight of the Civil War at the Battle of Palmito Ranch, and of being the last state to complete Presidential Reconstruction. It also had the most judicial upheaval of any state under review. By the end of Reconstruction, four sequential and distinct Supreme Courts existed in the Lone Star State. The first, staffed by disloyal Confederates, was disbanded after General Philip Sheridan took control of the state with the onset of Congressional Reconstruction. Most of the formative judicial work of Reconstruction was done by the so-called "Military Court," the second of the four.[46] The court was comprised of

[43] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 74.
[44] Randolph B. Campbell. *Grassroots Reconstruction in Texas, 1865-1880* (Baton Rouge: Louisiana State University Press, 1997), 7.
[45] Campbell, Randolph B., William S. Pugsley, and Marilyn P. Duncan, *The Laws of Slavery in Texas*, Texas Legal Studies Series (University of Texas Press, 2010), 142.
[46] The "Military Court" was established at the outset of Congressional Reconstruction. Prior to that time, the court remained staffed by unabashed Confederates. When the state fell under military control, the judges were relieved of their duty by General Charles C. Griffin, acting under the orders of General Philip Sheridan. Hamilton, Latimer,

Radicals Andrew Jackson Hamilton and Albert Latimer, and moderates Amos Morrill, Colbert Caldwell, and Livingston Lindsay.[47] Though only Amos Morrill hailed from outside the South, to many in Texas, this was a Carpetbagger's court. The majority of the justices favored legal remedies that set firm legal standards that also preserved antebellum legal principles. The structures of slavery were not completely dismantled as they would be in Louisiana, but the judges were careful to respect the Thirteenth Amendment. In sum, if a case related to slavery arose over issues dating before emancipation, they would hear the case. If the issue arose afterwards, the court refused to entertain the suit. Though cases involving antebellum customary practices complicated matters, this basic principle continued to guide the Texas Supreme Court throughout Reconstruction, despite the short two-year tenure of the "Military Court."

The "Semicolon Court," named for the interpretation of the punctuation mark in one of its decisions, was convened after the Constitution of 1869 went into effect and sat from 1870-1873. It included only three justices, Moses Walker, Wesley Ogden, and Lemuel Evans, all of whom had been strong Union Supporters.[48] However, with the election of a Democratic governor and the onset of Redemption, the Texas Supreme Court experienced increased instability, and

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Morrill, Caldwell, and Lindsay were the replacements deemed suitable by Griffin Campbell, Randolph B., *Grass-Roots Reconstruction in Texas, 1865-1880*.

[47] Hamilton had served as the state's first provisional governor after the war ended, but quickly became disillusioned by the initial direction of Presidential Reconstruction. Disgusted with his state's new constitution (he wanted it to include black suffrage) and appalled by Presidential Reconstruction, Hamilton vacated his office and went to Philadelphia and organized the Southern Loyalists' Convention in an effort to fight against Johnson's policies. He was appointed to the Texas Supreme Court in 1867 (the Military Court), where he served until 1869. He also participated in the Constitutional Convention of 1868, helping write the Radical Constitution that Texas would adopt later that year. University of Texas at Austin Tarlton Law Library Digital Collections. "Justices of Texas 1836-1986: Andrew Jackson Hamilton (1815-1875)." Accessed March 17, 2013.
http://tarlton.law.utexas.edu/justices/profile/view/45.

Albert Latimer was one of the original signers of the Texas Declaration of Independence. A strong Union supporter, Latimer served the Hamilton government in the years following the war. He also served as a delegate to the Constitutional Convention of 1866, where he was the head of the Radical Union Caucus. Prior to his appointment to the Supreme Court, he was the subassistant commissioner for the Freedmen's Bureau in Texas. L. W. Kemp, "LATIMER, ALBERT HAMILTON," *Handbook of Texas Online*
(http://www.tshaonline.org/handbook/online/articles/fla44), accessed April 23, 2014. Uploaded on June 15, 2010. Published by the Texas State Historical Association.

Amos Morrill, former law partner of Hamilton, remained a committed Unionist throughout the Civil War. He was appointed to the Supreme Court of Texas on September 10, 1867. University of Texas at Austin Tarlton Law Library Digital Collections. "Justices of Texas 1836-1986: Amos Morrill (1809-1884)." Accessed March 16, 2013. http://tarlton.law.utexas.edu/justices/profile/view/73.

Colbert Caldwell was a known Republican in the years following the Civil War. He was appointed justice of the Supreme Court in 1867. While campaigning for a position at the Constitutional Convention of 1868, Democrats attempted to assassinate him for his strong and outspoken political views. He survived, and won the seat, where he served as a member of the moderate Republican delegation. He was removed from the Supreme Court in 1869 after Radicals believed he was unsympathetic to freedmen and a hindrance to the goals of Reconstruction. Charles Christopher Jackson, "CALDWELL, COLBERT," *Handbook of Texas Online*
(http://www.tshaonline.org/handbook/online/articles/fca10), accessed April 23, 2014. Uploaded on June 12, 2010. Published by the Texas State Historical Association.

Livingston Lindsay, a Virginia native, participated in the Constitutional Convention of 1868, where he was dubbed a moderate. He left the Texas Supreme Court after it was reorganized in 1870. "Justices of Texas 1836-1986: Livingston Lindsay (1806-1892). Accessed March 16, 2013. http://tarlton.law.utexas.edu/justices/profile/view/65.

[48] Carl H. Moneyhon, "SEMICOLON COURT," *Handbook of Texas Online*
(http://www.tshaonline.org/handbook/online/articles/jps01), accessed April 19, 2014. Uploaded on June 15, 2010. Published by the Texas State Historical Association. The Court was so named because of the labored interpretation of a semicolon in *Ex Parte Rodriguez*.

was ultimately disbanded once again. In addition to high turnover in justices, the new governor pushed through a constitutional amendment that allowed him to add two additional judges (taking the total back to the traditional five) to the bench in an effort to shape the court's political leanings. Union military commanders had previously removed some of these judges, like Rueben Reeves, in 1867 as "impediments to Reconstruction."

After 1874, the court would indeed become more conservative. This would be the final court convened during Reconstruction, and it remained intact well after the end of the period. By 1876, Texas had replaced its Radical Constitution, adopted in 1869, with the Constitution of 1876, which, as of 2015, remains in effect. Reconstruction era views of the state's Democratic Redeemers are evident in it. For instance the Texas Supreme Court would be restricted to hearing civil cases only. A new court of appeals was established to hear criminal cases. The number of district courts was reduced by over 25 percent. Above all, in a move reminiscent of the antebellum period, all judges would be elected.[49] In a blatant attempt to shape the Court's power and political leanings, this change insured the state against a future Republican governor who might appoint less conservative judges than the Redeemers found palatable. Yet, in the end, the most conservative of the four Reconstruction courts of Texas had limited effect; it only decided eight of the forty-two post-emancipation slave cases litigated in the state. The bulk of the legal work related to slavery was done by far more moderate courts that were influenced by a handful of Radical-leaning justices.

North Carolina also falls in the moderate category. One of the last states to secede from the Union, North Carolina had a deeply divided population on the issue of secession. The poor yeomanry, concentrated largely in the Appalachian part of the state, seemed to offer some initial hope for Republican success. Many in the western counties had fought for the Union, and others from the region who may have once supported the Confederacy became so weary of war they founded the "Heroes of America" to help "Unionists escape to federal lines." The group was formidable, and numbered up to 10,000 men.[50] The yeomanry in North Carolina was perceived as such a threat to the established social order, that the Reconstruction governor Jonathan Worth, a Democrat who served from 1865-1868, urged the state to readopt the framework of the government formed in 1776. The Revolutionary-era structure "contained substantial property requirements for voting," which would have limited the effect the yeomanry could have on Republican successes in the state.[51] Compounding matters, North Carolina's Republican leaders decided against disenfranchising former Confederates in a bid to secure the loyalty and potential votes of whites in the state.[52]

It should come as no surprise then that the justices on North Carolina's Supreme Court had remained in their post despite serving the Confederate government. The state had not purged its former Confederate citizens. When Reconstruction began, three justices staffed the court. After the onset of Congressional Reconstruction and the adoption of a new state constitution, the court was expanded to 5 justices, all of whom would be elected. All the justices – Richmond Pearson, William H. Battle, Edwin G. Reade, Robert P. Dick, Thomas Settle, and William B. Rodman – had been unionists before the Civil War. But all were Southern in heart and mind, and served the state as Confederates, either as state officials or Confederate soldiers. For example, Reade served as a Confederate Senator, though he was ultimately judged to be "too much of a

[49] Campbell, Randolph B. *Grass-Roots Reconstruction in Texas, 1865-1880*, 25.
[50] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 16.
[51] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 330.
[52] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 324.

states-rights extremist" for the Confederate General Assembly, and Battle became a devoted Democrat, and when he was removed from the bench by the Reconstruction Act, he left his position on the court.[53] Pearson had served as Chief Justice of the court during the Civil War, and remained in his post throughout Reconstruction; his voice and his jurisprudence had the most lasting effect on the North Carolina Supreme Court. US military officials never challenged his position because he had opposed secession, and had openly challenged the Confederate government from the bench throughout the Civil War. He toed the line between Unionist and Confederate so well that Andrew Johnson considered appointing him to the United States Supreme Court.[54]

Despite their service to the Confederacy, the men of the court in the Tar Heel State were experienced jurists known for their respect for the law. As a consequence, they had little trouble striking down discriminatory laws passed by the North Carolina Legislature, over objection of the lawmakers and the many former slave owners who hoped to reestablish the antebellum social hierarchy. As we will see, they did precisely this to the state's apprenticeship law.[55] Despite this, the Reconstruction court of North Carolina found no reason to be as thorough in destroying slavery's vestiges as the Louisiana court had, and in terms of their rulings, shared much in common with the legal decisions rendered in Texas. The North Carolina court delivered rulings that were circumstantial, and often granted leeway to white litigants. The court took a case-by-case approach to determining the post-bellum legal order instead of creating a clear and absolute standard by which to rule, and as a result, the justices ruled on 67 post-emancipation slave cases during Reconstruction.

In contrast to the heavy caseload of North Carolina, Maryland, also a moderate state, only decided sixteen post-emancipation slave cases. There are two main reasons for this. First, the state had a smaller slave population than other Southern states; the state's slave population had been in decline during the antebellum years, and by 1860, bondspeople made up a mere 13% of

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[53] William S. Powell, ed. "Edwin Goodwin Reade," *Dictionary of North Carolina Biography, volume 5*. (Chapel Hill, University of North Carolina Press, 1994), 183-184. William S. Powell, ed. "William Horn Battle," *Dictionary of North Carolina Biography, volume 1*. (Chapel Hill, University of North Carolina Press, 1994), 118.

[54] Richmond Mumford Pearson served as Chief Justice of the North Carolina Supreme Court from 1858-1878. He was born in North Carolina in 1805. His father was a Revolutionary War veteran. He attended the University of North Carolina, and after graduating, established his own law practice in 1826. He was elected to his first judgeship in 1836, and was appointed to the state supreme court in 1848 by the Democratic General Assembly (Pearson was a Whig at that time). Pearson established his own law school in Mocksville, NC in 1836. Ten years later, he moved the school to his large plantation on the Yadkin River, called Richmond Hill. Pearson himself served as a teacher of law, and the school operated until his death in 1878. The school produced several illustrious graduates, including future judges and US Congressmen. Pearson served as Chief Justice of the Supreme Court of North Carolina from 1858-1878. During the Civil War, Pearson often challenged the Confederacy. He had been known as a staunch Federalist and Whig who opposed secession. In 1862, he interpreted the Confederate conscription laws to mean that any man could provide a substitute in lieu of military service. In 1864, he refused to uphold the suspension of habeas corpus, and released individuals who sought relief from him. Thus many saw Pearson's actions as an attempt to undermine the Confederate government in North Carolina. Because many remained confident in Pearson despite his controversial decisions during the war, he was promptly reelected to his position on the bench after the war ended. He was rumored to be one of President Andrew Johnson's choices for the US Supreme Court, but he was never nominated. Pearson declared himself a Republican, and supported the election of Ulysses S. Grant in 1868. Accusations of excessive drinking dogged the judge throughout his career. Powell, William S., ed.,"Richmond Mumford Pearson," *Dictionary of North Carolina Biography, volume 5*. (Chapel Hill, University of North Carolina Press, 1994), 49-51.

[55] Alexander, *North Carolina Faces the Freedmen: Race Relations during Presidential Reconstruction, 1865-67*, 118-119.

the state's population.[56] Second, the state remained under federal occupation throughout the duration of the war, effectively eliminating its ability to secede. The pro-Union legislature adopted a new state constitution in 1864 when emancipation was all but certain, that ended the peculiar institution in the state. During the Civil War, the Maryland Court of Appeals faced more adjournments than usual, though it did still convene. In the spring term of 1861, for example, the court suffered a "lack of judges," forcing it to suspend business.[57] By the end of the war, the court had gotten significantly behind in its work, so the Constitution of 1864 added judges to the bench, taking the total to five.[58] The "Chief Judge" would be appointed by the governor and approved by the state senate, while the remaining four judges would be elected from each of the judicial districts in the state. Richard Johns Bowie, James Lawrence Bartol, Brice John Goldsborough, Daniel Weisel, and Silas Morris Chochran staffed the first Court of Appeals after the adoption of the state's first Reconstruction constitution.[59] Maryland adopted a second Reconstruction constitution in 1867. The new court had eight justices: Bartol, who remained on the bench, James Augustus Stewart, John Mitchell Robinson, Richard H. Alvey, Oliver Miller, Madison Nelson, George Brent, and Richard Grason.[60]

The majority of Maryland's post-emancipation slave cases were decided by the court seated in 1867. Their position on the validity of antebellum slave contracts in the post-emancipation state was identical to the other moderate states. In the 1869 case *Williams v. Johnson* the court affirmed that the laws in effect at the time the contract had been executed became "vested" elements of the agreement. The contracts, despite the end of slavery, would be enforced.[61] In other notable cases, such as those related to African American families, the court would not countenance the overt practice of anything that resembled slavery. The Maryland court affirmed more than once that apprenticeship of African American children violated the state's ban on slavery.[62] As with most moderate states, legal support for matters related to slavery remained intact, but the court did uphold basic rights of freedpeople.

Virginia had the most robust and developed legal culture in the South prior to the Civil War. During Reconstruction, the Supreme Court of the state was somewhere in between moderate and conservative. Like Texas, the Virginia Supreme Court experienced a great deal of turnover during the Reconstruction years, when it decided forty-seven post-emancipation slave cases. According to the state's Constitution of 1864, three judges, who were nominated by the Governor and elected by the state legislature, sat on the bench of the Supreme Court. Richard C.L. Moncure, Alexander Rives, and William T. Joynes, all highly respected members of the Virginia Bar, served on the court from 1866 to 1869.[63] In 1869, Major General John Schofield,

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[56] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 37. Eighth *Census of the United States*, Census (United States Census Bureau, 1860).
[57] Carroll T. Bond, *The Court of Appeals of Maryland, A History* (Baltimore: The Barton-Gillet Company, 1928), 159.
[58] Bond, *The Court of Appeals of Maryland, A History*, 167. Bond is careful to note of the Constitution of 1864: it "was born of the passions of the war, and expressed the will of only a portion of the people temporarily in power, and supported by the federal military rule…."
[59] Bond, *The Court of Appeals of Maryland, A History*, 171.
[60] Bond, *The Court of Appeals of Maryland, A History*, 178-79. Grason had been elected to the Court of Appeals in 1864, but because of Southern sympathies, was unseated by the Maryland House of Delegates.
[61] *Williams v. Johnson*, 30 Md. 500 (1869).
[62] See especially, *In Re Turner*, 24 F. Cas. 337 (1867) and *Cotson v. Cotson*, 25 Md. 500 (1866).
[63] Samuel Norman Pincus, "The Virginia Supreme Court, Blacks, and the Law 1870-190." (Dissertation, University of Virginia, 1978), 22-23.

military commander in control of Virginia, replaced all three justices.[64] Together, the new justices, Horace Blois Burnham, Orloff Mather Dorman, and Westel Willoughby ultimately made up the so-called "Military Appeals Court."[65] The citizens of the state despised the court. According to one report, "Their decisions are reported in XIX Grattan, and in the copy of that volume in the State Law Library on the page where the names of the so-called judges appear, some wag has made a bracket embracing their names, and written, that "Although they sat upon the eagle's eyrie, they are buzzards still."[66] In the end, the military court only sat two sessions and decided eight cases.

In 1870, Virginia was formally readmitted to the union with a new constitution. The state was already under control of white Redeemers by this time, even though the new governing document was produced by a mixed-race convention with a Radical majority. The new constitution increased the number of justices on the Supreme Court from three to five, who would be chosen by the General Assembly for twelve-year terms.[67] Ultimately, the first court to sit under the authority of the new constitution included two familiar faces – Moncure and Joynes – and new judges Waller R. Staples, Joseph Christian, and Francis T. Anderson.[68] When it came to the new court's treatment of African Americans, Virginia Supreme Court historian Samuel Pincus has found that though the justices shared much of the conservatism of many white Virginians, they nonetheless provided fair assessments of the cases brought by black litigants, so long as the cases did not overtly threaten the regime of white supremacy that was already re-establishing itself in the state. In civil cases especially, the court was committed to professional standards of justice for all litigants. Yet, as Pincus notes, "dealing with individual parties fit into the traditional form of southern paternalism-disdain for the racial mass but generosity toward the familiar individual."[69] In other words, the Reconstruction-era Supreme Court of Virginia did protect the basic rights of freedpeople on a case-by-case basis, but they did so in ways that were clearly influenced by an older racial ideology. Overarching support for black rights, such as the right to jury service, received only token support without the threat of actual enforcement.[70]

Kentucky is the most conservative of the states explored in this project. As a border state, the combination of Kentucky's loyalty to the Union and its geographic and cultural connections to the states in rebellion led to a complex and difficult Reconstruction. Despite strong Confederate leanings and an internal secession effort, Kentucky attempted to remain a neutral

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[64] It is unclear why he did so. One source suggests that the sitting judges were dismissed because of Confederate ties, but only one (Joynes) served the Confederacy directly, and Rives was well-known to be a strong Unionist.

[65] Despite this name, it was in fact the Supreme Court of Virginia.

[66] George L. Christian. *The Capitol Disaster: A Chapter of Reconstruction in Virginia* (Richmond: Richmond Press, Inc., 1915), 4. Quoted from Samuel Norman Pincus, "The Virginia Supreme Court, Blacks, and the Law 1870-190." (Dissertation, University of Virginia, 1978), 23.

[67] Pincus, "The Virginia Supreme Court, Blacks, and the Law 1870-190," 25.

[68] Waller Redd Staples was born in Virginia in 1826. He was a member of the state legislature in 1853. A Whig turned Democrat, he served as a Virginia delegate to the provisional congress of the Confederacy in Montgomery, Alabama from its formation until 1862, when the Confederate Congress came into existence. He served in the Confederate House of Representatives until the end of the Civil War. He was elected to the Virginia Supreme Court in 1870. http://www.unirel.vt.edu/history/administration/staples_waller_r.html. Accessed March 27, 2013. Christian, also a former Whig, served in the state senate during the Civil War. Anderson was a Unionist Whig until the war, and served in the Virginia House of Delegates while the state was a member of the Confederacy. Pincus, "The Virginia Supreme Court, Blacks, and the Law 1870-190," 29.

[69] Samuel N. Pincus, *The Virginia Supreme Court, Blacks, and the Law, 1870-1902*, Distinguished Studies in American Legal and Constitutional History (New York: Garland Publishing, Inc., 1990), 249.

[70] Pincus, *The Virginia Supreme Court, Blacks, and the Law, 1870-1902*, 248.

state until a Confederate invasion in 1861 forced an alliance with the Union.[71] As one historian notes, "It was not a case of wanting to fight for the Confederates so much as a dislike for fighting against them."[72] Consequently, there were stark divisions among those Kentuckians who fought in the Civil War; 30,000 joined the Confederacy, 64,000 joined the Union, and 13,000 remained in state guard service.[73] The Bluegrass State was also represented in both the United States and Confederate Congresses. Kentucky, the birthplace of both Abraham Lincoln and Jefferson Davis, was itself a house divided.

The Kentucky political order made its ambivalence toward the Union clear. Historian Eric Foner notes that Kentucky was "firmly committed to the Union, but throughout the war remained under control of a conservative Unionist coalition that steadfastly opposed all federal policies that threatened to undermine slavery."[74] Indeed the size and dispersion of Kentucky's slave population gave the institution remarkably deep roots. Kentucky had a slave population "exceeding 225,000 in 1860," a larger number than Missouri and Maryland combined, and the prevalence of hiring out also gave non-slaveholders an unusually economic large stake in the peculiar institution.[75] Both President Lincoln and Secretary of War Edwin Stanton were concerned about Kentucky's loyalty to the Union, precisely because slavery was so entrenched there.[76] As a result of these concerns, Lincoln signed Proclamation 113 on July 5, 1864, which suspended habeas corpus and imposed martial law upon the state.[77] Although the rationale for this declaration was to preserve free elections, the real purpose was to suppress the state's strong pro-southern contingency.[78] Lincoln's efforts were hardly successful, as the presidential election of 1864 demonstrated. Kentucky supported "Copperhead" Democrat and former Union general George B. McClellan because of his pro-states' rights leanings. McClellan carried the state by a margin of more than 36,000 votes over Republican Lincoln.[79]

Because Kentucky remained loyal to the Union, the Emancipation Proclamation of 1863 did not apply there, and the institution of slavery remained legally and practically intact throughout the war. Many Kentuckians believed that their commitment to the Union would exempt them from emancipation. Thus, despite the fact that the Thirteenth Amendment passed in both houses of Congress in January 1865, Kentucky politicians remained undeterred. Unlike Maryland, which rewrote its state constitution before the Amendment was ratified, Kentucky remained committed fully to the peculiar institution; it did not adopt a post-bellum constitution until 1891.[80] When called upon to do so, the Kentucky legislature refused to ratify the Thirteenth

[71] Ross A. Webb, *Kentucky in the Reconstruction Era* (Lexington, Kentucky: University of Kentucky Press, 1979), 7. For a detailed account of Kentucky's forced abandonment of neutrality, see also Coulter, chapter 11.
[72] E. Merton Coulter, *The Civil War and Readjustment in Kentucky* (Chapel Hill: University of North Carolina Press, 1926), 118.
[73] Webb, *Kentucky in the Reconstruction Era*, 9.
[74] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 37.
[75] Berlin et al., *Freedom: A Documentary History of Emancipation 1861-1867*, 625.
[76] Webb, *Kentucky in the Reconstruction Era*, 7.
[77] Abraham Lincoln: "Proclamation 113 - Declaring Martial Law and a Further Suspension of the Writ of Habeas Corpus in Kentucky," July 5, 1864. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=69993.
[78] Webb, *Kentucky in the Reconstruction Era*, 7-8.
[79] Webb, *Kentucky in the Reconstruction Era*, 8.
[80] Coulter, *The Civil War and Readjustment in Kentucky*, 259. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 37-38. Berlin et al., *Freedom: A Documentary History of Emancipation 1861-1867*, 625.

Amendment, even over the endorsement of Governor Thomas E. Bramlette.[81] In addition, there was an outright refusal to repeal the state's slave code. Even supporters of Thirteenth Amendment like Governor Bramlette believed that the state legislature should refuse to ratify the amendment until Congress paid Kentucky $34 million—the assessed value of all Kentucky slaves in 1864—as reparations for property loss.[82] No federal dollars would be forthcoming, and Kentucky did not ratify the Reconstruction Amendments until 1976.

It was abundantly clear to politicians in Washington that Kentucky would resist emancipation bitterly. As a result, the Freedmen's Bureau was extended into Kentucky in December 1865 in an effort to move the process of black liberation forward and attend to the needs of the state's sizable black population.[83] No other Union state shared this fate, and Kentuckians protested it wildly; one Freedmen's Bureau inspector claimed that there was a "greater degree of hostility" toward the Bureau in Kentucky than in any other state he had inspected.[84] For example, freedpeople were largely excluded from Kentucky state courts. Many cases, especially those initiated by the Freedmen's Bureau concerning "outrages by whites against blacks" or violations of the Civil Rights Act of 1866 had to be taken to the federal level or directly before a US Commissioner by securing a writ of habeas corpus from the lower state court.[85] The Bureau "advised [black litigants] to transfer all suits against them to federal courts when their personal and pecuniary interest would be advanced by such a change."[86]

The outrage over forced emancipation was as palpable in the Kentucky Court of Appeals as it was in the state legislature and lower courts. The state's judiciary remained largely in line with the state's conservative legislature for the simple reason that the government of Kentucky was not dissolved during Reconstruction's Radical phase. Democrats remained in control of the government throughout the period, and the Republicans who did manage to influence state politics tended to be much more conservative than their Radical counterparts elsewhere.[87] While other judges on the Kentucky Court of Appeals tempered their opinions more than Chief Justice George Robertson, he set the tone for jurisprudence in Kentucky during Reconstruction. Robertson was a Kentucky native, who, despite inauspicious beginnings, rose to legal and political prominence. He had been a successful lawyer, Congressman, speaker of the Kentucky House, Secretary of the State of Kentucky, and a chief justice of the Kentucky Court of Appeals, the highest court in the Bluegrass State. He, like many other men of his class, had invested in slaves. He identified as a Whig during his years in political office, and had been friends with Abraham Lincoln since the 1840s, despite their differing views on slavery. However, their relationship became strained in 1862, when Lincoln issued the Preliminary Emancipation Proclamation. In addition, Robertson, was furious that "Union troops were 'forcibly detaining the slaves of Union Kentuckians.'" Remarkably, one of Robertson's own slaves fled to the Union

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[81] Bramlette was originally a Union Democrat who supported Lincoln until he suspended *habeas corpus*. Bramlette would later pardon most ex-Confederates and oppose the fourteenth and fifteenth amendments. But, Bramlette was also the leader of efforts to prevent the recruitment and enlistment of black slaves in Kentucky. Berlin et al., *Freedom: A Documentary History of Emancipation 1861-1867*, 631. Webb, *Kentucky in the Reconstruction Era*, 9-15. Kentucky finally ratified all three Reconstruction Amendments in 1976.

[82] Coulter, *The Civil War and Readjustment in Kentucky*, 259.

[83] Webb, *Kentucky in the Reconstruction Era*, 16.

[84] General F.D. Sewall, quoted in John E. Kleber, *The Kentucky Encyclopedia* (Lexington: The University Press of Kentucky, 1992), 357.

[85] Victor B. Howard, *Black Liberation in Kentucky: Emancipation and Freedom, 1862-1884* (Lexington, KY: The University Press of Kentucky, 1983), 134.

[86] Howard, *Black Liberation in Kentucky: Emancipation and Freedom, 1862-1884*, 138.

[87] Webb, *Kentucky in the Reconstruction Era*, 12-14.

camp of the 22nd Wisconsin Regiment, and though Robertson demanded the commander return the slave, the officer denied the request. Colonel William Utley refused to allow the Judge in the camp or to release the slave in question. In response, Robertson sued Utley in federal court, and had him indicted for "harboring a slave." When Lincoln learned of the situation, he offered Robertson $500 for the slave, but Robertson refused. Ultimately, in 1871, Colonel Utley was convicted in federal court, and was ordered to pay Robertson $935. Robertson recovered some of what the war had "taken" from him. In the end, the U.S. Treasury paid the bill on Utley's behalf.[88]

Tennessee defies classification, as its Supreme Court went through two distinct phases, one Radical (1865-1870), not unlike Louisiana, and one conservative (1870-1877), which reflected the arrival of Redemption. Complicating matters further was the state's troubled wartime history. Like other Appalachian states, Tennessee's population was fiercely divided on secession; the eastern, mountainous, part of the state remained staunchly Unionist, while the mid and western regions, which were more suitable to plantation agriculture, supported the Confederacy. However, these political divisions mattered little, as many battles, including the Battle of Shiloh in 1862, disrupted life in Tennessee. Only Virginia experienced more wartime violence. In addition, Union forces occupied the state throughout most of the Civil War. The constant fighting and presence of an occupying force produced great confusion in the state; citizens of Tennessee were often unsure of who was actually in control of a given territory.

Amidst the disorder, the state's legal system shut down almost entirely during the Civil War, as courthouses and legal documents were threatened or destroyed altogether.[89] It is not surprising, then, that the state decided ninety post-emancipation slave cases; many suits had to be suspended during the war. Governor William G. Brownlow, who replaced Andrew Johnson in 1864, reestablished Tennessee's Supreme Court in 1865.[90] However, Governor Brownlow struggled to staff the court with respected members of the Tennessee Bar. As one scholar describes, "The Reconstruction Supreme Court was staffed by non-elite second-tier lawyers and politicians."[91] From 1865 to 1870, the three-person court employed Samuel Milligan, Alvin Hawkins, James O. Shackelford, Horace Harrison, Horace Maynard, Henry G. Smith, and George Andrews.[92] None of the men were members of Southern high society, but while serving, they made up the state's Radical Supreme Court.[93]

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[88] William B. Allen. A History of Kentucky: Embracing Gleanings, Reminiscences, Antiquities, Natural Curiosities, Statistics, and Biographical Sketches of Pioneers, Soldiers, Jurists, Lawyers, Statesmen, Divines, Mechanics, Farmers, Merchants, and Other Leading Men, of All Occupations and Pursuits. (Louisville: Bradley & Gilbert, 1872), 261-264. Sanders. "Judge George Robertson,"
http://explorekyhistory.ky.gov/items/show/40#.UqJmumRDui4.

[89] R. Ben Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," in *A History of the Tennessee Supreme Court*, ed. James W. Ely Jr. (Knoxville, TN: The University of Tennessee Press, 2002), 99.

[90] The court had three justices, one from each of the state's Divisions.

[91] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 103-104.

[92] Milligan, a Breckenridge supporter and vocal Unionist, fled to Nashville during the Civil War to avoid being arrested by the Confederacy. There, he served as a clerk in Andrew Johnson's office. He remained close to Johnson, and left the Tennessee Supreme Court after the President appointed him to the United States Court of Claims in 1868. Alvin Hawkins had been a blacksmith, farmer, and teacher before turning to the law. Despite his inauspicious beginnings, he served in the Tennessee House of Representatives during the 1850s. Hawkins, a Whig turned Republican, was also a Unionist, and supported John Bell in the Presidential election of 1860. In 1864, President Lincoln appointed Hawkins the United States attorney for Western Tennessee. He resigned the post in 1865 after Governor Brownlow asked him to join the court. James O. Shackelford, a Virginia native, was a practicing lawyer until he was appointed to the Tennessee Supreme Court in 1865. Like Hawkins, Shackelford was a Whig turned Republican, however he had more Confederate sympathies than did the other two justices with whom he served. His

Tennessee's Radical court quickly established its position on the Confederacy and the end of slavery. According to the Court, the Confederacy was a "traitorous conspiracy," that would receive no legal credence. Those who had treated it as a legal government, through overt support or through tacit acceptance, including use of Confederate currency, would receive no help from the court.[94] The problems raised by emancipation were not unique to the state, but Tennessee's Radical Court's unwavering commitment to freedpeople and their newly acquired rights was noteworthy.[95] The Court rejected old slave law, and maintained that all former slaves be treated as free persons under the law.[96] This impulse often meant granting "inchoate freedom" – or certain rights to which they had previously been denied – to freedpeople on trial for crimes committed while enslaved, in order to afford them as many rights as possible.[97]

The Radical commitment of the Tennessee Supreme Court began to falter in 1868, when all of the justices resigned. Though they did so for different reasons, the resignations, coupled with the inability to re-staff the court meant there would be no session held in 1869. Compounding the turmoil, Supreme Court judges would be elected in August of 1870. It was the first time judges would be elected in Tennessee since the outbreak of war.[98] With the elections, the Radical phase of Tennessee's Supreme Court ended. Because the election was open to those previously prevented from voting because of their past Confederate ties, the Radical judges hardly stood a chance. Redeemers took the helm of the Tennessee Supreme Court (and legislature) in 1870, and ushered in the second era of Tennessee's Reconstruction jurisprudence marked by its conservatism.

Unlike their colleagues from the Radical Court, the judges of Tennessee's Conservative Court were prestigious jurists. However, because many of them had pledged allegiance to the Confederacy, one of their primary goals was to "resurrect the Confederacy" after the Radical court declared it a traitorous conspiracy.[99] This included nullifying rulings that had invalidated notes that used Confederate currency.[100] Overwhelmingly, Confederate defendants "could do no wrong," while Unionists "were invariably liable" for the crimes and infractions with which they had been accused.[101] The proceedings of Tennessee's high court were so biased, that the United States Supreme Court overturned its ruling against those acting under Federal orders.[102] Given these political and judicial leanings, it is not surprising that Tennessee's Conservative Court was no friend of the state's population of freedpeople.

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son, a Confederate soldier, was killed at Gettysburg. In 1867, Shackelford took a hiatus from the Court to serve as the Chancellor of the Nashville district, but he returned to the bench in 1868. Shackelford swapped positions with Horace Harrison. Harrison, who had been the Chancellor of Nashville, came to the bench to replace Shackelford. Henry G. Smith and George Andrews were both carpetbaggers. Smith had lived in Connecticut before moving to Tennessee in 1832, and Andrews was a Michigan lawyer who had only arrived to the state in 1865. Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 105.

[93] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 103-104.

[94] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 107.

[95] Union controlled territories of Tennessee were exempt from the Emancipation Proclamation.

[96] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 114.

[97] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 113.

[98] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 117. Franchise in Tennessee was equated to a property right, and was granted through judicial proceedings that determined whether or not a person aided the enemy.

[99] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 124-125.

[100] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 127.

[101] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 126.

[102] Brown, "The Tennessee Supreme Court During Reconstruction and Redemption," 126.

The process of litigating emancipation was more than a practical necessity or a judicial review of state laws. It was an integral and crucial part of defining the meaning of the Civil War and the end of slavery. While historians have long described the destruction of slavery as the result of war, Presidential proclamation, Constitutional amendment, or outright revolt by slaves and abolitionists, the destruction of slavery involved something more than traditional interpretations suggest.[103] Emancipation was also a project undertaken within the state courthouses across the former Slaveholders Republic.

Yet, this should not be surprising. As Laura Edwards has demonstrated, long before the first shots of the Civil War were fired at Fort Sumter, Southerners had not only become accustomed to settling their disputes – including those related to slavery – in court, but the "peace" of local communities often depended on the resolutions achieved there.[104] The very act of re-opening state courthouses after the Civil War to cases that helped settle issues related to emancipation was thus itself a crucial part of reasserting and maintaining law and order in the former Confederacy. It was not simply that litigants could resolve their disputes in ways that felt familiar. It was also important that litigants and jurists could begin to work out what emancipation meant for them in a traditionally peaceful arena. It provided a way of leaving the extreme violence of the war in the past, and gave Southerners an opportunity to consider their futures. In other words, the destruction of slavery was the most significant consequence of the Civil War, but making legal sense of it during the post-bellum years was equally important precisely because it determined the South's pathway forward.

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[103] For historical treatments of the abolition of slavery, see: Ira Berlin et al., *Slaves No More: Three Essays on Emancipation and the Civil War* (New York: Cambridge University Press, 1992). Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877.* Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration*. Litwack, *Been in the Storm So Long: The Aftermath of Slavery*. McPherson, James. *Battle Cry of Freedom.* New York: Oxford University Press, 1988. Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*.

[104] Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*.

Chapter Two
Thenceforward and Forever Free:
Determining the Date of Emancipation in the Courts of the Former Slave South

On January 1, 1865, just four months before Robert E. Lee surrendered to Ulysses S. Grant at Appomattox Courthouse, Henrietta Arnis of Warren County, Mississippi hired out her slaves Ben, Charles, and Eliza, to Texas residents P. Williams and H.J. Meadow. The promissory note signed by the parties stipulated that the hirers would owe the owner $700, "in current funds," on January 1, 1866. Annual interest of 8% would be added if the note were not paid on time. But the slaves stopped working "about the middle of June 1865" after the Union Victory in the Civil War secured their emancipation.[1] Williams and Meadow did not pay Henrietta Arnis on January 1, 1866, and though asked repeatedly, they flatly refused to honor the contract they had signed just a year before. Consequently, Arnis sued the two men for $1500, which included the original cost of $700, plus the annual interest, court costs, and general relief. The sheriff of Cherokee County, Texas served the two men on July 26, 1866.[2]

Ben, Charles, and Eliza, had become free people during the year for which they had been hired as slaves, and Williams and Meadows did not believe they should pay for the use of defunct property. Moreover, they alleged that the "plaintiff procured the note sued on by fraudulently representing to the defendants that she was the owner of the negroes for the hire of which the note was given, when in fact they were free and not the property of the defendant."[3] The defendants contended that the slaves "were free by the proclamation of the President of the United States on the 1st day of Jany AD, 1863. Which proclamation has been confirmed by amendment of the Constitution of the United States [and] which we are all bound to support [and] uphold by the oath of amnesty."[4] In other words, the defendants argued that because all slaves in the Confederacy had been emancipated by Lincoln's Emancipation Proclamation, Henrietta Arnis had no legal right to the bodies or the labor of Ben, Charles, or Eliza. As a result, the contract was null and void from the outset, freeing Williams and Meadows from their financial obligation.

Not surprisingly, Henrietta Arnis was unconvinced by the defendants' claim. She reasoned that they had as much access to the news about the Emancipation Proclamation as she did, but they hired the slaves anyway, hoping that a Confederate victory in the Civil War would prevent the proclamation from taking effect in Texas. If any fraud had been committed, she reasoned, it was against Ben, Charles, and Eliza, who were treated as slaves after they had become legally free. The defendant who "availed himself of their labor and services", therefore, cannot "be permitted to take advantage of his own wrong and fraud by having hired the said negroes from plaintiff who was then in the quiet and undisturbed possession of the same…."[5] If the defendants believed the laborers were free, she argued, they ought to have hired them directly, and paid them wages for their service. But, Henrietta Arnis did not believe that the Emancipation Proclamation had legally abolished slavery on January 1, 1863: "That it does not appear in and by said answer that negroes were lawfully freed; that the president had any lawful or constitutional right to issue said proclamation; and that it does not appear that said amendment

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[1] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864 5.
[2] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864.
[3] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, 4.
[4] *Williams v. Arnis*, 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, 5.
[5] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, 8.

was made prior to said hiring."[6] To Henrietta Arnis, Ben, Charles, and Eliza remained her property until the Thirteenth Amendment abolished slavery. The contract she made with Williams and Meadows was valid under the laws in effect at the time it was signed, and they were bound by law to honor it.

In the initial trial, Henrietta Arnis prevailed. The jury awarded her $466.66 plus an additional $20.96 in interest. The defendants, "greatly appalled and injured by the verdict," moved for a new trial.[7] They listed many reasons to substantiate their request for a new trial, including that the verdict was counter to evidence, and contrary to law and the charge of the court. These were standard charges in motions for new trials. But the defendants' amended motion included something far more peculiar, reflecting the legal ambiguity of the early Reconstruction period. In their petition, the defendants argued that since "freedom of the negroes being an open notion and palpable thing" by mid-1865, it would have been "judicially known and regarded without proof of the fact."[8] If they had known they needed to prove the precise date of emancipation, they would have done so at the initial trial in Cherokee County. Rather, far from being "an open and palpable thing," the precise date of emancipation remained an open question, and litigation would be required to settle it.

The Texas Supreme Court would ultimately decide this case in 1867, and the significance of it was not lost on the court or on the court's reporter, George W. Paschal. Paschal himself had been a prominent attorney in Texas, Justice on the Supreme Court of Arkansas, legal scholar and author, and ardent supporter of both slavery and the Union.[9] In his headnotes to *Williams v. Arnis*, Paschal wrote, "It is but just to remark, that when the opinion in this case was delivered, the country was in a great state of uncertainty as to what would be finally settled as to the great events of the revolution; hence questions involving contracts of the kind were not decided, unless they were forced upon the court."[10] If the Civil War were to be understood as a revolution, the ways in which that would be true were not immediately clear when cases like *Williams* began appearing on court dockets. Thus, the state courts would necessarily play a vital role in determining just how revolutionary the Civil War had been and would relieve "the great state of uncertainty" that remained in the immediate aftermath of Appomattox, even if they were reluctant to do so. *Williams v. Arnis* forced upon the justices one of the major legal questions that would plague the state's courts during Reconstruction: When did emancipation take legal effect? Related to this, how, exactly, had slaves been freed? What would the answers to these questions mean for litigants? The Texas Supreme Court wrestled with these issues several times during the Reconstruction period, but it ultimately had to resolve them in order to settle one of the lingering legal issues that had not been decided on the battlefields the Civil War or by legislative mandate. This task became part of legal Reconstruction in Texas.

Texas was not alone in this predicament; thousands of slave contracts that were made before and during the Civil War remained unsettled at war's end. As a consequence, courts

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[6] *Williams v. Arnis*, 30 Tex. 37 (1867). George W. Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868.* vol. 30 (Washington DC: W. H. & O. H. Morrison, 1870), 41.

[7] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, 19.

[8] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, 18.

[9] Hart, James P. "George W. Paschal." 28 Tex. L. Rev. 23 1949-1950, 23-42. Content downloaded/printed from HeinOnline (http://heinonline.org) February 9, 2012.

[10] *Williams v. Arnis*, 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868,* 45.

throughout the former Confederacy contended with the same basic questions that *Williams v. Arnis* had provoked in 1867. Simply put, determining when emancipation happened would require litigation across the South. In one sense, this was a practical necessity. For example, the 1872 case of *Shearer v. Smith* reveals that in Texas, slaves were being bought and sold even after the war had formally ended.[11] It was clear that some Southerners had no sense of, or were willing to ignore the effects of the war and the destruction of slavery. Indeed, going to court provided an opportunity to confront this. Setting an exact date of emancipation also gave judges fixed boundaries for determining the validity of slave contracts; contracts for sales or hires were valid if entered into before the set date, and were unenforceable if they were executed after. As Texas court reporter George Paschal made clear in his headnotes, given the degree of uncertainty that existed in the immediate post-bellum period, it was critical that judges take the important step of deciding the date of emancipation precisely because it helped solidify unstable legal ground; it provided judges – especially at the lowest levels – a guide to follow in cases that resembled *Williams*, and it gave potential litigants a better sense of their chances in court.

Though the Civil War had made the end of slavery inevitable, each state supreme court would decide its own date of emancipation on its own terms, making the legal act of freeing Southern slaves part of a protracted process of abolition that took place over time and in many places. This chapter explores one aspect of this piecemeal process that occurred in Southern courtrooms, the legal problems it created, and the results that ultimately came of it. Even though we find litigants who appear confused and desperate and judges who struggled to render verdicts in an altered legal landscape, the Southerners who met in courtrooms attempted to rationalize and make sense of just what emancipation meant and, more precisely, when it had taken place. Without a uniform rule for determining the precise moment slavery became illegal and establishing one was anything but straightforward, Southern courts managed to craft a solution to their problem by adopting one of four main options. It was plausible to consider January 1, 1863, the date the Emancipation Proclamation went into effect, as the day slaves were legally freed. Alternatively, one might reasonably consider December 5, 1865, the date the 13th Amendment was adopted, to be the true moment that slavery was abolished. The date the state constitution that prohibited slavery was adopted was chosen by some states. The final possibility was the date the Union army conquered the state and made the Emancipation Proclamation enforceable through military action. This chapter will explore each of these pathways for resolving the date of emancipation by examining decisions from the courts of Texas, North Carolina, Louisiana, Tennessee, and Kentucky in order to show that regardless of the path each state court chose to tread, the decision helped shape the Reconstruction policy of the state in profound and lasting ways.

The Slave Contract Dilemma

Setting the legal date of emancipation addressed a very specific problem. At the end of the Civil War, it was not clear whether any slave contract would or could be enforced in post-bellum courts. This was precisely the problem raised by the litigants in *Williams v. Arnis*. Thus, in determining the date of emancipation, courts were also making judgments about whether or not slave contracts could be enforced at all. To answer this question, courts were forced to address two distinct issues. First, once the Thirteenth Amendment had legally abolished slavery, state support of any contract governing the buying, selling, or hiring of a slave was potentially

[11] *Shearer v. Smith,* 35 Tex. 427 (1872).

antithetical to the letter and spirit of the new constitutional amendment. Second, Confederate-era contracts were arguably drafted under an entirely different rule of law, and establishing jurisdiction over them would require some sort of legal justification. Had the Southern states actually seceded, *de jure*, from the Union? Or, had they merely existed in a state of rebellion against the federal government? If the Confederacy had been a separate nation, Reconstruction courts may not have had the legal authority to rule on cases that originated during this time.

The former slave states dealt with the problem of post-emancipation slave contracts in different ways. Some, like South Carolina, Georgia, Louisiana, and Arkansas tried to avoid the problem altogether by proposing, or in some instances, actually adopting provisions in their new, post-bellum constitutions that declared all slave contracts null and void.[12] One historian describes this trend as an attempt at "retroactively condemning slavery."[13] Other states believed the potential problems raised by this policy were greater than its possible benefit. For example, delegates in Maryland's Constitutional Convention of 1864 anticipated and considered the difficulties emancipation and a provision like this might cause, including the violation of the US Constitution's protection of contractual obligations in Article 1, Section 10.[14] Delegate Daniel Clarke of Prince George's County worried, "There are many mortgages and bills of sale in this State where negroes are the sole security, upon the faith of which the contract was made. Pass this article; strike down this property; and then if any one of that class of persons holding such security desires to realize his money upon such a contract or bill of sale or mortgage, where is the security?"[15] Clarke had identified the central problem all Southern states faced. Most slave contracts had been made according to the laws in effect at the time they were executed, and to alter them after the fact would cause calamity. However, he also proposed a solution to the conundrum. "When a government abolishes slavery and compensates the owners of the slaves, the compensation stands in place of the slave property, and no contract is thereby impaired."[16] The majority of the delegation did not take the bait. Prior to the adoption of the Thirteenth Amendment, Maryland abolished slavery without providing compensation to slave owners. But, like most other states, it left slave contracts intact.

There are many reasons why a state might have tried to prevent the continued litigation of slave contracts. First, adopting these provisions could have been seen as an attempt to ensure prompt readmission to the Union.[17] It could be a gesture aimed at illustrating a state's commitment to the absolute abolition of slavery, the Thirteenth Amendment, and the policy of the federal government more generally. But condemning slave contracts would have done more than express the good will of the states. It would have prevented a substantial number of cases from appearing on court dockets, thereby easing the caseload of the courts that were burdened with other business, especially since many had just reopened after wartime closures. Most importantly, it would also have eliminated one of the remaining institutional legacies of slavery from Southern life and from Southern law. That is, incorporating newly freedpeople into Southern society would have remained an issue, but continued litigation over the value of the defunct institution would not. Courts would not continue to acknowledge slave contracts as legitimate business that would allow whites to continue to reap financial gains from the

[12] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 61, 170n42.
[13] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 61.
[14] Maryland attempted wartime Reconstruction even though it had not formally seceded from the Union.
[15] *The Debates of the Constitutional Convention of the State of Maryland*. Annapolis: Printed by Richard P. Bayly, 1864, 654.
[16] *The Debates of the Constitutional Convention of the State of Maryland*, 655.
[17] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law,* 61.

ownership of black bodies.[18] Ultimately, this would not be the course that most state courts or the Supreme Court took, for precisely the reasons Daniel Clarke outlined in the constitutional convention debates of Maryland in 1864: it violated Article 1, Section 10 of the US Constitution. In so doing, one aspect of slavery remained legally relevant. But, as we will see, others did experiment with invalidating all slave contracts, illustrating one of Reconstruction's roads less traveled.[19]

Settling the Date of Emancipation

"Part of the Public Law of the Land:" Tennessee

Just as we saw in the Maryland case of *Morsell v. Baden*, some states abolished slavery by changing their state constitutions in anticipation of the adoption of the Thirteenth Amendment. Tennessee amended its constitution on February 22, 1865, and as such, this was the formal date of emancipation in the Volunteer State. However, there was some confusion as to what the amendment actually meant for cases pending in the state's courts. The need for clarity prompted the Supreme Court of Tennessee to settle this issue in the 1866 case *Graves v. Keaton*.[20] The circumstances of this case are convoluted, but the chief task of the court was not. The judges needed to determine who bore "pecuniary loss consequent upon the emancipation of slaves."[21] *Graves v. Keaton* was an early example of how states might deal with this problem, and as such helped set the standard that other states would ultimately follow. The Texas Supreme Court, for example, cited it in *The Emancipation Cases*, reviewed below.

Graves v. Keaton began "prior to the December term, 1860" in the Carroll County court.[22] After William Seymour died, his widow Sarah and some of their children filed a petition against William H. and Francis M. Seymour, the infant children of the deceased. The goal of the suit was not to cause family fracture, but merely to force the sale of slaves "for purposes of distribution."[23] The family faced a common problem: there was no easy way to divide up the estate fairly without liquidating it. Because the slaves of the estate were of different ages and values, "it was impracticable to make a fair and just division of said slaves, among the parties in interest; and …it would be manifestly to the interest of the minors that said slaves be sold."[24] The court appointed the infants a guardian at law to represent their interests, and the county court ordered that the Commissioner and Clerk of the Court, W.H. Graves, to sell the slaves. Though the original record of the sale was lost, a substitute record states that C.W. Keaton purchased four slaves from Graves for $1771. The note was executed on February 20, 1862, when there was no question over the legality of slavery, as Lincoln's Emancipation Proclamation had not yet taken effect. At the December 1865 term of the Carroll County Court, the court determined that Keaton still owed a balance of $595 plus $144 in interest for the purchase.[25] Though remaining

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[18] Freedpeople's former status as slave would still have had bearing on the cases regarding customary marriage and other family issues.

[19] For a full explanation of the ways in which Southern states handled the problem of slave contracts, see Andrew Kull, "The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves," *Chicago-Kent Law Review* 70 (1994): 493–538.

[20] *Graves v. Keaton,* 43 Tenn. 8 (1866).

[21] *Graves v. Keaton,* 43 Tenn. 8 (1866), 8.

[22] *Graves v. Keaton,* 43 Tenn. 8 (1866), 9.

[23] *Graves v. Keaton,* 43 Tenn. 8 (1866), 9-10.

[24] *Graves v. Keaton,* 43 Tenn. 8 (1866), 10.

[25] *Graves v. Keaton,* 43 Tenn. 8 (1866), 11.

records are unclear on this point, Keaton presumably appealed this ruling because the slaves he bought had been emancipated since the original purchase.

There were two problems that the Supreme Court of Tennessee encountered when judging this case. First, "Neither the petition, or answer, or the report of the sales, made to the March Term, 1861, are in the record."[26] The "lost or mislaid" documents worked in Keaton's favor; the Carroll County Court had not followed the proper evidentiary rule for substituting the original record with other properly gathered evidence.[27] Without this evidence, there was no way to know for sure when the slave sale had taken place. This led to the second problem. The County Court ruled in the case during the December 1865 term, which was nine months *after* the state of Tennessee amended its constitution to outlaw slavery. "Without any formal decree directing and vesting" the title to the slaves to Keaton prior to December 1865, the Tennessee court had no choice but to rule in Keaton's favor. Judge Alvin Hawkins wrote for the court, "The pecuniary loss consequent upon the emancipation of slaves, by the amendment to the Constitution of the State, adopted on the 22d day of February, 1865, must be borne by those who were the owners of such slaves at the time of their emancipation. Until the sale is completed by the Court, of the report of sale, the purchaser acquires no title to the property."[28] The case was remanded back to the lower court, where the evidence necessary to compel Keaton to pay for the slaves he bought in 1862 might be lawfully entered. Unless and until that took place, the title of the now emancipated slaves remained "in the hands of William Seymour, deceased."[29]

While this settled the matter of Keaton's claim, the Tennessee Supreme Court crafted an opinion that had more far reaching effects. The court asserted, "The provisions of the amendment to the Constitution of the State, abolishing slavery, constitute part of the public law of the land, of which the Courts of the country are bound to take judicial notice."[30] For that reason, in *Graves v. Keaton*, the purchaser did not need to contest the report of the final sale in order for the County Court to take notice; emancipation had become law before the court had ever ruled. With its ruling, the Supreme Court of Tennessee expected that similar decisions rendered in future cases would be free of such "formal errors."[31]

Graves v. Keaton made clear that February 22, 1865 was the date slavery ended in Tennessee; the change to the state's constitution had accomplished that, and the court accepted the change as binding. Future cases in the Volunteer State related to emancipation never challenged that. However, the court also made clear implicitly that matters related to slavery would remain valid. At no point in the court's decision did the justices question the possibility that Keaton might still owe the Court Commissioner for the slaves he purchased in 1862; on the contrary, the lower court in Carroll County could still enforce such a ruling with proper evidence. Indeed, it was this portion of the ruling that the Texas Supreme court would adopt in *The Emancipation Cases*. The lawful owner of the slaves in question – Keaton, in this case – would bear the financial loss of emancipation. In other words, slave owners, or those with vested title at the time of trial, could not use the end of slavery to shield themselves from paying their debts

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[26] *Graves v. Keaton,* 43 Tenn. 8 (1866), 11.
[27] *Graves v. Keaton,* 43 Tenn. 8 (1866), 12-13. The evidentiary rule was established in Section 3907 of the Code of Tennessee. "Any record, proceeding, or paper filed, in actions at law or equity, if lost, or mislaid unintentionally, or fraudulently made away with, may be supplied upon application, under the orders of the Court, by the best evidence the nature of the case will admit of."
[28] *Graves v. Keaton,* 43 Tenn. 8 (1866), 13.
[29] *Graves v. Keaton,* 43 Tenn. 8 (1866), 14
[30] *Graves v. Keaton,* 43 Tenn. 8 (1866), 14.
[31] *Graves v. Keaton,* 43 Tenn. 8 (1866), 14.

unless the transaction occurred after the legal date of emancipation. Texas, as we shall see, chose a different date, but adopted the standard put forth by the Supreme Court of Tennessee in *Graves v. Keaton.*[32]

"By Force it was Destroyed:" Texas and North Carolina

Texans contested the date of emancipation more than their counterparts in other states. This was due in part to the nature of Reconstruction in the Lone Star State. As noted in the introduction, three different courts existed in Texas during Reconstruction, and each one addressed the date of emancipation. To be sure, the continued litigation over the issue of emancipation in Texas suggests that the tumult of the Reconstruction period often meant that seemingly settled legal issues were anything but. However, it was the verdict in the first case, the aptly named *The Emancipation Cases*, that ultimately provided the final answer. Decided in 1868, this case, more than any other case from any other Southern state, dealt squarely with settling the official date slavery ended.[33] The Texas court had been pressed on the issue of emancipation almost immediately after the Civil War ended in part because slavery continued to exist in Texas well after war's end.[34] Moreover, located on the periphery of the Confederacy, the Lone Star State did not experience the same degree of wartime destruction as much of the rest of the South; labor demands had not decreased by much. Finally, as was the case in all Southern states, Texas needed to meet the conditions set by Congressional Reconstruction policy, in order to demonstrate that state courts could not and would not be used to enforce illegal slave contracts. Since the courthouses in Texas were open and litigants in Texas, like Henrietta Arnis, were becoming increasingly uneasy about the status of their slave contracts, the matter needed immediate resolution.[35]

Heard by the so-called "Military Court" that had been staffed by Philip Sheridan, *The Emancipation Cases* concerned a slave hire contract made in January of 1865. At that time, the war had not yet officially ended, even though its outcome seemed certain. The Thirteenth Amendment had not yet been adopted, but the Senate had passed it in 1864 and the House had approved it in late January 1865.[36] The Emancipation Proclamation purported to have freed the slaves in rebellious states, but there was not a consensus as to its actual effect. Without legal direction from the federal government the Texas Court would have to make sense of

[32] There is a typo in the Texas Reports that cites the case as "*Graves v. Heaton.*" See George W. Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during Part of Galveston Session, 1868, All of Tyler and Austin Sessions, 1868, and Galveston Session, 1869*, vol. 31 (St. Louis: The Gilbert Book Company, 1882), 527.

[33] *The Emancipation Cases,* 31 Tex. 504 (1868). These cases form a critical part of this story. However, only the reported material remains. The case file was among those stolen in the 1970s by a janitor who worked for the Supreme Court of Texas. Historical case records have since been moved to the Texas State Library and Archive, where the staff continues to search for the stolen records. The Archive has located some of the lost material on eBay and other online auction sites, but recovering it has often involved lengthy and expensive interstate litigation.

[34] Campbell, Randolph B., William S. Pugsley, and Marilyn P. Duncan, *The Laws of Slavery in Texas*, Texas Legal Studies Series (University of Texas Press, 2010), 142. A case from Red River County, *Algier v. Black,* 32 Tex. 168, involved the validity of a contract that exchanged land for a slave that was dated August 4, 1869. See also, *Shearer v. Smith*.

[35] Appeals in contract cases reached the Texas Supreme Court in the spring of 1867. Campbell, ed. *The Laws of Slavery in Texas,* 140.

[36] For a thorough discussion of the passage and adoption of the Thirteenth Amendment, see Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*.

emancipation's muddled context independently, by rendering its own interpretation of the meaning of the Emancipation Proclamation and the Thirteenth Amendment.[37]

The first step in this process required the Court to determine the nature of the relationship between Texas and the United States. Though the United States Supreme Court would rule on this issue in another case from this state, *Texas v. White*, discussed further in Chapter Five, it had not done so when the Texas Supreme Court issued its verdict in *The Emancipation Cases*. If the state of Texas had remained part of the Union despite its rebellion against it, the Constitutional provision against "impairing the obligation of contracts" remained applicable.[38] If the state had legally seceded, the Civil War had rendered it a conquered province and only Congress could decide the fate of captured property. The Texas court had to decide whether it would accept any part of the *ab initio* doctrine. As a result, the opinion of the court, written by Chief Justice Amos Morrill, addressed this issue first.[39]

> It is evident that if, during the rebellion, the citizens of Texas were citizens of and subject to the constitution of the United States, then they could not "be deprived of property," in slaves, money, stocks or agricultural products, without due course of law. If they were a part of another state or *de facto* government, and they and their property were captured by the forces of the United States, in that case not the commander-in-chief of the army and navy of the United States, but congress, and congress alone, had and has "power to make rules concerning those captures." In either case the proclamations, military orders, or whatever else they may be called, can have no effect or force upon any other than the men subject to the commander, unless they are based upon an act of congress.[40]

In effect, the majority of the justices on the Texas Supreme court sidestepped, at least in part, the issue of secession. As we will see, those who dissented rejected this maneuver. But to the majority, it did not matter whether Texas had seceded from the United States or if it had remained a state in the Union; "in either case the proclamations, military orders, or whatever else they may be called, can have no effect or force upon any other than the men subject to the commander." In other words, until the people of the state of Texas, whether seceded or in a state of rebellion, could be compelled to abide by executive or congressional actions, they could not, and did not, have any legal force. The next question thus became, when did the United States have the ability to enforce emancipation?

The opinion addressed that question by evaluating the Emancipation Proclamation itself. In so doing, Morrill's ruling defined Lincoln's executive action as it related to law in the state.

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[37] Two cases were collapsed to form *The Emancipation Cases*, indicating the growing importance of settling the date of abolition in Texas. The cases were *Hall v. Keese* and *Dougherty v. Cartwright*

[38] United States Constitution, Article 1, Section 10.

[39] Amos Morrill was born and educated in New England. He moved to Texas in 1838, and to Austin specifically in 1854. There he established a law practice with future Provisional Governor A.J. Hamilton. He strongly opposed secession, and remained a committed Unionist throughout the Civil War. With the outbreak of hostilities, Morrill fled Texas, moving first to Mexico, then to Massachusetts, and finally to New Orleans. He returned to Austin after the war ended. Morrill was appointed to the Supreme Court of Texas on September 10, 1867, after a military order removed the judges from the state's first Reconstruction court. University of Texas at Austin Tarlton Law Library Digital Collections. "Justices of Texas 1836-1986: Amos Morrill (1809-1884)." Accessed March 16, 2013. http://tarlton.law.utexas.edu/justices/profile/view/73.

[40] *The Emancipation* Cases, 31 Tex. 504 (1868), 520.

"That the emancipation proclamation was issued as a war measure appears on its face; that it proved to be one of the greatest of war measures is universally admitted…."[41] Its purpose was equally clear. It "declared that all the slaves in a certain designated portion of the United States are, and henceforward shall be, free; and that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons."[42] In the minds of Morrill and the majority of justices on the Texas Supreme Court, the Emancipation Proclamation was a military measure dependent upon the ability of "the military and naval authorities" of the United States. Therefore, it could not be implemented unless and until Union forces ended the rebellion in Texas. Simply put, slaves remained shackled and slave contracts remained valid until the Union Army occupied Texas and enforced federal policy.

As a result, the slave sale contract that prompted the case had to be valid. Union forces had not yet reached or secured Texas at the time the parties entered into the agreement. Even though "the cause which proved mortal to slavery would soon sweep over the land was apparent to some, and disbelieved by others, … there was, … no breach in the contract on the part of the vendor at the time of the sale."[43] The seller had not intentionally breached the contract. Thus, because the slave's "freedom was occasioned afterwards, not by the vendor, but by the sovereign power of the nation, the vendor did not violate his contract."[44] The laws in effect in the state of Texas at the time the contract was made did not prohibit the practice or business of slavery, therefore the contract remained enforceable. While it may have been obvious that the abolition of slavery would take effect in Texas, it had not yet become a legal reality when the contract was made. The two parties had agreed to the terms of the sale and committed themselves to its execution. The slave's freedom did not release the buyer from his contractual obligations because the abolition of slavery had come from a "superior power…the sovereign power of the nation," not the seller. Thus, the contract had to be valid, and so too were the contracts arising from similar circumstances.

Associate Justice Livingston Lindsay clarified and simplified many of the points made by Chief Justice Morrill's opinion. He reaffirmed the rationale for upholding the contract in question. In Texas, slavery "might have continued to exist for generations yet to come, but for the civil convulsion brought on by the rebellion." The practice and business of slavery continued, "both in fact and in law, until by the actual force of the national arms its disruption and overthrow, as a legal institution, was made a reality." In essence, Justice Lindsay provided a simple description of the entire existence of the peculiar institution: "By force it was established; by force it was destroyed."[45] Force had been needed to destroy slavery in Texas, and when the contract was made, no such force had yet been brought to bear. Thus, slavery remained legal until the Union Army could secure the state and enforce the Emancipation Proclamation.

Justice Lindsay also specified the exact moment when this happened – something the opinion failed to do. Lindsay stated clearly "that slavery was not abolished on the 1st day of January, 1863, the date of the final proclamation of the president of the United States, nor yet did it exist in Texas at the date of the adoption of the XIIIth article of the constitution of the United States." Instead, slavery had been abolished "upon the success of the national forces…." When

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[41] *The Emancipation Cases,* 31 Tex. 504 (1868), 526.
[42] *The Emancipation Cases,* 31 Tex. 504 (1868), 526.
[43] *The Emancipation Cases,* 31 Tex. 504 (1868), 527.
[44] *The Emancipation Cases,* 31 Tex. 504 (1868), 527.
[45] *The Emancipation Cases,* 31 Tex. 504 (1868), 535.

General Gordon Granger and his forces arrived in Galveston "on the 19th day of June, 1865, … the legal manacles which held that race in bondage in this state were then dissolved…. This, in my judgment, is the actual, the natural, and the legal epoch of emancipation in the state of Texas."[46] Justice Lindsay proclaimed June 19, 1865 the legal date of emancipation in Texas. It was on this date that General Granger arrived in Texas and issued a proclamation, that declared the end of slavery in Texas and voided all Confederate laws.[47] This proclamation prompted a mass celebration by freed slaves, and became the basis for "Juneteenth." Juneteenth, celebrated by former slaves as the day of jubilee, also became the actual legal date of emancipation in Texas.[48] The Texas Supreme Court united symbolic freedom with legal emancipation.

The dissent in *The Emancipation Cases* offers a critically useful glimpse at one of the alternative legal paths that Reconstruction might have taken in Texas. Associate Justice Andrew Jackson Hamilton interpreted the meaning of the Emancipation Proclamation differently than the justices in the majority. In fact, he advocated an outcome in this case that left him branded a radical by jurists on both sides of the Mason Dixon line.[49] Hamilton agreed with the majority opinion that the central issue of the case was whether or not slaves could be legally traded in Texas after Lincoln issued the Emancipation Proclamation. He also agreed that military force ultimately decided the issue of abolition, since "if the confederacy had succeeded, the courts of this state would have disregarded not only the proclamation of emancipation, but the XIIIth amendment of the constitution as well, and this court would not be sitting here to determine this or any other question."[50] However, Hamilton parted ways with the majority by asserting that a war between two independent nations had, in fact, existed between the United States and the Confederacy, even if Lincoln and other Union supporters denied the constitutionality of secession. "The revolting states did practically, not legally, withdraw from the union."[51] As a result, "It is too late for those who were engaged on the Confederate side to insist now that they have always been in the union…. The thing was done, the right to do it was denied, and that question of right was decided by wager of battle against the confederacy."[52] The question was settled; the Confederacy lost the war and those who supported it should not be able to reap any further benefits from slavery. The response was similar to that of some Republicans in Congress, who were stunned to see Southern delegations return to Washington in December of 1865 expecting to be received by the Thirty-Ninth Congress.[53] Congressional Republicans refused to seat them. Like the Northern Congressmen, Justice Hamilton refused to overlook the fact that thirteen Southern states had actually engaged in a bloody war against the Union. The theoretical legality of that rebellion was a moot point.

Hamilton, an ardent Unionist, despite his Southern roots, rejected the legal fiction of referring to the Southern states as "in open rebellion." To him, they had seceded, plain and

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[46] *The Emancipation Cases* 31, Tex. 504 (1868), 533-534.
[47] "Gordon Granger," Texas State Historical Association, accessed March 18, 2013. http://www.tshaonline.org/handbook/online/articles/fgr10
[48] In other Southern states, this happened with less fanfare. Where military action was common, slaves often left their posts as soon as the Union Army could offer them protection. (See Ira Berlin, et. al. *Slaves No More*. Cambridge: Cambridge University Press, 1992. Alternatively, Union troops occupied some states sooner than others; in North Carolina, for example, troops emancipated slaves in April of 1865. See *Woodfin v. Sluder,* 61 N.C. 200 (1867).
[49] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 61.
[50] *The Emancipation Cases,* 31 Tex. 504 (1868), 537.
[51] *The Emancipation Cases,* 31 Tex. 504 (1868), 544.
[52] *The Emancipation Cases,* 31 Tex. 504 (1868), 544, 546.
[53] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 226.

simple. Thus, he had no sympathy for the claimants in *The Emancipation Cases*, and instead openly supported the premise of the vanquished nation. He wrote bluntly: "The conquering power has now a right to demand that the policy which they were constrained to adopt during the war, as well as subsequent measures, shall be respected."[54] The Emancipation Proclamation, therefore, had to be appreciated as the legal date of the abolition of slavery in those states that had rebelled against the United States. "This proclamation of emancipation, thus warranted by the laws of war, fully expressed the will of the United States government as a belligerent upon the subject embraced in it. It was, that from and after that date the former slaves in the insurrectionary states and districts (including Texas) should thenceforth be forever free."[55] The contracts made by the litigants in this case, and by extension, any petitioner after January 1, 1863, should not be enforced by the courts of Texas or any other state. These contracts were made by parties with full knowledge that emancipation had been declared by President Lincoln, the "rightful sovereign," making them nothing more than a gamble on Confederate success. Without sympathy, Hamilton declared to the plaintiff, "There let him rest."[56] This was all the consideration Hamilton required.

Hamilton appreciated the stakes of the case. He understood that by continuing to enforce slave contracts in the post-bellum South, Texas and the rest of the former Confederacy would be supporting the very institution the Civil War had destroyed. A critical remark in his dissent makes this point explicitly: "The question here is not as to the moment of time when the former slaves in Texas actually obtained their freedom by the events of war; but it is whether now the courts will aid in carrying out and enforcing contracts against the public policy of the government, pronounced in the most solemn form as both sovereign and belligerent in a great civil war."[57] Hamilton's judgment went far beyond the facts presented in *The Emancipation Cases*. His dissent also rendered a verdict on the Civil War itself. Continuing to support slave contracts was repugnant to the outcome of the war, and dishonored those who had secured the Union victory at great cost. Moreover, it was an "injustice to the memory and character" of Abraham Lincoln.[58] No amount of legal maneuvering on the part of the justices who voted to uphold the contract in question would placate Hamilton. His dissent was a pure expression of his personal conviction and his legal beliefs.

If the majority had sided with Hamilton, legal Reconstruction in Texas may have proceeded very differently. Hamilton's dissent left open the possibility of considering the former Confederacy a conquered nation, and George Paschal, the court reporter in *The Emancipation Cases*, made clear exactly what was at stake for Southerners while state suicide was being considered.[59] He wrote in the preface to the Texas Report of 1868, which included *The Emancipation Cases*,

> When I returned to my home in 1868, I found the convention in session, the whole country under military rule, the business of the courts well-nigh suspended, three members of the supreme court serving in the constitutional convention, the

[54] *The Emancipation Cases,* 31 Tex. 504 (1868), 546.
[55] *The Emancipation Cases,* 31 Tex. 504 (1868), 551
[56] *The Emancipation Cases,* 31 Tex. 504 (1868), 553.
[57] *The Emancipation Cases*, 31 Tex. 504 (1868), 553.
[58] *The Emancipation Cases*, 31 Tex. 504 (1868), 547.
[59] James P. Hart, "George W. Paschal." 28 Texas Law Review 23 1949-1950. Content downloaded/printed from HeinOnline (http://heinonline.org). The author of this biography was an Associate Justice of the Supreme Court of Texas. Thu Feb 9 17:29:03 2012

> people in utter confusion as to the landmarks of liberty, the great mass of the legal profession entirely in the dark as to what had been the decisions for several years, and, under the cry of '*void, ab initio*' there were still greater uncertainty as to what constitution and statute laws the people were living under.[60]

These were the circumstances facing the Texas Supreme Court in 1868. Though the majority of the justices decided against this path, it was considered, and advocated strongly by two justices (Hamilton and Justice Colbert Coldwell). Without direction from Washington, five judges determined "what constitution and statute laws" the people of Texas "were living under."

Even though emancipation seemed like a settled legal issue after the 1868 verdict, the Supreme Court of Texas revisited the issues decided in *The Emancipation Cases* two more times – first in *Dowell v. Russell* in 1873, and again in *Garrett v. Brooks* in 1874. *Dowell* didn't overturn *The Emancipation Cases*, but it did refuse to accept any specific date for emancipation in Texas. This refusal reopened the possibility for further cases disputing the legality of slave contracts, which is precisely what the court in 1868 had tried to prevent.[61] Indeed, the issue was brought before the court again in *Garrett* just a year later. Realizing the uncertainty left by the *Dowell* decision and the potential for endless future disputes, Judge Thomas J. Divine, a former Confederate judge, reaffirmed Juneteenth as the date of emancipation in Texas. He wrote in the *Garrett* opinion, "The date of General Granger's order or declaration of Abraham Lincoln has been considered as the definite period from which the destruction of the right to hold slaves in Texas is to be dated."[62] By 1874, the litigation of emancipation in Texas had been challenged, but had ultimately come full circle; the Court reaffirmed the original date, June 19, 1865 as the moment slavery became illegal in the state.

Some states used a variant of the Texas model. Courts in such states still used the moment that the Union military could enforce the Emancipation Proclamation as the line of demarcation, but instead of establishing a single date, they established a rule for judging. In North Carolina and other states (See Appendix A), slaves were not considered free until they fell behind Union lines. In effect, this model put in place a moving target. Though it created a standard for ruling, it did not make it easy on litigants to determine the validity of their claims in court. Nonetheless, the North Carolina court remained committed to this path throughout Reconstruction. As noted in the introduction, the Supreme Court of North Carolina did not undergo the sort of upheaval that the court in Texas experienced. The Chief Justice remained at his post throughout the Civil War and Reconstruction; there was no need to revisit the matter.

As had been the case in Texas, a military order was issued declaring North Carolina under the control of the Union Army. General John McAllister Schofield, working with General Sherman during the final months of the Civil War, occupied Wilmington in February 1865, and joined Sherman in Goldsboro in late March of the same year. On April 27, 1865, a few weeks after the official end of the Civil War, Schofield issued General order No. 31, "announcing to the army and people of North Carolina that hostilities within this state have definitely ceased; that for us the war has ended, and it is hoped that peace will soon be restored throughout the

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[60] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during Part of Galveston Session, 1868, All of Tyler and Austin Sessions, 1868, and Galveston Session, 1869*, 7.

[61] Campbell, Randolph B., Pugsley, and Duncan, *The Laws of Slavery in Texas*, 143.

[62] Campbell, Randolph B., Pugsley, and Duncan, *The Laws of Slavery in Texas*, 143. *Garrett v. Brooks,* 41 Tex. 479 (1874).

country."[63] In other words, North Carolina found itself under the control of Union forces, marking the end of the war in the state.

One North Carolina case in particular set the standard for deciding when slavery had been abolished in the state – *Harrell v. Watson* (1869). Meredith Watson purchased a slave boy from Stanley S. Harrell, the administrator of John Vaughn's estate, on September 26, 1864 for the large sum of $2000. Watson paid half of what he owed in Confederate currency at the time of the initial transaction, with the understanding that he would pay the remaining balance plus interest at a later date. However, Meredith Watson never paid that balance, because the slave he purchased had been emancipated. Harrell sued Watson for the remaining value of the note. As in *The Emancipation Cases* and *Williams v. Arnis*, the purchaser, Watson, argued that the slave boy he "purchased" had actually been a free person at the time of the sale; Lincoln's Emancipation Proclamation had liberated him. Thus, the contract was void on its face. Also like the Texas cases, the North Carolina Supreme Court ruled in *Harrell v. Watson* that the Emancipation Proclamation did not, in fact or as a matter of law, free the slaves owned in the state. "[W]e do not admit the premises, to-wit, that by force of the proclamation of the President all slaves are set free from and after 1 January, 1863."[64] The Emancipation Proclamation was simply a "war measure…limited to such slaves individually as should come under the control of the armies of the United States."[65] In other words, North Carolina's Supreme Court also believed that it was up to the US Army to render the Proclamation enforceable, which it had not done prior to the date the contract at issue in this case was executed. Watson would have to pay the amount he owed to Harrell.[66]

This case, decided a year after *The Emancipation Cases*, applied a stricter rule to determine the moment emancipation took place. Indeed, Justice Pearson interpreted the Emancipation Proclamation as narrowly as possible – perhaps more narrowly than he should have. The Justice chose to interpret the phrase "the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons" as the key portion of the text; he assumed that it was the military's recognition and maintenance of freedom that counted, and this could only be achieved, he reasoned, if and when a slave fell under the direct control of Union forces. Justice Pearson disregarded the part of the Proclamation that declared, "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free." Had the Justice chosen to elevate this passage, he could not have reached the same conclusion as he did in *Harrell*. This language clearly proclaims the emancipation of slaves in the entire Confederacy, regardless of military authority.

According to Chief Justice Pearson, this proclamation did not necessarily destroy slavery in North Carolina. He acknowledged the consequences of the General's order in his opinion, but he did so in far narrower terms than did the court in Texas. "[T]he military order of General Schofield, after the surrender, simply had the effect of announcing that the whole state was then under the control of the army of the United States, and…all persons then held as slaves in the State of North Carolina were free and should be so treated."[67] Though this seemed to imply that the Tar Heel State would follow the lead of the Texas court, Pearson maneuvered sharply away

[63] *United States Congressional Serial Set,* volume 1237, 194.
[64] *Harrell v. Watson*, 63 N.C. 454 (1869). 458.
[65] *Harrell v. Watson*, 63 N.C. 454 (1869). 459.
[66] *Harrell v. Watson,* 63 N.C. 454 (1869). State Library of North Carolina, case 9345.
[67] *Harrell v. Watson,* 63 N.C. 454 (1869). 459.

from this position. "But surely a military order could not have the effect of abolishing or making unlawful the institution of slavery. That was left as an act that could only be done by the *government* of the United States or by an ordinance of a convention of the people of the state."[68] In effect, this ruling declared that only slaves under the *direct* control of the Union forces were free because only the military could enforce the Emancipation Proclamation. Universal emancipation had not and could not have taken place in the state until the federal government – Congress – or the people of North Carolina abolished slavery.[69] Neither had happened when the contract at issue was executed.[70] Thus, because the contract between Watson and Harrell was made when slavery was still legal in North Carolina, it was enforceable. To rule otherwise, reasoned Pearson, "would violate the immutable principle of justice adopted in our Constitution, by which *ex post facto* laws are forbidden."[71] Of the three justices on the court, none dissented.

In effect, slavery was not completely destroyed in North Carolina until the 13th Amendment was adopted to the US Constitution in December of 1865. Ultimately, the ruling in *Harrell* established the criteria for establishing emancipation, but it did not set a specific date. Rather, slavery may have been legal in some parts of the state while illegal in others; the distinction depended entirely on military occupation and judicial review. Unlike the court in Texas, the North Carolina Court ruled that the arrival of the Union Army in the state and the end of the Civil War was not enough to abolish the peculiar institution. Slaves had to fall under the *direct* control of the military before their freedom could be granted and guaranteed. Chief Justice Pearson and the North Carolina Supreme Court reaffirmed this ruling in the 1870 case of *West v. Hall*.[72] Pearson wrote in his very short opinion to this case, "It is settled that a contract for the purchase of a slave is not illegal, even when made after the Proclamation of the President, the slave not being under the control of the military forces of the United States."[73] Though the ruling was subsequently challenged, *Harrell v. Watson* remained the standard for judging emancipation in North Carolina throughout Reconstruction.

"By the Will of the Sovereign Power:" Louisiana

When it came to determining the impact emancipation had on slave contracts, Louisiana took an entirely different route than most of the South. Indeed, the actions of the Louisiana court stand out in this story for a few important reasons. First, Louisiana began the process of Reconstruction before the end of the Civil War; much of the state had been occupied by Union forces relatively early in the war, after General Benjamin Butler occupied New Orleans in April 1862.[74] This means that some parishes, but certainly not all, were under the control of Union

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[68] *Harrell v. Watson,* 63 N.C. 454 (1869). 459.
[69] The case does not mention the role of the Thirteenth Amendment, though it is clearly implied.
[70] The state legislature did in fact adopt a Black Code that abolished slavery in March of 1866, but the effect of the Thirteenth Amendment made the law redundant. General Assembly, *Public Laws of the State of North Carolina Passed by the General Assembly at the Sessions of 1866 '67* (Raleigh: Wm. E. Fell, State Printer, 1867), 99; and Senate Ex. Doc. no. 26, 39 Cong., 1 Sess., 197. March 10, 1866. See also, http://www.learnnc.org/lp/editions/nchist-civilwar/5516
[71] *Harrell v. Watson,* 63 N.C. 454 (1869). 460. This rationale differs slightly from other state court rulings. Many states viewed the central problem posed by post-emancipation slave contract cases as "impairing the obligation of contract" while North Carolina's justices felt the problem was one of *ex post facto* laws. The distinction is minor, as both prohibitions are listed in Article 1, Section 10 of the Constitution, but it is a distinction worth considering, as it adds complexity and variety to the different routes taken by state courts being reviewed in this chapter
[72] *West v. Hall,* 64 N.C. 43 (1870).
[73] *West v. Hall,* 64 N.C. 43 (1870), 1.
[74] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877,* 45.

forces three years before the war officially ended.[75] Uniformity would be more elusive here than elsewhere. Second, it was one of the states that forbade the legal recognition of slave contracts in its Reconstruction constitution. Articles 127, 128, and 129 of the Louisiana state constitution of 1868 all concerned this issue. Article 128 was the most direct: "Contracts for the sale of persons are null and void; and shall not be enforced by the courts of this state. Article 127 refused to recognize any contracts in which Confederate currency was used, and Article 129 refused to assume the debt of the Confederate government of the state and, critically, denied "compensation for slaves emancipated or liberated in any way whatever."[76] The document thoroughly rejected the state's Confederate past by repudiating contracts, currency, and debts incurred while under its rule.

Finally, unlike the courts of other states, Louisiana's Supreme Court actually upheld this provision until the US Supreme Court deemed it unconstitutional in an 1873 case explored in Chapter Five.[77] In effect, the position held by the Louisiana Supreme Court on the legality of slave contracts acted as an inversion of the rulings in most other Southern states. Here, we find the court verdicts favoring the litigants who owed a debt for slaves bought or hired, not those to whom the debt was owed. Thus, we ought to see Louisiana's attempt to nullify slave contracts as part of the state's effort to completely topple the antebellum regime of planter hegemony, making legal Reconstruction in the Bayou State a comprehensive and thorough project. The Louisiana Supreme Court, for its part, remained committed to and persuaded by the vision set forth in the state's Reconstruction constitution throughout much of the era.

Even before Louisiana adopted the Constitution of 1868 that nullified slave contracts, the Supreme Court of the state ruled that it would not uphold them in *Wainwright v. Bridges*. Whether the constitutional convention considered the ruling in this case or not is unclear, but Justice James G. Taliaferro wrote the court's opinion and also served as a prominent delegate to the convention charged with drafting the document. In fact, Justice Taliaferro presided over the convention as President on December 12, 1867, the day these specific provisions were addressed directly. The coincidence strongly suggests that the court's ruling and Justice Taliaferro's opinion on the matter were most likely considered, but the journal of the debates does not confirm it explicitly. Coincidence or not, what we find in the opinion of *Wainwright* found its way into the written constitution of the state of Louisiana.

Wainwright v. Bridges itself involved a complicated slave sale that included a warranty, mortgage, and three bonds for the sale of a slave. On December 8, 1860, in Saint Helena Parish Louisiana, Alice F. Bridges, Thomas Newsom, and Burlin C. Newsom purchased slaves from the probate sale of the estate of the late Isaac Dykes. They agreed to pay the estate's administrator, Thomas Wainwright, three payments of $895.50, due in twelve, twenty-four, and thirty-six months. The three defendants procured mortgages on the slaves in order to pay for the purchase.

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[75] The Union occupied the parishes along the Mississippi River, and those parishes around New Orleans. The Confederate government reestablished itself in Shreveport after the Union invasion.

[76] Article 129, Constitution adopted by the State Constitutional Convention of the state of Louisiana, March 7, 1868. Published by Printed at the Republican Office in New Orleans. University of Pittsburgh Internet Archive, http://archive.org/details/constitutionadop1868loui. Accessed March 23, 2013.

[77] Many states, especially in the Deep South, attempted to employ these provisions. Most state courts invalidated them as unconstitutional. Georgia and Louisiana courts left them intact until the US Supreme Court intervened. Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 60-61.

The defendants paid the first two notes, but refused to pay the amount that remained.[78] They claimed that the slaves they purchased "were warrantied as slaves for life" but the Emancipation Proclamation had rendered "the consideration of said agreement or mortgage…failed and said notes no longer became due….[79] Unconvinced, Thomas Wainwright sued the three defendants on October 11, 1865 to recover the final payment he believed they owed. In the original trial, the plaintiff, Wainwright, prevailed. The jury awarded him the full amount he sought. The defendants, Bridges, Newsom, and Newsom, appealed the verdict.

The basic context of *Wainwright* was similar to hundreds of other post-emancipation slave cases. Defendants claimed that the Emancipation Proclamation had abolished slavery and freed them from their obligation, while plaintiffs demanded that the original contracts be enforced. The warranty issue – that guaranteed a slave for life – was also a common feature in these types of cases, and it will be explored further in a later chapter. However, the similarities to cases outside of Louisiana end there. For one thing, the date of the original promissory notes distinguishes this case from many others that might otherwise appear nearly identical. In this case, the contract was executed before Louisiana seceded, which meant that there was no question about the legal status of the state at the time the contract was executed, as was common in the cases that involved contracts drafted during the Civil War – like *The Emancipation Cases* or *Harrell v. Watson*. In *Wainwright,* the sole issue before the Louisiana Supreme Court was the validity of the slave contract. Put another way, the court had to decide whether it was legal to continue making payments for slaves that had been emancipated after the original contract had been signed.

In settling this issue, the Louisiana court rejected the post-bellum enforcement of any slave contract. Justice Taliaferro wrote in the opinion of the court, "When, therefore, the sovereign will of this nation declared that African slavery should no longer exist within its borders, the unavoidable result was, that the laws which had therefore sustained the institution of slavery and given their sanction to and enforced contracts…ceased to exist."[80] In effect, the court ruled that the destruction of slavery also invalidated the laws that were necessary for courts to uphold and enforce slave contracts. Emancipation had not simply freed the slaves, proclaimed Justice Taliaferro, it had also abolished all the attendant elements of slavery as a state-sanctioned institution. This was so, reasoned the court, because slavery

> [E]xisted in this country without the positive authority or sanction of the paramount organic law of this nation…. It was simply permitted at the time of the formation of the government…. The laws, therefore, which existed until recently upon our statute books, on the subject of African slavery, were merely regulations in regard to that relation which existed only by the will of the sovereign power.

If the will of the sovereign were necessary to permit and "regulate" the peculiar institution, then the sovereign power also had the power to destroy it. In this case, unlike those from North

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[78] *Wainwright v. Bridges,* 19 La. An. 234 (1867). Historical Archives of the Supreme Court of Louisiana, Early K. Long Library, University of New Orleans. http://libweb.uno.edu/jspui/handle/123456789/16701. Accessed March 16, 2013. Transcript page 4.

[79] *Wainwright v. Bridges,* 19 La. An. 234 (1867). Historical Archives of the Supreme Court of Louisiana, Early K. Long Library, University of New Orleans. http://libweb.uno.edu/jspui/handle/123456789/16701. Accessed March 16, 2013. Transcript page 12.

[80] *Wainwright v. Bridges,* 19 La. An. 234 (1867), 239.

Carolina in particular, the necessary sovereign power came directly from the Executive of the United States, not from the people of the state. It followed that "Freedom, it has been properly held, was a preexisting right; slavery a violation of that right. Titles to slaves would, therefore, seem to be vitiated…."[81] The abolition of slavery restored the "preexisting" condition of freedom, and eliminated with finality the institution that had violated it for centuries. A viewpoint like this one, which was incorporated into the court's ruling, confirmed Louisiana's radical streak. The Emancipation Proclamation abolished slavery, and all slave contracts, regardless of their date, became instantly void on January 1, 1863.[82]

Wainwright, and others like him, would find no relief in Louisiana. The ruling freed the debtors from their contractual obligation, including the mortgages they took out in order to purchase the slaves in 1860, because emancipation rendered slavery "inevitably demolished, and with it all its surroundings. …The action of the supreme law leaves the courts without power to enforce obligations of the kind sued upon in this case."[83] Both parties were released from their contractual responsibilities. It was a windfall for Bridges, Newsom, and Newsom, and a major financial loss for Wainwright and the family he represented. By extension, citizens of Louisiana in similar contractual predicaments could expect to have their debts wiped clean as well.

The dissent in *Wainwright*, written by Justice Ilsley (Justice Labauve concurred with the dissent), asserted that the court should have adopted a ruling similar to the ones rendered in Texas and North Carolina, proving the widespread, though not universal, acceptance of the approach.[84] That is, slavery was legal at the time the contract was executed, therefore the contract itself must be upheld by the court. To do otherwise violated the constitutional right against the impairment of contract. For Justice Ilsley, the "dissertation upon the subject of African slavery" was unnecessary, and he quoted the dissent in the *Dred Scott* case to make his point: "'It is immaterial whether a system of slavery was introduced by express law, or otherwise, if it have the authority of law.'"[85] No pontification on the nature of slavery was necessary for the two dissenting justices. That slaves were recognized as property in Louisiana at the time the contract in question was executed was the only salient fact the justices should have considered. The digression entertained by the court and expounded by Justice Taliaferro distracted the court from performing its duties. "The solemn expression of legislative will, cannot be made to yield to every change of circumstances or events, and it is the sacred duty of judicial tribunals to carry out and apply recognized principles of law, upon all occasions and to all cases."[86] According to Justice Ilsley, the majority of the court did not live up to this standard in this case. Worse yet, it violated "The rule laid down in Article 1892 of the Civil Code," which stated "'That where the consideration of, or the cause of the contract really exists at the time of making it, but afterwards

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[81] *Wainwright v. Bridges*, 19 La. An. 234 (1867), 238.

[82] Surprisingly, despite the finality of the majority opinion, petitioners continued to bring cases like Wainwright hoping for a different outcome. The court turned them down six separate times, and each time, referred them to Justice Taliaferro's 1867 ruling. See *Austin v. Sandel*, 19 La. Ann. 309 (1867), *Halley v. Hoeffner*, 19 La. Ann. 518 (1867), *Posey v. Driggs*, 20 La. Ann. 199 (1868), *Dranguet v. Rost*, 21 La. Ann. 538 (1869), *Lefevre v. Haydel*, 21 La. Ann. 663 (1869), *Rodriquez v. Bienvenu*, 22 La. Ann. 300 (1870), and *Palmer v. Marston*, 14 Wallace (U.S.) 10 (1871)

[83] *Wainwright v. Bridges*, 19 La. An. 234 (1867), 239, 240.

[84] John Henry Ilsley was born in England in 1806. He attended Oxford University before immigrating to the United States at age 19. He was admitted to the Louisiana Bar in 1866, and served on the state supreme court from 1865-1868. "Louisiana Supreme Court Justices, 1813-Present," Supreme Court of the State of Louisiana. http://www.lasc.org/Bicentennial/justices/Ilsley_John.aspx Accessed March 25, 2013.

[85] *Wainwright v. Bridges*, 19 La. An. 234 (1867), 239, 243.

[86] *Wainwright v. Bridges,* 19 La. An. 234 (1867), 239, 249.

fails, it will not affect the contract, if all that was intended by the parties was carried into effect at the time.'"[87] The dissenting justice identified positive law that so perfectly addressed the issues before the court in *Wainwright*, that he could not help but conclude that the majority had committed a grave miscarriage of justice. Without a doubt, the majority ruling in *Wainwright* was more radical than many other Southern state court rulings, and for this reason alone it is not difficult to see why it provoked such a targeted response from the justices in the minority. However, as we shall see, this radicalism would not last in Louisiana. The US Supreme Court would ultimately force the state down a more moderate path.

"Look Alone to the Government:" Kentucky

Kentucky, unlike the other states under consideration here, did not formally secede from the United States.[88] Thus, there were no questions over the relationship between the state and the Union. Nor did the courts inquire much into the meaning of the Emancipation Proclamation; it was not a state in rebellion so the Proclamation never applied.[89] In fact, when Lincoln issued the Proclamation, many citizens and officials of the state condemned it as unconstitutional, and refused to grant or recognize the freedom of any slave residing in Kentucky.[90] Moreover, many believed that there was no immediate reason to suspect that Lincoln's war measure would become federal policy or Constitutional law. Ultimately, however, remaining loyal to the Union, in an effort to escape the consequences of secession was a gamble that did not pay off for Kentucky slaveholders any more than secession had for the Confederates. On December 6, 1865, the Thirteenth Amendment abolished slavery in the Bluegrass State. Thus, unlike in other Southern states, this was the only date that mattered. Despite its certain adoption, the legislature of Kentucky, which was not replaced during Reconstruction, refused to ratify the Thirteenth Amendment, even over the endorsement of Governor Thomas E. Bramlette. However, most Kentucky supporters of the Thirteenth Amendment, such as the Governor, believed that the state legislature should stipulate that the state would only ratify the amendment after Congress paid reparations to the state for the loss of property.[91] The sum they had in mind was $34 million, which was the assessed value of all Kentucky slaves in 1864.[92] They never saw a dime.

Partly the result of their outrage and disbelief, many Kentuckians asked the state courts for relief from emancipation, even after the Thirteenth Amendment made it clear that none would be forthcoming. Consequently, the Kentucky Court of Appeals (the highest court in the state) heard and ruled on many cases that involved the legal meaning of emancipation. These cases in particular, provide a useful contrast to the other Southern states because only one issue

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[87] *Wainwright v. Bridges*, 19 La. An. 234 (1867), 239, 248.
[88] The Confederacy also claimed Kentucky as one of its states. It was represented in the Confederate Congress. See McPherson, *Battle Cry of Freedom*, 692.
[89] In one 1866 case, *Commonwealth v. Palmer*, Judge Robertson proclaimed, "President Lincoln's proclamation of emancipation, whatever else might be said of it, excepted Kentucky from its operation, and applied exclusively to the seceding States. That portentous document, therefore, afforded no semblance of pretext for a claim to freedom by the slaves of Kentucky." *Commonwealth v. Painter,* 65 Ky. 570 (1866).
[90] Foner, *Reconstruction,* 37.
[91] Bramlette was originally a Union Democrat who supported Lincoln until he suspended *habeas corpus*. Bramlette would later pardon most ex-Confederates and oppose the fourteenth and fifteenth amendments. But, Bramlette was also the leader of efforts to prevent the recruitment and enlistment of black slaves in Kentucky. Berlin et al., *Freedom: A Documentary History of Emancipation 1861-1867*, 631. Webb, *Kentucky in the Reconstruction Era*, 9-15. Kentucky would not officially ratify the Thirteenth Amendment until 1976. It ratified the Fourteenth and Fifteenth Amendments at the same time.
[92] Coulter, *The Civil War and Readjustment in Kentucky*, 259.

was at stake: whether to enforce slave contracts after emancipation. The Kentucky cases reveal a group of litigants and judges who seemed totally unprepared for emancipation precisely because they believed their loyalty to the Union would continue to protect them from abolition. In Kentucky especially, the bewilderment and anger over the abolition of slavery was palpable. Eric Foner notes that "resistance to change proved greatest in Kentucky."[93] When it came to legal Reconstruction in the Bluegrass State, this was an understatement.

Just five days after the Thirteenth Amendment was adopted, the Kentucky Supreme Court ruled on *Hughes v. Todd*.[94] The case began months before, but the adoption of the Amendment must have required the justices on the court to rethink their verdict, even though the facts of the case remained unchanged. On January 2, 1864, Harry I. Todd and H.I. Morris hired the slave Marshall from Ben. S. Hughes. The hirers agreed to pay Hughes $150 on December 25, 1864. However, in June of 1864, Marshall left Todd's employ, after being "recruited and enlisted as a soldier in the army of the United States."[95] The war had come to Kentucky. Since they did not receive the labor stipulated in the contract, the men who hired the slave refused to pay. As a result, the slave's owner, Hughes, filed suit in the Franklin Circuit Court in March 1865. The trial court sided with the defendants, prompting Hughes to appeal the case.

In their brief to the Kentucky Court of Appeals, the defendants argued that Marshall had been taken by the federal government, "for public purposes, and in pursuance of a public law."[96] "The right of the sovereign power to appropriate any and everything within its dominions for public purposes," they further claimed, "is too well admitted to need argument."[97] The result of the action "amounted to a total deprivation and eviction."[98] In effect, the defendants, Todd and Morris, made the same claim that the Louisiana Supreme Court would later accept. The sovereign power of the United States had the power to commandeer chattel property and destroy the property interest in it. As a consequence of this action, the defendants had to be released from their contractual obligation. In response, Ben S. Hughes made the opposite argument in his brief to the Kentucky Court of Appeals. He wrote, "if the negro's services were lost by any means not occasioned by the appellant," then the hirers were not entitled to an abatement.[99] The appellant urged the court to reject the invocation of sovereign power, and uphold the terms of the contract precisely because the slave's owner had not occasioned the breach in the contract. Instead, the loss came as a result of federal action, for which he could not be held responsible.

The Kentucky Court of Appeals agreed, and overturned the trial court's ruling. The justices determined that the hirer was not responsible for aiding the slave's escape. Rather, "the flight and enlistment seem to have been the voluntary acts of Marshall himself. He was not drafted or forcibly taken from the hirer by the Federal government."[100] Ultimately, Chief Justice Robertson, writing the opinion of the court, tacitly granted the personal will of the slave property

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[93] Foner, *Reconstruction*, 37.

[94] *Hughes v. Todd,* 63 Ky. 188 (1865).

[95] *Hughes v. Todd,* 63 Ky. 188 (1865). Kentucky Department for Libraries and Archives, Public Records Division. Kentucky Court of Appeals #135. Brief for Appellees, 1.

[96] The law to which they refer is a Congressional Act passed on February 24, 1864: "An act for enrolling and calling out the national forces, and for other purposes." It allowed for the enlistment of black soldiers.

[97] *Hughes v. Todd,* 63 Ky. 188 (1865). Brief for Appellees, 1. Kentucky Department for Libraries and Archives, Public Records Division. Kentucky Court of Appeals #135. Brief for Appellees, 5.

[98] *Hughes v. Todd,* 63 Ky. 188 (1865). Brief for Appellees, 1. Kentucky Department for Libraries and Archives, Public Records Division. Kentucky Court of Appeals #135. Brief for Appellees, 5.

[99] *Hughes v. Todd,* 63 Ky. 188 (1865). Brief for Appellees, 1. Kentucky Department for Libraries and Archives, Public Records Division. Kentucky Court of Appeals #135. Brief for Appellant, 1.

[100] *Hughes v. Todd*, 189.

and held that “the owner of the slave is not responsible for such loss, nor is the hirer entitled to any abatement of the price agreed to be paid for the hire,” because it was the federal government that had enticed the slave to flee by allowing him to enlist in the Union Army.[101] Instead, Mr. Todd, the hirer,

> Must look alone to the government for reparation. And, if the government has neither paid him nor will pay him, its act was unconstitutional and void as to him, and was, therefore, not a lawful eviction under title, but a wrongful abduction without title. It does not appear that the owner has received either the payment or the assurance of the full value of his slave, or of any value constitutionally ascertained and fixed. And, therefore, he cannot, by substitution, or trust, or otherwise, be made liable to the hirer for *his* partial loss.[102]

In other words, Mr. Hughes, the slave owner, could not twice suffer the loss of his slave property. He had already lost the entire value of his slave due to formal emancipation by the federal government, and by the court’s reasoning, making him pay an additional sum to the aggrieved slave hirer would have merely added insult to injury.

The court acknowledged that Mr. Todd, the hirer, did lose something, a “partial loss,” but that loss was caused by the congressional act, not the slave owner. Appropriate redress, in the form of compensation, ought to have come from the federal government, not the court nor either party named in the suit. Certainly, the demand for compensation was not novel; the Maryland constitutional convention considered the same thing, and so did the federal government in the early years of the war. But without federal willingness to offer compensation for slaves in the post-bellum period, Justice Robertson wasted his breath. After all, the Thirteenth Amendment mentioned nothing about it, and the very idea of compensation had been all but abandoned by 1863 with the issuance of the Emancipation Proclamation.[103]

None of this seemed to matter to Robertson, as he broadened his remarks even further. He attacked the actions of the national government itself and deemed them an unconstitutional “mockery” of personal property rights.[104] Mr. Hughes’ property was taken from him “for public use” without “due process of law” or “just compensation.”[105] Judge Robertson continued,

> The act of taking the slave was…unconstitutional and void as to its legal effects, unless the government either prepaid or assured the payment of his actual value to his owner…. If this be not so, the boasted palladium of private property against arbitrary power is but a mockery, and the constitution itself may become a dead letter.[106]

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[101] *Hughes v. Todd*, 63 Ky. 188 (1865), 190. It is worth noting that Justice Robertson acknowledges the personhood and will of Marshall. Antebellum courts have a complicated history when it comes to granting slaves personhood or agency. See, e.g., Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* and Morris, *Southern Slavery and the Law, 1619-1860*.
[102] *Hughes v. Todd*, 63 Ky. 188 (1865), 190
[103] Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877*, 7.
[104] He invoked the Fifth Amendment to substantiate his claim.
[105] “The Constitution of the United States”, Amendment 5.
[106] *Hughes v. Todd*, 63 Ky. 188 (1865), 190-191.

With unbridled vitriol, Judge Robertson and the other justices channeled the legacy of the Kentucky Resolutions of 1798, re-claimed the right of the state to invalidate federal law, and attempted to nullify both Enlistment Acts of the US Congress, even though they no longer had any effect after the war.[107] Rather than determining the legal meaning of emancipation, the Kentucky Court of Appeals essentially asserted that emancipation by federal fiat was unconstitutional.

However, Justice Williams issued a robust dissent. After demonstrating that the enlistment of black soldiers was unexceptional in American history, Justice Williams attacked the majority opinion directly. Specifically, he challenged the invalidation of the federal enlistment laws that the majority had found to be so egregious.

> [T]he policy of declaring those laws unconstitutional is as unwise and unjust to the loyal slaveholder, whose slaves have in fact been freed, as the policy of emasculating the war powers, and thereby rendering the government impotent, is destructive to society and to the existence of the government, and unjust to the people and States who desire its perpetuity…. Moreover, there are many questions confided alone to the judgment and discretion of the political department of the government, as necessary for the preservation of the body-politic, which have been wisely withheld from the judiciary; and within the scope of these may be placed the power to provide for the common defense, to declare war, to raise armies and provide navies, to repel invasion and suppress insurrection.[108]

Judge Williams denied the rationale used by the majority of the Kentucky Court of Appeals to nullify the enlistment laws. Congress was indeed acting within its authority when it passed the laws, as the Constitution expressly permits that body to assemble a military force for the protection of the Union. It does not, however, specify how that ought to be done. According to Williams, Congress was merely exercising its "discretionary power."[109] Furthermore, Judge Williams challenged the notion that the federal laws were a disproportionate attack on the slaveholders of Kentucky. Rather, their ultimate best interest rested with the preservation of the Union itself, and the ability of the federal government to ensure peace and eventual prosperity. If the abolition of slavery became part of the plan to preserve the nation, then so be it.

Finally, the dissent attacked the idea that slaveholders were owed just compensation for their lost property. For Judge Williams, the fact that the nation was at war altered the way the law could be applied to resolve this issue. For him, using civil law to demand restitution was improper. "Military and martial laws are the rules that govern war, armies, force and turbulence. Civil laws govern peace, courts, and public tranquility. The peaceable rules of the civil law can no more be applied as limitations on the powers of war, armies, force and turbulence, than can the states of peace and war be reconciled as existing at the same time."[110] Therefore, due process of law was not violated when the federal government emancipated slave property. Martial law was in place because the nation was at war, and those rules were being followed. The application

[107] Congress passed the first act on July 17, 1862 and the second on February 24, 1864.
[108] *Hughes v. Todd*, 63 Ky. 188 (1865), 54, 56.
[109] *Hughes v. Todd*, 63 Ky. 188 (1865), 62.
[110] *Hughes v. Todd*, 63 Ky. 188 (1865), 227.

of civil law by Judge Robertson and the other concurring justices was, according to Judge Williams, misguided and inappropriate. The ultimate loss of property was merely part of the cost of war.

Despite the dissent, the court's decision in this case demonstrates the fury over emancipation, the loss of wealth, and by extension, the loss of social standing for slave owners throughout the state of Kentucky. Whether it was because of the Enlistment Act or ultimately the Thirteenth Amendment, the federal government was the cause of the loss of slave property, not the individual parties named in the suit. As this case makes clear, the judge was willing to transform his bench into a platform for protest against the political actions of the US Congress. Above all, Judge Robertson's rancorous decision suggests that Kentuckians would continue to cling to the antebellum status quo for as long as possible. Here, the Kentucky court reveals the state's political position. The Bluegrass State was neither subjected to wartime Reconstruction nor experienced the post-bellum replacement of its government by the US military. The verdict veered well outside the boundaries of conservative jurisprudence, and publicly exhibited the rage that many others experienced privately.

It also showed the Kentucky court aligning itself with the state legislature, clinging desperately to an institution that no longer existed. It seemed that neither the legislature nor the courts were willing to accept that a Union victory in the Civil War actually meant a consolidation of federal power that superseded that of the states. They challenged this interpretation openly, and with palpable hostility. Slavery was dead everywhere, not just in the former Confederacy, and Kentuckians were angry that their calculated decision to remain loyal to the Union had not paid off. The impassioned ruling, coupled with a recalcitrant state legislature, all but belied the notion that Kentuckians would or could come to fully accept emancipation or the Reconstruction efforts to ensure black freedom and equality, and they portended the strength and popularity that Redeemers would ultimately possess during the later years of Reconstruction.[111] The Kentucky example, perhaps more than any other state under review here, strongly indicates the doomed future of Reconstruction. In part, this is because the Bluegrass State never experienced a Radical period. After all, the state remained committed to its antebellum constitution until 1891, when it finally adopted a new one that did not sanction slavery.

Yet somehow, over the course of Reconstruction, the Kentucky Court of Appeals managed to temper its opinions and refrain from the kind of impassioned rulings displayed in *Hughes*. Indeed, part of what makes the issue of emancipation so fascinating in Kentucky is the way it was approached: there was no controversy over when it happened, but there was plenty of bluster over the effect of a decision forced upon them by the federal government. After the initial shock of emancipation wore off, the court adopted positions similar to those from the Texas and North Carolina courts. For example, in 1867, the Kentucky Court of Appeals reached a verdict in

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[111] The Kentucky legislature only took actions to provide for the civil rights of freed slaves after the Freedman's Bureau was extended into the state in December of 1865 – the only loyal state to share that fate. Out of their fear over continued federal control, the Kentucky legislature finally began enacting laws to aid its former slaves. For the purposes of this study, the most important of these were: granting the right to sue and be sued, the right to own property and receive it as a gift, the right to marry (though miscegenation remained illegal), and the establishment of equal criminal punishments for blacks and whites. Webb, *Kentucky in the Reconstruction Era*, 16. However, Kentucky barred black testimony until 1872. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 421. See especially Victor B. Howard, "The Black Testimony Controversy in Kentucky, 1866-1872," in *Black Southerners and the Law 1865-1900*, ed. Donald G. Nieman, vol. 12, 12 vols. (New York: Garland Publishing, Inc., 1994).

Cook v. Redman.[112] Mr. Redman sold a slave named Allen to Mr. Cook in 1858 for $1600. The sale included a warranty that "covenanted that he was sound and a slave for life."[113] Mr. Cook sued Mr. and Mrs. Redman on March 19, 1861, citing a breach of contract. Allan, the slave in question, was deaf, making him unsound.[114] But, by the time the case reached the Kentucky Court of Appeals, Allen was a free man. Neither party could recover the lost "property." Nonetheless, Judge Robertson believed that Mr. Cook "may be entitled to some relief, even though the constitutional amendment had made Allen a free man and the appellee's wife being still alive, his title had never otherwise ceased than by the slave's emancipation by law…."[115] Furthermore, Robertson argued, "although the loss of Allen…deprived the appellant of his value without the appellee's fault, yet as the appellant, to some extent, paid for more than he got, he may be equitably entitled to restitution *pro tanto*" (as much as one is able).[116]

In an even more extreme case, *Whitmer v. Nall* (1868), Justice Peters ruled similarly.[117] A.J Whitmer purchased the slave Martin for $225 "on the 10th of November, 1865," just one month before the passage of the Thirteenth Amendment.[118] Justice Peters ruled,

> At the date of the sale, the adoption of the amendment to the Constitution of the United States was not only most probable, but it was regarded generally as an event certain to take place within a short period, whereby the slaves in the United States would be emancipated. None could buy slaves then in ignorance of the precarious tenure by which such property was held….[119]

Even though Judge Peters noted the stupidity of the speculative slave purchase when formal emancipation was all but certain, he recognized the legality of the contract that had been entered into freely, and held both parties to its terms. Slavery was not officially illegal in Kentucky at that moment, so the contract stood. Regardless of the circumstances or the Justice writing the opinion, Kentucky remained committed to the notion that slave contracts were valid as long as they had been executed prior to the date the Thirteenth Amendment had been adopted.

Conclusion

The process of litigating the date of emancipation ought to be seen as an important part of legal Reconstruction and of national reunion. When petitioners approached benches across the South, they hoped to exploit the uncertainty left by the unplanned emancipation that Union victory in the Civil war had secured. By creating a legal line of demarcation, Southern courts not only participated in resolving an element of this uncertainty, but they also participated in

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[112] *Cook v. Redman*, 65 Ky. 52 (1867).
[113] *Cook v. Redman*, 65 Ky. 52 (1867), 53. For a more detailed discussion on the legal process of determining the "soundness" of slaves, see Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum southern Courtroom* (Athens: The University of Georgia Press, 2000). Also, Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law and southern Slavery* (New York: Cambridge University Press, 1998). For a discussion on the practical ways to determine soundness in a slave market, see Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (Cambridge, Massachusetts: Harvard University Press, 1999).
[114] *Cook v. Redman*, 65 Ky. 52 (1867), 53.
[115] *Cook v. Redman*, 65 Ky. 52 (1867), 53.
[116] *Cook v. Redman,* 54. Latin translation of *pro tanto*: for as much as one is able.
[117] *Whitmer v. Nall*, 2 Ky. Op. 361 (1868). Kentucky Department for Libraries and Archives, Public Records Division. Kentucky Court of Appeals #1632.
[118] *Whitmer v. Nall,* 2 Ky. Op. 361 (1868), 364.
[119] *Whitmer v. Nall*, 2 Ky. Op. 361 (1868), 364.

resolving one of slavery's residues – the legal acts of buying, selling, and hiring slave property. As such, resolving these cases became part of the process by which Southerners and Southern law reestablished themselves in a Union without slavery. In this way, the cases that settled the date of emancipation in their respective states were as much about reunion as they were with taking one step toward abolishing the peculiar institution.

The cases reviewed here demonstrate that this process was anything but straightforward. Determining what emancipation meant legally turned out to be a lengthy process that often had little to do with the freedom of slaves and instead had much to do with figuring out the legal meaning of that freedom. Ultimately, an examination of one of the ways in which state courts addressed the thorny legal issue of emancipation – determining when it happened – prompts two crucial conclusions. First, the destruction of the institution of slavery must be understood as a disjointed process, not as a single event. This was true in practical terms, as slaves crossed Union lines to claim their own freedom, as well as in legal ones, where state courts issued a variety of different rulings that set the date of emancipation. Accepting this conclusion requires a rethinking of traditional interpretations of the end of slavery. Historians have told the story of how slaves freed themselves by leaving their plantations en masse, and they have chronicled the process by which Lincoln's Emancipation Proclamation became the Thirteenth Amendment. However, historians have not acknowledged or addressed the slower process that took place in courtrooms across the former Slave South. Abolition happened there, too. While arguably the process of abolition in Southern courts was more tedious than it was jubilant, this chapter has shown not just what one aspect of legal emancipation entailed, but also why it mattered.

Coming to a consensus about the legal date of abolition addressed one of the lingering issues brought on by emancipation, but as the rulings in Tennessee, Texas, North Carolina, Louisiana, Kentucky make clear, states forged their own unique paths as they settled the matter. Simply put, they told different versions of the same story. Determining the precise date of abolition eliminated one element of confusion during a period marked by uncertainty, by allowing judges to determine which slave contracts were valid and enforceable. It also gave litigants a way to decide whether it was worth their while to take their post-emancipation slave contract dispute to court. Texas and North Carolina both chose dates that relied on military force. Instead of simply using the Emancipation Proclamation, these state courts ruled that the business of slavery, and the contracts that resulted from it, were legal until the United States military could enforce the Presidential edict. Texas used a slightly less rigid standard than did North Carolina, ruling that the arrival of General Granger and the army under his command was enough to destroy the peculiar institution in the Lone Star state. Thus, Texas had a fixed date of emancipation: June 19, 1865, otherwise known as Juneteenth. North Carolina, on the other hand required Union forces to be in direct control of an area before victory over slavery could be claimed. As a result, no single fixed date existed there, but the respective high court did produce a standard for testing the validity of slave contracts in post-emancipation courts.

In some ways, Louisiana and Kentucky are outliers in this story. Each had a unique set of circumstances that prompted very different responses from most of their counterparts. The Emancipation Proclamation went into immediate effect in Union-controlled regions of Louisiana, and it attempted wartime Reconstruction. Moreover, the Louisiana Supreme Court itself was comprised of justices whose views on secession and emancipation aligned with federal policy. This was possible precisely because the military leaders of the state ensured their ascendancy to the post. This resulted in a truly, albeit temporary, Radical Reconstruction in the Bayou State. Along with few others, the Louisiana Supreme Court continued to uphold the provision in the

state's Radical constitution that invalidated all slave contracts. The court reasoned that any further enforcement of the business of bondage was tantamount to the further support of slavery itself, which was counter to federal policy. Thus, Louisiana would uphold no slave contract, regardless of its date of origin. Essentially, the court ruled, the destruction of slavery not only emancipated the slaves, it also demolished the legal devices necessary to support the institution. The Louisiana courts, therefore, had no ability to enforce any slave contract. Louisiana denied litigants the benefit of the judiciary when it came to enforcing slave contracts, illustrating that at least for a time, other alternatives to the slave contract dilemma were possible. Such drastic measures may have been precisely what the region needed in order to successfully transform from the Slaveholder's Republic into a truly new South.

Kentucky represented yet another example for ruling on emancipation. Because Kentucky remained loyal to the Union, the Emancipation Proclamation never applied there. Thus, establishing the date of emancipation proved to be easier in the Bluegrass state than elsewhere. The Thirteenth Amendment abolished slavery, and it went into effect on December 6, 1865. Yet, because the people of Kentucky did not expect that they too would be subjected to the "punishment" of emancipation, citizens and justices alike expressed their outrage at having to share the same fate as the conquered Confederacy. Despite intense feelings and resentment, Kentucky ultimately settled on a path similar to Texas and North Carolina. Contracts that were executed while slavery remained legal continued to be enforceable in court. Eventually the rage that marked the first opinions rendered by the Kentucky Supreme Court would subside, but the sentiment never truly disappeared. It would reemerge in the form of Black Codes, Jim Crow laws, and racially charged violence.

In addition to fixing the date of emancipation, or setting the standards by which a slave contract could be evaluated in the post-bellum South, the collective results of contract cases described in this chapter lead to a second important conclusion: These cases determined that slave contracts could remain legally binding even after the chattel property being conveyed could no longer be possessed. This meant that those who still owed money for slaves they had bought or hired prior to emancipation were still on the financial hook. In other words, some white Southerners would continue to pay for slaves, while others reaped the economic gain, even though the object of the transaction no longer had value to anyone. The nature and extent of this financial loss, as well as the white Southerners' response to it, will be explored in a later chapter. In this context, however, the continued support of slave contracts suggested that at least part of the antebellum social order remained largely intact after the war, and there were some who continued to profit from slavery. For them, the social and financial benefits of slave ownership persisted well after the end of the peculiar institution. This has profound implications. It indicated that some of the constitutive elements of the institution of slavery – the legal sanction, institutional support, and social benefits – survived emancipation.

Chapter Three
The Ties that Bound: Exposing the Social Practice of Slavery in Post-Bellum Courts

On February 26, 1873, Texas citizen Augustus Catchings died, leaving an estate worth $6000. The District Court of Kaufman County, Texas appointed an administrator for the estate, but Sally Catchings objected that "she had lived with said Augustus Catchings as his wife," making her the rightful heir.[1] But Sally Catchings was more than just the purported wife of Augustus; she had also been his slave. Sally Catchings pushed the Texas Supreme Court into a legal – and social – no man's land. Could a former slave have been the lawful wife of any man? Could she inherit a white man's estate? Was this woman the legitimate wife of Augustus Catchings or a former slave seeking payment for years of forced servitude? Did Augustus Catchings ever intend for Sally to be considered his wife or had he believed her to be his concubine? Old and new law – and the hopes and aspirations of former slaves and former slave owners – converged in the Texas courthouse.[2]

Strengthened by her newly acquired freedom, Sally Catchings went to court and facing a legal institution, which included jurists and white litigants who had not previously recognized her as a legal person. Many white Southerners still did not, refusing to accept evidence presented by former slave women like Sally Catchings. Rather, they relied on the deeply entrenched beliefs about African Americans and contended that these freed women were merely using the uncertainty of Reconstruction to their advantage; these were charlatans trying to get rich. Alexander T. Wilson, the court appointed administrator of the Catchings estate, believed Sally was one of these women. He alleged that she had never before purported to be the wife of Augustus Catchings, but was "influenced to do so now by pretended friends to her."[3] This contention reveals the fear among some that former slaves would, and in fact were, attempting to get something from former masters and upend the antebellum social order. It would be up to state court judges to take on at least part of the burden of stopping them from doing so.

On the other hand, perhaps Wilson was on to something. Augustus Catchings had been legally married to a white woman, and had legitimate children. It was only after the death of his wife that he moved to Texas and purchased Sally to be his slave. She had been purchased to care for Augustus' son."[4] Moreover, charged Wilson, Sally had been compensated for her work, despite being a slave. "As remuneration to the said Sally for her services," Augustus Catchings "fed, clothed, and cared" for her and her six illegitimate children.[5] Wilson charged that Augustus purchased 250 acres of land, "worth fifteen hundred dollars," and wagon and mule team "worth

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[1]Appellant's Brief, *Wilson v. Catchings*, 41 Tex. 587 (1874). Case file M-9038, box 201-4383; Texas State Library and Archives, Austin, Texas.

[2] Interestingly, it appears as though Augustus Catchings may have been a Union sympathizer during the Civil War. He registered a claim with the Southern Claims Commission before he died in 1873. U.S. Southern Claims Commission Master Index, 1871-1880, accessed via ancestry.com July 1, 2013. The claim was later barred in 1905. *Barred and Disallowed Case Files of the Southern Claims Commission, 1871-1880*; (National Archives Microfilm Publication M1407, 4829 fiche); Records of the U.S. House of Representatives, Record Group 233; National Archives, Washington, D.C. Ancestry.com. [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2007.

[3] *Wilson v. Catchings*, 41 Tex. 587 (1874). Transcript, 10. Case file M-9038, box 201-4383; Texas State Library and Archives, Austin, Texas.

[4] *Wilson v. Catchings*, 41 Tex. 587 (1874). Transcript, 12. Case file M-9038, box 201-4383; Texas State Library and Archives, Austin, Texas.

[5] *Wilson v. Catchings*, 41 Tex. 587 (1874). Transcript, 12. Case file M-9038, box 201-4383; Texas State Library and Archives, Austin, Texas.

five hundred dollars" and had given them to Sally for her own personal enjoyment.[6] There are many reasons why Alexander Wilson would enter this into evidence. For one thing, it showed that Augustus was a kind master who took good care of Sally and her children. It also suggests that not only had Sally been compensated for her work, but also that she had already received much more than what had been owed to her. Any effort to secure more from the Catchings estate was nothing more than attempted thievery.

Yet, there was another way to interpret this evidence. Augustus Catchings could have intended to leave this property to the woman he loved, or at least with whom he had a consensual relationship. This alternative seemed completely implausible to Alexander Wilson. Indeed, the characteristic paternalism of antebellum slavery is unmistakable in this post-bellum case. According to Wilson, the slave owner, Augustus Catchings, was kind and generous; the slave, Sally Catchings, was ungrateful and conniving. Ultimately, it was up to the justices of the Texas Supreme court to decide whose claims were legitimate and whose were fraudulent. However, despite the scandalous circumstances, in 1874, the court ruled on a technicality. Rather than address the facts of the case – whether or not Sally Catchings was the common law wife of Augustus – the court ruled that jurisdiction in the case was not clear.[7] In 1874, the Texas Supreme Court remanded the case back to the lower court to sort out. It is unknown whether or not Sally ultimately prevailed.

Upon first glance, *Wilson v. Catchings* presents itself as a tantalizing case about miscegenation. However, it is also indicative of a great deal more. Sally Catchings asked the Texas Supreme Court to do something unprecedented: to transform a customary relationship between master and slave into a legal marriage between man and wife. She was not the only former slave to make such significant demands. Could common social practices of slavery – like interracial sex – be translated into protected post-bellum law? Would antebellum law continue to influence the former slave states in matters related to family? Could one's former slave status continue to haunt newly freedpeople? How would judges navigate this radically altered legal terrain?

The answers to these and other similarly fraught legal questions were not immediately clear at the end of the Civil War. As post-emancipation slave cases make clear, emancipation secured by Union victory may have ended the practice of bondage, but it did not and could not eradicate all of the peculiar institution's attendant elements, nor could it neutralize the social assumptions and common attitudes many whites had about African Americans. Judges and litigants alike confronted the reality that emancipation – the act of liberating slaves – had not fully abolished slavery. Significant relics remained, and litigation became one important way that Southerners confronted them. In the aftermath of war, and out of the destruction of slavery, former slaves across the South turned to the courts to participate in this process. Freedpeople used their new legal personhood and standing to go to court and challenge the traditional assumptions and practices of whites. They did so for personal reasons, often related to the preservation of family, but also to help construct a post-bellum order that reflected their own

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[6] Headnotes, *Wilson v. Catchings*, 41 Tex. 587 (1874). Catchings was a wealthy planter. In 1850, as a resident of Hinds County, MS, Catchings owned 35 slaves. Ancestry.com. *1850 U.S. Federal Census - Slave Schedules* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2004.
Original data: United States of America, Bureau of the Census. *Seventh Census of the United States, 1850*. Washington, D.C.: National Archives and Records Administration, 1850. M432, 1,009 rolls.

[7] There was confusion over whether Augustus Catchings had died in Kaufman or Rockwall County. This determined which court should have received original jurisdiction. Rockwall County was created out of part of Kaufman County, though the Texas Supreme Court was not interested in determining when that took place.

visions of a society without slavery. When seen in this context, *Wilson* becomes more complex; it was more than a case about miscegenation. The case was just one of many that involved in the process of litigating emancipation.

This particular case ended with a fizzle, but the issues raised in the proceedings resonated. During the post-bellum period, other courtrooms across the South heard cases similar to *Wilson v. Catchings* and rendered more substantive verdicts. Moreover, though miscegenation suits were certainly some of the more sensational post-emancipation slave cases, there were other types of cases, including those regarding the apprenticeship of free black children and inheritance from former masters, that provoked similarly fraught legal questions regarding the relationships between former slaves and the white Southerners who had owned them. Indeed, one of the central problems emancipation left unresolved was that though it freed slaves from bondage, it certainly did not transform common attitudes toward African Americans or destroy every legal element of slavery. Many antebellum laws and legal perceptions that had regulated the peculiar institution, including statutes regarding miscegenation, apprenticeship, and inheritance, remained on the books. Complicating matters further, Black Codes passed in the wake of Southern defeat reinstated antebellum rules in a post-bellum world. Thus, the decisions in the cases described in this chapter were indeed part of the larger project of eradicating slavery from Southern law and society. In effect, the rulings became part of the process of abolition and post-bellum discussions about what the nature of the relationship between freed slaves and white society ought to be, and, more importantly, what rights freedom and citizenship would actually guarantee.

In many ways, this chapter concentrates on the post-bellum family of both Southern whites and former slaves. There is a robust literature on the intersections between race, sex, and family in the nineteenth century South, and this chapter draws on it in important ways. First, this scholarship stresses the centrality of the household itself; it was here that Southern men and women, both black and white, assumed their prescribed places in the social order.[8] The state – that is, the courts – intervened in household matters sparingly during the antebellum years; they did so only when, as Peter Bardaglio argues, the male head of household violated the institution in a way so egregious that it threatened the patriarchal social order.[9] Emancipation changed all that; black men enjoyed new authority to institute legitimate households of their own, and they did so quickly.[10] This new authority was perceived as a threat to traditional white male patriarchy, and elicited swift legislative responses from those seeking to circumscribe the potential equality of black households to white. These responses, in the form of new Black Codes, represented not

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[8] See especially, Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction*. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (New York: Cambridge University Press, 2008).

[9] Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, 28. "Household matters" accounted for most issues that transpired between members of the household; the male head of household had expansive rights over wives, children, and other dependents. It was only when he abused these rights, or neglected his responsibilities to his household that courts might intervene.

[10] For example, in 1866, more than 9,000 black couples registered their unions in North Carolina. Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), 134. Determining the legality of slave marriages in the years after the end of slavery was a significant legal problem. Most states passed laws requiring couples to register their marriages with the state in order to receive full recognition. As Leon Litwack has shown, the Freedmen's Bureau often assisted families in this regard, but many couples were unaware of the legal requirements, and failed to act. Though the issue will not be addressed in this dissertation, there were a significant number of post-emancipation slave cases that were complicated by the failure to register the marriages of former slaves.

only an attempt to control the population of newly freed slaves, but also the moment when the traditional reluctance by the state to interfere with household matters gave way to larger concerns about the four million former bondspeople who were no longer governed by the laws and customs of slavery.

However, not all households of freedpeople were headed by legally recognized husbands and fathers. The realities of slavery, such as the forced separation of families and children born to slave mothers and white enslavers, created significant legal problems, including the establishment households headed by single women who violated normative gender roles by serving in such a capacity, as well as cases related to bigamy, bastardy, and custody.[11] These issues have also been previously addressed by scholars, and influence this work. The Black Codes and state constitutional provisions that emerged to police the newly legitimate black household often failed to capture the complexities of the households that were ultimately established.

Finally, and related to state intervention in family law, are treatments of interracial relationships, also known as miscegenation. This was the great fear of so many white Southerners: the racial mixing that had once taken place within the confines of both the legitimate antebellum household and the institution of slavery, would be legalized in ways that could destroy white hegemony and patriarchy while 'diluting' the purity of the white race. Historians and legal scholars have used analyses of miscegenation and anti-miscegenation laws both as an example increased state intervention in family affairs and as an entry point for larger discussions about the long history of racial discrimination, American racism, and segregation.[12] After all, legal bans on interracial marriage remained firmly entrenched in American law until the 1967 Supreme Court case *Loving v. Virginia* invalidated them. The literature on miscegenation, which is particularly relevant to the cases examined in this chapter, will be explored further when assessing those suits.

This chapter does not seek to undercut the important work already done by scholars interested in the reconstruction of black families. Rather, I contend that these issues, and the cases from which we learn about them, must also be seen as part of the larger project of legal Reconstruction. Two simultaneous and inextricably linked things occurred when African American litigants sued white members of their communities. First, they asserted newly acquired rights and forced a reconsideration of the intimate relationships they had with the people who once owned them. Second, they presented Southern courts with a serious problem: how to judge cases involving persons without legal pasts. Few courts, if any, were ready or equipped to handle the suits of former slaves. There were no precedents for cases that involved a former slave woman claiming the right to inherit her lover's estate, or a black woman asserting her right to be a parent, or former servants demanding their inheritance. These cases forced the collision of both old and new Southern law and society. They exposed both the unsavory and the paternalistic

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[11] For a discussion of gender and Reconstruction, see especially, Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* and Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household*. Bigamy was sometimes a problem for former slaves; because of forced separation, many slaves had more than one 'husband' or 'wife.' These multiple unions sometimes created problems for those seeking to establish new households. One's current partner may not have been one's preferred partner. Which partner was legitimate? As Michael Grossberg and Leon Litwack have shown, this problem was faced by both freedpeople and courts alike. Litwack, *Been in the Storm So Long: The Aftermath of Slavery*.

[12] Mary Frances Berry, *The Pig Farmer's Daughter And Other Tales of American Justice* (New York: Vintage Books, 1999). Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009). Peter Bardaglio and Michael Grossberg also discuss miscegenation.

elements of slavery, and forced judges, Southern whites, freedpeople, and lawmakers to confront past practices, reevaluate post-bellum policy, and envision a free South. By exploring cases involving interracial marriage, apprenticeship, and inheritance, this chapter will illustrate the ways in which the social relationships that often existed between former slaves and their white owners or superiors complicated Reconstruction and the end of slavery, and explain how and why Southern courts intervened in these otherwise personal matters. In addition, it will explain the reasons why many former slaves turned to the courts to legitimate their personal claims. In the process, this chapter will reveal some of the effects of the legal changes that emancipation forced upon Southern states, and the social consequences of loosening the formerly rigid social boundaries of the antebellum South.

In the end, it became clear to judges hearing these complicated cases that they would have to create new case law in order to rule, or as turned out to be more common, make old law fit unprecedented circumstances. As Thomas Morris has shown, during the antebellum decades, there was never a discrete body of 'slave law' that was separate or distinct from Southern law more generally; there was only an "interrelationship between slavery and law," that required the application of pre-existing legal instruments to meet the evolving needs of slave owners and lawmakers who sought ways to govern the peculiar institution.[13] That judges would continue to behave in a manner that reflected this past practice during Reconstruction, therefore, seems only natural – and even predictable. To be sure, this type of jurisprudence permitted a great deal of flexibility; it allowed judges to respond to the particular circumstances of the cases before them. However, there were implicit dangers in applying antebellum standards to post-bellum problems. First, it produced an uneven jurisprudence even if the method proved able to resolve difficult cases. Second, it left open the possibility of continuing to see black litigants as former slaves, not as freedpeople. That is, instead of wiping the slate clean, one's past life as a slave had bearing on present circumstances. Admittedly, there was no way to fully erase the slave past, but as will become evident, some judges worked harder to do so than others.

When freedpeople went to court to settle claims about interracial marriage, apprenticeship, and inheritance, they were forced to litigate deeply personal matters and divulge personal – and often painful – facts about their slave pasts. At the center of many of the cases examined in this chapter are husbands and wives, parents and children, and members of extended families who sought the means and ability to free themselves from the remaining burdens of slavery. Yet, for some freedpeople, like Sally Catchings, going to court was the means by which they could contest white attempts at circumscribing their newly won freedom. In this sense, we ought to see the suits freedpeople initiated against whites as a form of *active* resistance that opposed continued white oppression, the reinstitution of the antebellum social order, and the denial of rights to which emancipated slaves believed they were entitled. These were assertions of legal personhood that employed post-bellum law deployed in state courts to claim and protect what many former slaves believed rightfully belonged to them.[14] This included the dignity that came with being the legally recognized wife of a white man, the legal rights to motherhood that had been diminished by apprenticeship laws, or the receipt of inheritance that had been bequeathed by a deceased master who saw fit to leave something of value to his slaves.

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[13] Morris, *Southern Slavery and the Law, 1619-1860*, 3.

[14] On claiming rights, see especially, Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South*. Elizabeth Regosin. *Freedom's Promise: Ex-Slave Families and Citizenship in the Age of Emancipation*. (Charlottesville: University Press of Virginia, 2002).

For the first time African Americans could go to court – as plaintiff or defendant – with white Americans, the very possibility of which demonstrates not just the promise of Reconstruction, but of one of its first tangible effects: legal standing for former slaves. In so doing, freedpeople engaged in the process of determining the meaning – legal and otherwise – of their own liberation, while simultaneously making claims about what rights they believed belonged to them and helping to construct a post-bellum order that reflected their own visions of a society without slavery.[15] Their cases reveal that at least for a time, some former slaves were able to use state courts to not only demand, but actually achieve the outcomes they desired, illustrating that the promises of Reconstruction were indeed within reach.

Wives or Concubines?

For the most part, slave women had never had the legal right to marry anyone, let alone white men.[16] But after emancipation, Sally Catchings, and other women like her, forced Southerners to confront some of the lived realities of slavery, which included interracial relationships that that existed without statutory sanction, but were nonetheless socially acceptable. Certainly, the sexual liaisons – consensual and otherwise – between white men and slave women were well known, even if they were not always acknowledged openly. Mary Boykin Chestnut wrote in her famous Civil War diary that "old men live all in one house with their wives and their concubines, and the mulattoes one sees in every family exactly resemble the white children—and every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds, or pretends so to think."[17] However, the idea that a slave woman would turn to the court to transform these customary relationships into legally binding unions was not only preposterous in the antebellum years, it was also legally impossible. Slaves had no right to sue. Equally absurd was the notion that the relationships could have been consensual, loving, or mutually supportive. What white man would openly and willingly choose a black woman as his wife?[18] To chose one as a concubine, however, was another matter entirely. Traditional narratives from the antebellum period had no answer to this, but by asserting their newly gained legal personhood and going to court, a few former slave women tried to demonstrate that there may have been more of these consensual interracial relationships than white society had been previously willing to admit.

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[15] For a thorough discussion of the precise visions and the way they were adopted as slavery gave way to freedom, see Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration.*

[16] Though most states prohibited slaves from marrying, this was not universally true. For example, Maryland passed a law in 1777 that permitted marriages between slaves. For a test of this law, see *Jones v. Jones,* 36 Md. 447 (1872). In addition, Drawing on the state's unique civil law past, Louisiana's Supreme Court ruled in 1819 that slave marriages "acquired an incipient set of rights." However, this ruling was universally rejected by other slave states. Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America,* 131. By the time of the Civil War, interracial marriages were prohibited by law in all but two states – Mississippi and South Carolina. Pascoe, *What Comes Naturally: Miscegenation and the Making of Race in America*.

[17] Mary Boykin Chestnut and C. Vann Woodward. *The Private Mary Chestnut: The Unpublished Civil War Diaries*. Oxford: Oxford University Press, 1984, 42.

[18] Often, if and when interracial relationships were publicly revealed, the black woman was blamed for the social misconduct. As the trope went, her 'savage sexuality' enticed the otherwise proper white man into committing the misdeed. Black women were seen as either the innocuous "mammy" or the hyper-sexualized "jezebel." It was always the jezebel, with her promiscuous nature, who played a role in these interracial marriage cases. Jennifer L. Morgan. *Laboring Women: Reproduction and Gender in New World Slavery*. (Philadelphia: University of Pennsylvania Press, 2004). Deborah Gray White. *Ar'n't I a Woman?: Female Slaves in the Plantation South*. (New York: W.W. Norton & Company, Inc., 1999).

As Sally Catchings' case illustrated, interracial sex within the institutional confines of slavery was one thing; legal sanction of interracial marriage – known since 1864 as miscegenation – was quite another altogether.[19] Whether or not Sally and Augustus Catchings had engaged in interracial sex was far less troubling than the notion that she would go to court to legitimate the union and lay claim to a white man's estate. Peggy Pascoe's study of miscegenation law in *What Comes Naturally* helps make clear why this was so, and why the stakes in post-emancipation miscegenation cases were so high as a consequence. Preventing interracial marriage prevented "amalgamation," or the birth of interracial children, and, as Pascoe argues, afforded white Southern lawmakers with a device to help solidify racial categories and cement white hegemony after the institution of slavery no longer served that purpose. Yet, while the word may have been new, laws prohibiting miscegenation were not. In general, colonial law in British North America had banned both interracial sex and marriage. However, in the years following the American Revolution, statutory prohibitions on interracial relationships became less common, making possible the picture that Mary Chestnut described in her diary.[20] White men in the South regularly had sex with – often raped – and kept as concubines their female slaves.[21] The fact that children were often the product of these liaisons mattered little, since the illegitimate children followed the condition of their slave mothers, and were thus born in bondage without being recognized by their white fathers. Frederick Douglass, for example, famously fit into this category. The institution of slavery, however, prevented black women from demanding the same rights as legitimate wives.[22] The peculiar institution ensured that these relationships had no negative consequences for the white men who engaged in them, and helped render complete the power these masters held over their female slave property.

With the end of slavery and the subsequent acquisition of citizenship rights, the idea that an illegitimate concubine (former slave) could become a legitimate wife (free woman) threatened the established social order in the South. In effect, Sally Catchings, and other women like her, forced Southerners to confront a reality of slavery: interracial relationships that existed without statutory sanction, but were nonetheless commonly practiced, and the existence of such relationships had serious implications in a world without slavery. For one thing, former slave women like Sally Catchings had acquired the legal standing necessary to demand the benefits of legally recognized marriages, thereby violating the long standing social and legal prohibition against turning slaves into "respectable wives." Secondly, the prospect of legitimate interracial relationships sparked fear and abhorrence at the prospect of sanctioned sex that produced legitimate biracial children, whose very existence would threaten the purity and strength of the white race.[23] It is not surprising then, that during and in the immediate aftermath of the Civil War, states across the nation began adopting or strengthening their laws that prohibited interracial marriage.[24] Many states, in the West especially, enacted miscegenation laws for the first time

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[19] Pascoe, *What Comes Naturally: Miscegenation and the Making of Race in America*, 1, 28. Pascoe notes that "miscegenation" was coined in 1864 by "two New York politicos" who wanted to replace "amalgamation" with a word that more accurately described the biological mixing of the races. Fears over racial mixing were heightened by the prospect of emancipation, which opened up the possibility for interracial marriage.
[20] Pascoe, 20-21. Because laws that banned interracial marriage had no basis in common law, their legality was questionable. Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*, 127.
[21] Harriet Jacobs' *Incidents in the Life of a Slave Girl* recounts her experiences with a master determined to have sex with her. The lengths she went to escape this fate are a central part of the famous slave narrative.
[22] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 27.
[23] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 28.
[24] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 27-28.

during the Civil War, fearing that interracial relationships would be one of the consequences of emancipation. Mississippi and South Carolina, the only two Southern states without antebellum miscegenation laws, enacted statutes in 1865. Alabama and Georgia both adopted provisions in their new post-bellum state constitutions that banned the practice.[25] Legislatures and state constitutional conventions took these proactive steps in an attempt to instill antebellum social values into the law of post-emancipation United States. These actions should be seen as efforts to limit the degree to which emancipation would revolutionize the South. They offered the possibility for whites to regain some control over the lives of the African American population that they had once owned. It remained to be seen whether state courts would uphold these policies.

During Reconstruction, miscegenation began to trouble courts and legislatures alike precisely because it was not yet clear how to reconcile the right to marry granted by citizenship with the intent by white lawmakers to prevent racial mixing.[26] Either there had to be a clear break from the antebellum statutory restrictions against mixed race marriage, or some other basis for such laws would have to be concocted, either by legislatures or by jurists. The state needed some way to show that preventing miscegenation was in the public interest. The body of slave law that had formerly provided that justification during the antebellum period no longer sufficed.[27] Adding another layer of complexity to the picture, it was not immediately clear whose rights miscegenation laws violated. After all, such statutes not only prevented black women from marrying white men; they also prohibited white men from marrying black women, thereby circumscribing traditional white male privilege that included the ability to choose a wife.[28] The impulse to prevent racial mixing would have to be balanced against the freedoms traditionally enjoyed by white men.

Thus, as a group, post-bellum cases involving miscegenation reflected the fears and challenges that faced courts, legislatures, and white Southerners alike. But they also suggested the complicated personal family issues that former slaves had yet to resolve. Critically, post-emancipation miscegenation cases were decided during the small window of time after the Civil War when legal alternatives to the right for black women, even former slave women, to marry a white man had not been totally foreclosed by Jim Crow. They were decided during the period of fluidity before the adoption of the “one drop rule,” which defined “black” with extreme rigidity. Therefore, the possibility for shaping the future of Southern law and society was particularly promising in these “miscegenation” cases. Litigation exposed some of the complicated social practices of slavery to the light of the post-bellum – and post-emancipation – South, while simultaneously revealing emotional impulses white society had rarely sanctioned or countenanced before. By working out these issues in court, freed slaves defended their families while their white counterparts bristled as traditional racial ideologies were turned on their head.

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[25] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 30.

[26] Pascoe argues that the invention of the science of race helped justify the laws that prevented whites and blacks from procreating.

[27] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 40.

[28] Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 11. There was an inherent conflict in passing such laws because it limited the romantic choices white men could make, which “conflicted with long-standing conceptions of White men’s sexual freedoms and civil rights, including the right to choose their own wives and control their own property.” The opposite formulation, white women marrying black men, offered many other problems that Pascoe’s work spells out in detail. Such a scenario did not present itself in the cases under consideration here.

Sally Catchings was not the only former slave from Texas to claim that she had been married to her master. Leah Foster initiated a similar case. The Texas Supreme Court decided *Bonds v. Foster* in 1872. A former Texas slave, Leah claimed to have lived with her owner, Alfred H. Foster, in what she claimed to be a common law marriage. After Alfred died, Leah Foster went to court in an attempt to claim the property and other inheritance that her purported husband had bequeathed to her and their children in his will. Leah contended that Alfred was the father of her children; they were not simply illegitimate dependents of the household. The will clearly indicated Alfred's intentions, thus the case centered solely on one question: "was Leah the wife of Foster, and are her children the offspring of his loins?" The simple query had the potential to transform the Texas social order; customary interracial unions might be granted legal legitimacy.[29]

The Texas Court easily determined that Foster "was the owner of one Leah, whom he made either his wife or his concubine." Custom complicated the court's ability to sort out this matter; many white men had engaged in sexual relationships with their slaves, but few intended these unions to be recognized by law. But several of Foster's actions helped the court determine that Leah was indeed a lawful wife. In 1847, Louisiana resident Alfred Foster "took the woman and several children of hers to the State of Ohio, and established them in a home in the city of Cincinnati, where he provided them with the necessaries of life; he also emancipated the woman and her children. They remained in the city of Cincinnati four years, Foster spending a portion of each year with them." This was legal under the laws of Ohio, and sufficient to establish a common law marriage. In addition, trial records demonstrate Alfred's commitment to his family. "According to the testimony of Fields Foster, the eldest son, he spent his nights and frequently took his meals with the family." After four years in free territory, "Foster brought this family away from Cincinnati, and with them removed to the State of Texas."[30]

The information provided to the Texas court showed unequivocally that Leah had been the common law wife of Alfred, and that the will ought to be honored. Thus, in 1872, the Texas Supreme Court ruled in Leah's favor. According to the Texas court, though their marriage would not have been recognized in Texas before emancipation, the legal union that was established in Ohio had not been dissolved. Thus, after slavery ended in Texas and Leah gained full citizenship, the marriage – and rights included therein – were fully reestablished. Consequently, Leah and her children were recognized as the legitimate family and heirs of Alfred Foster. Judge Moses B. Walker wrote in the opinion for the court, "The parties continued to live together, habitating themselves as man and wife, until after the law prohibiting such a marriage had been abrogated by the 14th Amendment to the Constitution of the United States. A marriage might then be presumed in the State of Texas upon the same state of facts, which would raise a similar presumption in Indiana or Ohio." It was clear to the members of the Texas Supreme Court that Leah's race, slave status, and the antebellum prohibition against interracial marriage had been the obstacles standing in the way of the couple's legal union. Formidable as those obstacles might have been, gaining citizenship had obliterated them, and entitled Leah to enjoy all the rights of marriage in Texas. That she was a former slave and an African American woman had no bearing whatsoever on these rights. The stage was set for future interracial marriage claims.[31]

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[29] *Bonds v. Foster,* 36 Tex. 68 (1872), 68. Texas State Library and Archives, box 201-7020, file number M-6471. *Bonds v. Foster* became a central part of chapter one of Pascoe's work. The case serves as a starting point in a much larger story that chronicles the development of post-bellum miscegenation statutes and legal thinking.

[30] *Bonds v. Foster,* 36 Tex. 68 (1872), 68-69.

[31] *Bonds v. Foster,* 36 Tex. 68 (1872), 68-70.

As we have already seen, two years after Leah Foster found success in the Texas Supreme Court, Sally Catchings asked for the same recognition. Alexander T. Wilson represented the deceased and intestate Augustus Catchings and his estate. However, Sally believed she ought to assume this role, as his rightful widow. Wilson rejected the notion that this former slave could have been the lawful wife of Augustus. Rather, "she has no right title nor interest whatever in the estate… [and] Augustus Catchings has legitimate children all living in Hines County Mississippi."[32] Indeed, while a Mississippi resident, Augustus had been lawfully married to a white woman; she died before he purchased Sally, but not before giving birth to several legitimate children. It was only after the first Mrs. Catchings died that Augustus migrated to Texas. Indeed, the welfare of his children formed the basis of Sally's relationship with him; she "was brought as a hireling and for the purpose of waiting on and taking care of the said minor son," Willie. Whatever their relationship became, Augustus initially intended for Sally to care for his motherless son. The fact that Augustus had previously married a 'proper wife' and had legitimate heirs puts Sally's post-emancipation position in stark relief. While there is no necessary reason why Augustus Catchings would not have entered into a romantic relationship with Sally, the notion that he would have done so at the expense of his children's right to inherit appears dubious, and certainly seemed so to Alexander Wilson.[33]

Yet, additional factors presented in the trial transcripts complicate this picture. Alexander Wilson presented evidence that he hoped would show the degree to which Augustus had provided for Sally: he had gone above and beyond his duty as her slave owner, and she was now trying to get more from the Catchings family after she was urged to do so by her "pretended friends." However, the evidence he offered hardly accomplished Wilson's aims. Instead, it raised more questions about the true nature of the couple's relationship than it settled. For instance, Sally had six children of her own, and they too came with the Catchings family to Texas. Augustus, "as a remuneration to the said Sally for her services by his own extensions and labor and with his own means, supported, fed, clothed and cared for the said Sallie [sic] and her minor children." There is no indication in court records that Augustus purchased these children, but they remained with Sally nonetheless. Furthermore, in 1871, well after Sally's emancipation, Augustus Catchings purchased 500 acres of land in Kaufman County, "and had the deed executed jointly to himself and the said Sallie [sic]." Wilson continues, "Sallie [sic] paid nothing for said land that she has never had any means of her own except what was given her by the said Augustus." Making Sally the joint owner of property strongly indicates that the relationship between Augustus and Sally transcended the common boundaries of master and slave. While this evidence certainly does not establish firmly that Augustus wished Sally to be considered his legal wife, it does suggest that he made a concerted effort to care and provide for Sally and her children in the years following his death. By the time of the initial trial, Sally owned 250 acres of land, $200 worth of personal property, and possessed "two very fine mules" worth $500. Whether the court would let her keep the property was yet to be seen.[34]

Unfortunately, the ruling in the case left much to be desired. Rather than rule on any of the substantive issues related to Sally's status as the legal wife of Augustus, the Texas Supreme Court instead chose only to pay attention to a jurisdictional issue, and remanded it back to lower

[32] Hines County likely refers to *Hinds* County, Mississippi.
[33] *Wilson v. Catchings*, 41 Tex. 587 (1874). Transcript, 11-12. Case file M-9038, box 201-4383; Texas State Library and Archives, Austin, Texas. The date of the move was not determined by the court; it was merely recorded as "18-".
[34] *Wilson v. Catchings*, 41 Tex. 587 (1874). Transcript,10, 12, 15.

court. It was unclear which Texas county actually had the original authority to try the case.[35] Nonetheless, *Wilson* still had the potential to rattle the Texas legal community and Southern society more broadly. Like *Bonds*, the case openly challenged antebellum social conventions about interracial relations, and corroborated the notion that other former slave women might attempt to legitimate the lives they shared with slave owners by demanding that customary relationships be turned into legal marriages. Sally Catchings was the second Texas woman in two years to seek marital legitimacy with a white man, and the potential of this precedent could not have been lost on the members of the court. In Texas at least, it appeared as though the problem of turning concubines into "respectable wives" was gaining steam. Yet, as the *Catchings* decision makes clear, the court was not interested in validating *all* interracial relationships; rather, the justices insisted that the unions meet the standard of otherwise lawful marriage. Unsurprisingly, there would be no universal acceptance of interracial relationships in Texas, but nor would there be universal condemnation or prohibition.

In some instances, former slave women went to court not as the "surprise wives" of their former masters, but rather to defend open and well-known marriage to white husbands from being impugned by suspicious and disapproving whites. In the Louisiana case of *Hart v. Administrators* (1874), there was little doubt that Cornelia Hart, a former slave, had had a consensual relationship with her owner, Ephraim C. Hart.[36] However, upon his death, Ephraim's relatives – a motely crew of brothers, sisters, nieces, and nephews who seemed to crawl out of the woodwork in time for the trial– refused to acknowledge the marriage or the right of Cornelia's children to inherit their father's estate. These long lost family members believed they were the rightful heirs to the estate of E.C. Hart, and denied the possibility that a black concubine and mixed race children could ever inherit their relative's substantial fortune. As a consequence, after the death of her husband, this mother spent years fighting protracted court battles to establish herself as the lawful wife of E.C. Hart in order to secure a future for her children, as the legitimate heirs of their father's large estate.

The facts of the case were complicated, but not unusual. Cornelia began living "in concubinage" with Ephraim C. Hart in 1854. She was his slave, but also his partner. Prior to her emancipation, Cornelia and Ephraim had five children, four of whom were living at the time of the trial: Imogene, Sandy, Archie, and Cornelia. They lived as a family in Caddo Parish, Louisiana until E.C. died in 1869. Yet, the administrators of the Hart estate and the relatives of Ephraim contended that despite their cohabitation and paternity, the children "are persons of color and were conceived and born out of wedlock and while their mother a colored woman was a slave and incapable of contracting marriage" with E.C. Hart, "who was a white man" who never "legally acknowledged or legitimated" the children he had with Cornelia.[37] Testimony, however, challenged the defendants' claims.

In her testimony, Cornelia Hart asserted that she lived with Ephraim Hart "openly and publicly as his wife" from 1854 until his death in 1869.[38] Moreover, she "was recognized in the community as his wife."[39] Once legally permitted, Father J. Pierre, the family's priest, formally

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[35] When the case reached the Texas Supreme Court, there were petitions pending in both Rockwall and Kaufman county courts. The complication arose because Rockwall County was established in 1873 out of land that had previously been considered part of Kaufman County.

[36] *Hart v. Administrators,* 26 La. Ann. 90 (1874).

[37] *Hart v. Administrators,* 26 La. Ann. 90 (1874), Transcript 19-20

[38] *Hart v. Administrators,* 26 La. Ann. 90 (1874), Transcript, 57. According to trial records, Cornelia Hart had the complexion of a white woman, while her husband was darker.

[39] *Hart v. Administrators,* 26 La. Ann. 90 (1874), Transcript, 57.

married the two in 1867. Hart loved his children, his wife proclaimed. "Mr. Hart was in the habit of treating these children as his own before the world," Cornelia said, using language still used by family courts to help establish paternity. Cornelia believed they lived a life above reproach; there was no mystery about her relationship or about the paternity of her children. To their community in Shreveport, Louisiana, the Harts were husband and wife.

The family's priest, Father J. Pierre, corroborated Cornelia's story. He came to the Shreveport home of Ephraim and Cornelia Hart on November 28, 1867, when Ephraim was sick with yellow fever, and believed he was dying. "After conversation with him (Hart) of serious import," Father Pierre "celebrated the marriage between Ephraim C. Hart and Cornelia Hart," which "was a lawful marriage before the Catholic Church." While being cross-examined, Father Pierre explained why the marriage was so important. "Mr. Hart was seriously sick, and might have died before the next day." The priest "wanted to fix up the matter to the best of his ability before it was too late," and "wanted to save his (Mr. Hart's) soul, and fix up his temporal matters" in case Ephraim died immediately. The marriage became the device by which the family could be protected by Louisiana law, and a way to ensure Ephraim died in peace, which was precisely why the family's priest urged the action.[40]

Ephraim did not die in 1867; rather, he lived for another two years as Cornelia's husband. After his health scare, Ephraim wanted to ensure that "the children would be provided for," and asked Father Pierre to baptize his children. Simply put, "he intended that they should have his property." Indeed, the priest described a man who felt a great deal of anxiety about being able to provide for his children after he died. He turned to his priest for comfort and advice on this matter, and took the steps that Father Pierre suggested in order to secure his family's future. Demonstrating his intent, Ephraim Hart clearly wanted to be considered a legitimate family, and took several steps to secure that legal reality. Father Pierre performed the baptisms on December 24, 1868.[41]

Even though the judges of the Louisiana Supreme Court seemed utterly convinced by Cornelia Hart's assertions about her private life, there remained the question of whether the marriage and inheritance could be deemed legitimate. The defendants, Hart's relatives, argued that "the plaintiff being a woman of color, she was prohibited by law from marrying E.C. Hart, and that her children could not be legitimated by a marriage subsequent to their conception or birth."[42] The laws in effect at the time the two were married prohibited the interracial union, the defendants claimed, and "the pretended marriage of those persons was null as having been entered into in violation of prohibitory law."[43] Furthermore, E.C. Hart had not met the standards set by the Louisiana Civil Code to legitimate his children, even years after their birth. Thus, the family members from New York were the only legitimate heirs to the Hart family estate.

Cornelia Hart and her attorneys were ready to combat these charges. If they had been able, Cornelia argued, she and E.C. Hart would have taken the legal steps necessary to legitimate their children long before the baptism in 1868. Rather, "there existed an incapacity" that prevented them from doing so.[44] However, this "incapacity was removed by the Congress of the United States" in the Civil Rights Act of 1866, "and by the adoption of the fourteenth amendment to the

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[40] *Hart v. Administrators,* 26 La. Ann. 90 (1874), Transcript, 57, 64-66, 69.
[41] *Hart v. Administrators,* 26 La. Ann. 90 (1874), Transcript, 171, 173-176.
[42] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 91
[43] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 92.
[44] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 93.

Constitution."[45] Combined, these legal acts made the plaintiff and her children citizens of the United States, and guaranteed to them all the rights and benefits of citizenship, regardless of their race or former status as slaves. Thus, as long as the court recognized the union, there was no legal reason to preclude the family from the rights that white families enjoyed. This would violate both Congressional Act and Constitutional Amendment, and also the spirit of emancipation itself.

Though the defendants challenged the constitutionality of the Civil Rights Act of 1866, and argued that the marriage took place after the adoption of the Fourteenth Amendment, the majority of Louisiana court ignored them. Judge Taliaferro paid little attention to the pleas of the defendants, and wrote that there was "no reason to doubt the constitutionality of the act."[46] The Civil Rights Act of 1866 "made [Cornelia and her children] citizens of the United States, and relieved them of all previous disabilities they labored under on account of race, color or previous condition of slavery, by annulling previously existing laws of the State creating such disabilities, and conferred upon and vested in them all the civil rights and privileges of white persons."[47] As long as this were so, the right to marry and inherit had to be enforced by the court. "Cornelia Hart, therefore, in November, 1867, was vested with the right to enter into a contract of marriage. Our law considers marriage in no other view than as a civil contract."[48] As for the ability of the couple's children to inherit, the court declared standards set by Louisiana civil code had been met in order to make them legitimate heirs. "[W]e must bear in mind that at the time of the marriage of these parents in 1867, the incapacity in the children under the former laws of becoming legitimated on the ground of the legal inability of their parents to contract marriage at the time of the conception of the children, had been obliterated.... [I]n other words, the effect of the law of congress was to place them in every respect as to legal rights, in the situation of white children."[49] By accepting fully the Radical Republican premises of national citizenship set forth in the Civil Rights Act of 1866, the court honored the marriage and family of Cornelia and Ephraim Hart, while simultaneously reinforcing the Louisiana court's commitment to the freedom and equality of African Americans.

The case was not decided unanimously; Justices Morgan and Wyly dissented. Justice Morgan, who wrote the dissent, did not believe that "children born from parents so situated [could] be legitimated under the laws of Louisiana."[50] Morgan could not overlook the timing of the children's birth. They were born when their parents could not have been married, and this "incapacity" could not be overruled by subsequent emancipation or citizenship. Because of that fact, the civil law that otherwise provided fathers with the ability to recognize their children after their births could not be applied. "[L]egitimation could only take place if the natural children were the issue of parents who might, at the time their children were conceived, have contracted marriage."[51] The children of Cornelia and Ephraim Hart did not fit into this category, and the dissenting justice believed that the laws in effect at the time the children were born had to be respected.[52] Citizenship, under this formulation, granted rights from the moment it was bestowed

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[45] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 93.
[46] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 93.
[47] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 93.
[48] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 93-94.
[49] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 95.
[50] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 100.
[51] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 100.
[52] This was the same rationale dissenters in the Louisiana case (*Wainwright v. Bridges*) that set the date of emancipation used to reject the majority opinion.

forward; it did not, and could not have applied retroactively. There could be no wiping the slate clean. Former slave status remained legally relevant to some jurists in the post-emancipation South. However, in Louisiana, their voices would continue to be muffled by more radical leaning judicial majorities until the onset of Redemption and Jim Crow.[53]

Despite Justice Morgan's reasoning in his dissent, he seems to have arrived at his conclusion with some difficulty. The stakes of the case were obvious to him; he understood that the court had been charged with making a ruling not just about a single marriage, but about marriage rights and citizenship of freedpeople more generally. "The case is of great importance, not so much on account of the interests involved, which are large, as on account of the principle which it settles."[54] Morgan struggled with what his dissent meant for the children at stake in the case; they would be the innocent victims of the unfortunate timing of their birth.

> I know it seems hard that collateral kindred should be permitted to inherit in preference to the children of his body, no matter how begotten, and that such children should suffer from the result of a sin of which they were innocent, and which they could not prevent. But the law has put its ban upon them, white and black, and I have not the power to remove it. Hart knew when he was begetting these children what the consequences would be to them. If they suffer, it is from his fault, and not the laws, civil and moral, which he defied.[55]

For Morgan, there was no way to fully eradicate slavery from the lives of freedpeople; abolition only had the legal power to go so far. It could not alter the past or absolve the practice of slavery. A "sin" had been committed, and the law had been "defied." Accepting such a belief would render abolition anything but complete; freedpeople would continue to suffer the burdens of slavery. America's slave past would remain part of the post-emancipation present and Jim Crow future.

Luckily for the Hart children, the majority of the Louisiana court did not agree with Justices Morgan and Wyly. Ultimately, in evaluating the marriage between Ephraim and Cornelia and judging the legitimacy of their children, the Louisiana Supreme Court accomplished several things. First and foremost, the court helped define the meaning and implications of African American citizenship. In the Bayou State, it appeared as though the court would not be willing to entertain the curtailment of citizenship rights, at least not when it came to the ability to marry and inherit. Second, the court made possible the legal recognition of mixed race marriages. As Peggy Pascoe and others have made clear, this would not have been popular with the state's conservative residents (Redeemers by 1874), but the justices of the court felt compelled by the standards set by Congress to ignore this impulse.

Palpable emotions seem to leap off the pages of transcripts, records, and briefs, of the *Hart* case. A mother describes the love her husband had for their children, and the family priest explains the anxiety that a father felt about ensuring his family's future safety and financial security. This was not a story that many Southerners expected to hear. As any family might, Ephraim and Cornelia had the taken steps they believed would legally ensure the legal recognition of their union and the right of their children to inherit. Yet, in order to realize those plans, Cornelia Hart had to reveal intimate details about family relationships, struggles, and

[53] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 100.
[54] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 102.
[55] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 104.

planning. A white widow would never have had to describe such details in a public courtroom. Cornelia's status as a former slave and continued status as a person of color required that she bear this burden. Desperate to save and protect her family, Cornelia Hart chose to take her dispute to court, regardless of the certain invasion of her privacy. Just as her husband had done, she took responsibility for the future of her family by challenging the outsiders who threatened it. In the process, she demanded that the Louisiana Supreme Court uphold her rights and the rights of her children as she understood them – as the rights of citizens who deserved to be treated equally to all others. She got her wish when the court declared that it considered her mixed race children "as occupying the same position that white children occupy." The victory was thorough; Ephraim's white relatives left the South without a penny. [56]

Apprenticeship

In some instances, former slave women went to court not as wives trying to legitimize their marriages, but as mothers attempting to regain custody of children who were taken from them and bound out to white masters. These cases also involved the legitimation and establishment of families, and required a renegotiation of the relationships between former masters and former slaves. Immediately following the Civil War, many Southern states passed apprenticeship laws as part of their Black Codes (1865-1866). Leon Litwack describes Black Codes as having their ideological roots in the "antebellum restrictions on free Negroes" while still being a clear manifestation of the post-emancipation experience.[57] Apprenticeship laws in particular gave Southern lawmakers the ability to kill two birds with one stone; the laws were "legal expression[s] of the lingering paternalism (to protect the ex-slave from himself) and a legislative response to immediate and pressing economic problems."[58] Apprenticeship statutes achieved these ends by allowing black orphans or children of destitute former slaves to be placed as apprentices with white families under the guise of preventing dependency on the state. White Southerners who housed apprentices, themselves often former masters, were thus able to reap the benefits of the free labor these minor children could provide while simultaneously controlling at least a portion of the newly free population.[59] In exchange, the state was relieved of potential dependents who might further drain their already depleted coffers.

Apprenticeship was not a new concept, but it was applied in novel ways in the years immediately following the Civil War. Eric Foner rightly stresses the difference between the traditional apprenticeship models from Europe and America that were intended for "training youths in a skilled trade," and the models employed after the Civil War that "represented nothing less than a continuation of slavery."[60] Yet, while the practice resembled slavery, its ideology and purpose had changed significantly. As Northern journalist Sidney Andrews remarked, Black Codes, including apprenticeship laws, "'acknowledge the overthrow of the special servitude of man to man, but seek … to establish the general servitude of man to the commonwealth.'"[61] In other words, black labor was no longer being performed for the benefit of white masters and individual property owners; instead, it became understood as something owed to the state and the commonweal.

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[56] *Hart v. Administrators,* 26 La. Ann. 90 (1874), 95.
[57] Leon Litwack, *Been in the Storm so Long: The Aftermath of Slavery*, 366.
[58] Leon Litwack, *Been in the Storm so Long: The Aftermath of Slavery*, 366.
[59] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 201.
[60] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877,* 201.
[61] Sidney Andrews quoted in Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 202.

Consequently, apprenticeship should be understood as one limitation of citizenship to be borne by former slave parents. Many parents, however, refused to bear this burden. Instead, they had a clear understanding that the legal system could address their grievances and help them negotiate post-bellum relationships with whites. The forcible removal of their children from their family homes was not part of the freedom former slaves had envisioned for themselves, and they went to court to assert that belief. As Southern whites struggled to redefine the social order and accept black freedom in these new and unfamiliar times, freedpeople demanded their parental rights be upheld.

Southern courts bound out former slave children to provide the free labor that had formerly been done by slaves, and as a means to restore white hegemony, though they often did so believing that there were no other options. Freed slave children would certainly become homeless vagrants without the intervention of the court and the security of an apprenticeship, they reasoned. However, in some cases, this was done without the knowledge or consent of parents. Leon Litwack goes so far as to describe some post-belllum apprenticeship as "[coming] close to legalized kidnapping."[62] Not surprisingly, then, former slaves complained bitterly to the Freedmen's Bureau, demanding that their children be returned to them. In heart wrenching pleas, freedpeople excoriated lawmakers and Southern whites "'for Trying to keep My blood when I kno that Slavery is dead.'"[63] Though Congress passed the Civil Rights Act of 1866 to either invalidate or prevent Black Codes by spelling out the rights of citizenship to which freedpeople were entitled, this did not necessarily stop the apprenticeship of black children to white "guardians" or address the demands of parents looking to regain custody of their children who had already been bound out. While some freedpeople turned to the Freedmen's Bureau for help – and many received assistance there – others went directly to state courts to fight for their children. Even though the laws, courts, and the "police apparatus" had not traditionally responded to the demands of African Americans, some parents believed correctly that the state court system could help them.[64] Thus, the presence of post-emancipation apprenticeship cases suggests not only that there was a clear understanding within freed black communities that the legal system could address their grievances and help them negotiate post-bellum relationships with whites, but also that Southern courts may have been more available to black litigants than previously thought. Though black litigants may have faced an uphill climb, they regularly found judges willing to help them reunite with their children.

Unlike many other Southern states, Texas had little law pertaining to apprenticeship before the Civil War. There existed a provision for orphaned children to "bind out such minor to some suitable person who will undertake the support and education" of the child, but this law was passed in 1848, and applied primarily to white children, not to freed slaves.[65] The Texas penal code also contained a note about apprentices. It stated that "apprentices were put in the same category with children and slaves, as to offenses perpetrated at the insistence of parents, guardians, or masters."[66] Once again, this did not directly apply to *freed* slaves. Indeed, Texas,

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[62] Litwack, *Been in the Storm So Long*, 237.
[63] Quoted from Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 201.
[64] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 203.
[65] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868,* 117. *Timmins v. Lacy,* 30 Tex. 115 (1867).
[66] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868,* 118. *Timmins v. Lacy,* 30 Tex. 115 (1867).

like all former slave states, had few laws to handle the multitude of issues that emancipation had raised. Novel apprenticeship laws were passed precisely because state legislatures worried about swaths of black children becoming reliant upon states that had few financial resources to support them. Former judge and Texas court reporter George Paschal wrote pointedly of this problem.

> The sudden emancipation of four millions of illiterate people, who had hitherto been slaves--a people without property, money, or book-learning--required some change of legislation. It is not to be denied, that the shock was a great one, and that it distracted the minds of many, and caused inventions, as to how the labor should be controlled for the benefit of the old masters. Although most men had long felt, few were willing to acknowledge, that slavery was a very expensive institution of the master.[67]

Paschal and other Texans believed the emancipation of slaves forced upon civil society four million dependents, many of whom were children; and, as former already masters knew, caring for them would be costly.

The Texas Legislature passed an apprenticeship law on October 27, 1866 as a partial solution to this problem.[68] The law permitted apprenticeship if parental consent were given, if local officials deemed a minor to be "indigent or vagrant," or "if parents have not the means, or who refuse to support" their children.[69] This last provision allowed for the removal of children from their parents' care, even over the objections of mothers and fathers. As was common in the traditional laws of apprenticeship, "corporeal chastisement" was permissible when deemed necessary by "the master or mistress."[70] Apprentices were forbidden from traveling outside of the county where their masters lived, and were subject to pursuit and "recapture" by masters if they tried to "run away from, or leave the employ of" masters.[71] These minor children became entirely subject to the will of their white "guardians."

This brief history of apprentice laws in Texas came almost entirely from the headnotes of *Timmins v. Lacy* (1867). It took George Paschal just a few paragraphs to illustrate why so many former slave parents decried the attempts by lawmakers to apprentice their children. The apprenticeship law passed in Texas allowed white guardians to treat their wards as they had once treated their slaves. Moreover, it usurped the parental rights freed slaves believed they had finally gained as citizens. No longer ought they have to endure the forcible removal of their children from their family homes; that was not part of the freedom former slaves had envisioned for themselves.

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[67] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 119-120. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[68] George W. Paschal, *A Digest of the Laws of Texas*, Fourth Edition, vol. II (Washington DC: McGill & Witherow, 1874), 1192.

[69] Paschal, *A Digest of the Laws of Texas*, 1192.

[70] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 120. *Timmins v. Lacy,* 30 Tex. 115 (1867). Paschal, *A Digest of the Laws of Texas*, 1192.

[71] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 120. *Timmins v. Lacy,* 30 Tex. 115 (1867). Paschal, *A Digest of the Laws of Texas*, 1192.

Thus, freed slave and Texas resident Sarah Lacy defied the new law and contested the apprenticeship of her child, Elkin Pope. According to the terms of the new apprenticeship law, Sarah's son had been sent to live with Mary B. Timmons on January 14, 1867, "to learn the vocation of farming."[72] Mary Timmins contended that Elkin's father, Harry Pope, gave the parental consent that allowed the apprenticeship. "Harry Pope, is not able to afford said minor that paternal protection and maintenance which nature and society demand; in view of which fact, he gives his full consent to the apprenticeship of said minor to petitioner."[73] In her Appellee's brief to the Texas Supreme Court, Mary Timmins asserted that

> The primary object of the laws was to prevent in proper cases, minors from becoming a charge upon the county, and was not made for the benefit of those seeking to have minors bound to them. It is a significant fact connected with the numerous applications including this, to have minors apprenticed in this county, that in a great majority of cases the very sympathies and kind feelings of applicants, caused them to seek those generally who are able to do good work for the parties to whom sought to be apprenticed.[74]

To Mary Timmins, her "kind feelings" would protect Elkin Pope from destitution and dependency. By offering to become Elkin's guardian, Mary helped the state and the child; she was taking part in solving one of the problems created by unplanned emancipation. She had offered to take in Elkin according to the law, and believed that her guardianship ought to be supported – for the sake of the state and for Elkin Pope. Evidently, the labor he was to provide the Timmins family was not mentioned in her brief.

It did not matter to Mary Timmins that Elkin had a mother willing and able to care for him. She was unwilling to return the boy even when Sarah Lacy and her husband Moses objected to their apprenticeship.[75] They contended that "they are the legal parents of … Elkin, and are legally and rightfully entitled to the care and control of their said child…. Harry Pope…is not the legal father" of their son, and thus had no right to consent to Elkin's apprenticeship.[76] Sarah and Moses lived and worked in Cherokee County and had the means to care for Elkin and for their four other children. They believed that there was no reason why their son should be apprenticed to a white guardian when they "ha[d] a comfortable home, with provisions amply sufficient for

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[72] *Timmins v. Lacy,* 30 Tex. 115 (1867). Texas State Library and Archives, Box 201-4046, file M-3866. The case file for *Timmins v. Lacy* is among those recovered by the Texas State Library and Archives. According to the Note for Researchers in the file, it was "part of a large cache of files stolen from the basement of the Court building in the 1970's." It appears that only part of the transcript was recovered. However, the published report of the case is quite complete, and includes salient passages from the court records.

[73] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 123. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[74] *Timmins v. Lacy,* 30 Tex. 115 (1867). Appellee's Brief, 17. Texas State Library and Archives, Box 201-4046, file M-3866. Underlining in original transcript.

[75] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 124. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[76] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 124. *Timmins v. Lacy,* 30 Tex. 115 (1867).

the support of themselves and family."[77] In their arguments to the Texas Supreme Court, the Lacys asked that they simply be "let alone" to live as a family without the interference of Mary Timmins or the Texas judicial system.[78]

Yet, even the Lacys seem confused or unsure about the Texas apprenticeship law and what rights they as parents they possessed. Though they vehemently contested their son's apprenticeship, Elkin's parents submitted that if he "must be apprenticed, they prefer that your honorable court bind him to William T. Long of Cherokee County."[79] Even though the Lacys understood enough about state law to go to court and they knew that they had acquired rights as free people, certain antebellum impulses seeped into these trial proceedings. Elkin Pope's parents tried to negotiate their preferred outcomes, not unlike slaves facing sale or hire during the years before the Civil War. Walter Johnson and Ariela Gross, among others, have shown that, in a variety of ways, slaves participated in securing their own futures.[80] By selecting a different guardian for their son in the event that they could not take custody demonstrates that this was precisely what Lucy and Moses Lacy were attempting to do – hedge their bets in an attempt to negotiate the best possible outcome for their family. Even if the court did not award custody to them, the Lacys should at least have a say in where their son lived and worked.

Perhaps the Lacys felt compelled to create a contingency plan because the former slave status of Sarah and Moses Lacy and Harry Pope became central to the case, and it was unclear what bearing that would have on the outcome. While slaves, Sarah Lacy and Harry Pope were married "after the usual fashion of negro marriages."[81] They had three children, Elkin, and two other younger children. Harry abandoned his family after he came to believe Sarah had had a child with another man. Nonetheless, Harry claimed he had always been the acknowledged father of the three children, and thus had the right as a free man to consent to their apprenticeship to Mary Timmins. He believed he possessed full paternal rights.[82] In fact, Harry Pope arranged the apprenticeship with Mary Timmins himself. The two agreed that Mary would give each of Harry's children "one hundred acres of land on their arriving at the age of twenty-one years."[83] On its face, it appeared as though the apprenticeship was not only legal, but also provided a great deal more benefit to the children than most apprenticeships that simply exchanged labor for basic care. But Sarah Lacy challenged Harry Pope's claim to parental rights. Elkin had remained with

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[77] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 124. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[78] *Timmins v. Lacy,* 30 Tex. 115 (1867). "Respondents Arguments." Texas State Library and Archives, Box 201-4046, file M-3866.

[79] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 125. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[80] Walter Johnson's *Soul by Soul* describes the ways in which some slaves attempted to influence their sales. Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market*. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*.

[81] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 125. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[82] If the court found this to be the case, nineteenth century coverture laws would have granted Harry Pope full authority over his children and the decisions he made for their well being.

[83] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 127. *Timmins v. Lacy,* 30 Tex. 115 (1867).

his mother after his father was sold away from the home he had shared with his children.[84] Sarah had raised and cared for Elkin throughout his life. Though Harry attempted to see Elkin and his other children frequently even after he had been sold, he was not their primary caregiver. Still, Harry believed he retained his parental rights because he had not abandoned his children by choice. This belief prompted him to contract his children's labor to Mary B. Timmins.

Complicating matters further, believing she had parental rights over her children, Sarah Lacy had hired her son out to G.W. Pearson. When Elkin and her other son, Chaff, began working for Pearson, Robert Timmins, the son of Mary, "went to Pearson's house with a double-barreled gun, and carried said children back" to the Timmins household, "claiming them under a contract." Undaunted, the children quickly returned to their mother and the employ of G.W. Pearson, only to be once again hauled off by Robert Timmins, "under an order from the [Cherokee] county court" that had approved the initial apprenticeship. In post-emancipation Texas, where African Americans had supposedly become full legal persons, a white man with a shotgun and a court order absconded with two black children. This was not the freedom that many former slaves believed they had achieved, and it was certainly not the sort of freedom Sarah Lacy was willing to accept. It was, however, what white Southerners like the Timmins' had come to expect – legal validation of their white privilege and continued access to black labor.[85]

This case leaves plenty of room to speculate about the psychological damage and fear experienced by the Lacys and young Elkin Pope as a result of their dangerous encounter, but there is no conjecture necessary to characterize the actions of Robert Timmins. By showing up armed, Robert Timmins attempted to reinstitute the violence and terror that pervaded and propped up the institution of slavery, and the actions certainly ought to be viewed as an assertion of white hegemony and authority over his former property. It seems inescapable that in the mind of Robert Timmins and by extension, his mother Mary, it had been *their right* to Elkin's labor that had been violated, not Sarah Lacy's claim to motherhood, and Texas law gave them permission to act accordingly – with guns loaded. This response might have been acceptable in 1857, but not in 1867. Sarah and Moses Lacy refused to accept these actions without putting up a fight of their own.

Despite the attempt to keep custody of the boy who worked for her, Mary Timmins did not receive the verdict she hoped from the Texas Supreme Court. The justices of this tribunal agreed with the lower court's assessment and declared that the only relevant question was whether Harry Pope had the ability "to authorize the court to apprentice" Elkin Pope, "not withstanding the opposition of his mother, and her ability to support and maintain him."[86] Implicit in this question was the legality of the marriage between Sarah Lacy and Harry Pope and the conditions surrounding the customary marriages of slaves. Under other circumstances, the appropriate custody of Elkin and his siblings would be easy to determine.[87] If his parents had

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[84] Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 127. *Timmins v. Lacy,* 30 Tex. 115 (1867).

[85] *Timmins v. Lacy,* 30 Tex. 115 (1867), 128-129. For a larger discussion of traditional white privilege in Southern courtrooms, see Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*.

[86] *Timmins v. Lacy,* 30 Tex. 115 (1867), 135.

[87] For a thorough discussion of the laws of marriage in nineteenth century America, see Hendrik Hartog, *Man and Wife in America* (Cambridge: Harvard University Press, 2000), Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*.

been married at the time of his birth, his father would have had total control over his children. If his parents had been white and unmarried, Elkin would have been considered a bastard, and his mother would have had sole custody, unless his father legitimated him after the fact (as happened in the case of *Hart v. Administrators*, discussed above). Because his parents were slaves in a customary, but not legally sanctioned marriage, his status became murkier. Did the newly acquired status of his parents affect Elkin's relationship to them? Could his father retroactively legitimate him? The court's view of his parent's marriage would determine which parent had the right to make legal decisions for Elkin.

Ultimately, the Texas Supreme Court proclaimed that Elkin Pope was a bastard, because "there can be no lawful wedlock between parties who are under disability and cannot exercise the freedom of consent essential in any contract."[88] These were the legal limits slavery forced upon Sarah Lacy and Harry Pope; according to the court, their children could not have been legitimate under Texas law because they were born as slaves to slave parents who were barred from marrying. However, the justices questioned whether emancipation had changed these otherwise well-accepted beliefs on slave marriage. "'Emancipation gives to the slave his civil right; and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during slavery, produces all the effects which result from such contract among free persons.'"[89] In other words, emancipation had the potential to make legal the marriage that had once been understood solely as customary. Yet Elkin Pope's parents had not been "married" in any sense at the time of emancipation; they had already separated. Furthermore, each had new spouses. To the Texas Supreme Court, this meant that Elkin and his siblings could not be retroactively legitimated. "For most certainly emancipation can have this effect only in such connections as are existing between slaves at the time it takes place."[90] Moreover, the justices believed that Harry Pope had in fact abandoned his family. Thus, they believed that Sarah Lacy, the biological mother of Elkin, had retained full custody of her child. Because she did not grant her permission for the boy to be apprenticed, and because she had the means to care for him, the apprenticeship was therefore invalid. Sarah and Moses Lacy were reaffirmed as the rightful parents of Elkin Pope.

In an unusual passage of the court's opinion, the justices communicated genuine concern for Sarah Lacy, while simultaneously exposing their misunderstanding of slavery. Chief Justice George Fleming Moore, author of the opinion, wrote

> Surely it is not to be supposed that merely because the father, when discharging his duties as such, is regarded as the head of the family, may, after years of desertion and abandonment, during which he has left his wife to struggle unaided for their support, rob her, by means of this law, of the society of her children, and thus add to the injury already done her the severest blow which can be inflicted upon a woman, whatever may be her condition in life.[91]

On the one hand, we see the court express distress at the "abandonment" of Sarah, and the idea that she might be further injured by the man who caused her to "struggle unaided for their support." Sarah Lacy's status as a former slave seems not to enter into the justices'

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[88] *Timmins v. Lacy,* 30 Tex. 115 (1867), 135.
[89] *Timmins v. Lacy,* 30 Tex. 115 (1867), 137. Texas Supreme Court quoting *Girod v. Lewis (6 Mart. 559)*
[90] *Timmins v. Lacy,* 30 Tex. 115 (1867), 137.
[91] *Timmins v. Lacy,* 30 Tex. 115 (1867), 138.

condemnation of Harry Pope; "whatever may be her condition," she was entitled to better than "the severest blow which can be inflicted upon a woman." On the other hand, the court ignored the fact that this "abandonment" was due, at least in part, to the condition of slavery under which both Sarah and Harry lived. Harry could not have, and would not have been expected to provide support for his children who were born as slaves. Moreover, he had little control over his sale, which further prevented him from assisting his family. While the court took Harry and Sarah's former slave status into account for the purposes of determining the legality of their marriage, and thus the legitimacy of their child, the justices overlooked the fact entirely when condemning Harry Pope for actions beyond his control. [92]

The ruling in *Timmins* preserved the family Sarah Lacy had created, but it did so by affirming the illegitimacy of Elkin Pope and ignoring the constraints that Harry Pope suffered as a slave. Put another way, the Texas Supreme Court seemed committed to preserving the established families of former slaves, but it had little understanding of the complicated circumstances under which these families came into being. This boded well for parents with custody who did not want their children apprenticed to white guardians; the Texas court would not uphold illegally obtained apprenticeship contracts. However, the former slave status of those parents who did not have well-established custody of their children may have had an injurious effect, despite the fact that the peculiar institution had prevented parental ties from fully forming in any legal sense. These parents would have found it far more difficult to keep their children out of harm's way, whether they had the means to provide for them or not.

While this ruling had mixed results, it is not difficult to see why the Texas court ruled in the way it did. Handling the cases of former slaves was new territory for them, and as a result, applicable law was difficult to find. Thus, the court applied the laws and precedents that most closely resembled the scenario they had been asked to review. In essence, judges took laws and precedents that had not been designed to apply to the predicaments of former slaves, and forced them to fit. In *Timmins v. Lacy*, this meant holding the members of the Lacy and Pope families to the same standards as white Texans, despite their slave pasts. For some former slaves like Sarah Lacy, this was advantageous, but for others like Harry Pope, it held them to a legal standard they could not possibly have met. The cruel irony inherent in this was that although former slaves sought the full enjoyment of freedom and citizenship that matched that of whites, achieving that equality did not necessarily help produce the legal outcomes they desired.

Unlike in Texas, apprenticeship laws had been on the books in North Carolina since the colonial period, and some were specifically directed toward free black children.[93] The law written in the Revised Code of 1854 stated clearly that "it shall be the duty of the several courts of pleas and quarter-sessions to bind out, as apprentices, …the children of free negroes where the parents with whom such children may live, do not habitually employ their time in some honest,

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[92] George Fleming Moore was born to a planter family in Elbert County, Georgia in 1822. He was raised primarily in Alabama, where began studying and practicing law in 1844. He moved to Texas in 1854, and became one of the State Reporters in 1858. He served briefly in the Texas Cavalry, until he was elected to the Texas Supreme Court in 1862. Moore was removed from the court in 1867, while the state was under military rule. He returned to practicing law until he was re-appointed to the court in 1874. He resigned from the court in 1881, and died in 1883. University of Texas at Austin Tarlton Law Library Digital Collections. "Justices of Texas 1836-1986: George Fleming Moore." Accessed July 11, 2013. http://tarlton.law.utexas.edu/justices/profile/view/71

[93] John Hope Franklin, *The Free Negro in North Carolina, 1790-1860*. (Chapel Hill: University of North Carolina Press, 1943), 122. Free black children were bound out to white masters as early as 1733.

industrious occupation; and all free base born children of color."[94] *Beard v. Hudson* (1867) required the North Carolina Supreme Court to pass judgment on this antebellum statute during the post-bellum period, testing whether the old law would apply under radically new circumstances. Thus, the ruling had the potential to influence the continued apprenticeship of black children in the years following the Civil War, and the role that the courts would play in the maintenance of those apprenticeships.[95]

The County Court of Rowan apprenticed John Hudson, an African American boy who was the son of Nicey Hudson, to John Beard during the Fall 1859 term. John Hudson was ordered to work for Beard until he reached the age of twenty-one. However, the minor did not stay under Beard's care for that long. In May of 1865, just as the Civil War was coming to a close, John ran away "and was then living in an idle and disreputable manner, with his mother."[96] Beard sued Nicey Hudson and demanded that the boy be returned to him. In the original trial in the county court, and then again in the appeal at the Superior Court of Rowan County, Beard was denied his request "upon the ground that" neither court "had the power so to do."[97] In response, John Beard's attorneys argued before the North Carolina Supreme Court that the "only question in this case is whether the county courts have power to bring apprentices into court."[98] If they did, then John Hudson ought to be returned to John Beard. If they did not, then the court had to accept that "a free negro child has left his master and is running at large, subject to no restraint but its own will, liable to all the nice crime generally found dwelling with idleness."[99] A scenario like this ought to be avoided, Beard argued, for many reasons. It put "society at large" at risk of "having an increase of the elements of corruption thrown upon it." Presumably, black children were the "elements of corruption" to which Beard's brief referred. It harmed the indentured child by preventing the master from "the chance of doing his duty in educating his apprentice," and, it hurt the master by depriving him of the boy's labor. Certainly, if the court had the power to apprentice the boy in the first place, it must also have the ability to continue overseeing the relationship between the master and the child, thereby preventing the unsettling situation that might otherwise arise.[100]

The plaintiff's argument overlooked a very important fact. John Hudson was not "running at large;" rather, he had run away from his court-appointed guardian to live with his mother. The 1860 Census lists Nicey Hudson as a free woman, who was the head of her own household. Though alleged by John Beard, it remains unclear whether or not this household was actually an "idle and disreputable" one. Nicey Hudson had four other children living with her, and none had been apprenticed like their brother John. This suggests that Nicey had resources enough to support them, making her "idleness" questionable. Nor is it clear from the remaining records why young John ran away to his mother in May of 1865. Perhaps he was mistreated

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[94] *Revised Code of North Carolina, Enacted by the General Assembly at the Session of 1854*. (Boston: Little Brown & Company, 1855), 77-78.

[95] *Revised code of North Carolina, Enacted by the General Assembly at the Session of 1854*, 77-78.

[96] S.F. Phillips, *Reports of Cases at Law Argued and Determined in the Supreme Court of North Carolina*, vol. 61 (Raleigh: Nichols, Gorman & Neathery, 1868), 180.

[97] Phillips, *Reports of Cases at Law Argued and Determined in the Supreme Court of North Carolina*, 180.

[98] *Beard v. Hudson,* 61 N.C. 180 (1867). State Library of North Carolina, Record Case Number 8888. Argument of Plaintiffs Counsel, 1.

[99] *Beard v. Hudson,* 61 N.C. 180 (1867). State Library of North Carolina, Record Case Number 8888. Argument of Plaintiffs Counsel, 1.

[100] Phillips, *Reports of Cases at Law Argued and Determined in the Supreme Court of North Carolina*, 180. *Beard v. Hudson,* 61 N.C. 180 (1867). State Library of North Carolina, Record Case Number 8888. Argument of Plaintiffs Counsel, 1.

while under the care of Beard. Maybe he missed his mother and siblings. Or, quite possibly, John Hudson believed that the end of the Civil War meant that he was no longer required to have a master at all. Whatever his reason, John Hudson preferred to live with his family instead of John Beard.[101]

John Hudson's reasoning mattered little to the North Carolina Supreme Court. They ruled that he must return to the Beard household to complete his term of indenture, without mention of the circumstances that led to the suit. Rather, in 1867, Justice Reade dedicated his opinion to the explication of the proper use and necessity of apprenticeship laws and to the court's role in administering the indenture. The state Supreme Court found that the lower courts had erred in refusing to aid John Beard. Indeed, "it will be seen that the contract of binding, the indentures, is not between the master and the apprentice, but between the master and the court."[102] In this formulation, the apprentice and the guardian had entered into an agreement with the court, not with each other. Therefore, it was the duty of the court to ensure that the master sustained his legal duties to care for the apprentice as well as to guarantee the apprentice "should serve the master." If this relationship broke down in some way, the court was obligated to step in. "The power of the court over orphans does not cease when they are bound out.… While the ordinary relations of master and apprentice exist, the court ought not to interfere. … [B]ut when the relation is wantonly broken, or grossly abused, it becomes the duty of the court to interfere." Thus, apprenticeship laws cast North Carolina courts in the role of regulator; it would be up to judges to determine the terms of apprentice and decide whether those terms were being met. In the case of John Hudson, the North Carolina Supreme court ruled that they were not. "The apprentice had wantonly left the master's service, and was living in 'an idle and disreputable manner.'" Thus, it was "the duty of the court to have him brought and delivered to the master anew." Once again, the antebellum past factored into the court's decision. The apprenticeship contract superseded the fact that all parties involved now shared the same status as citizen. Nicey Hudson's claim to parental rights went unheeded.[103]

Despite the fact that *Beard v. Hudson* originated from circumstances set in motion before the Civil War, the post-bellum ruling had clear implications for the children who were bound out during the Reconstruction years. The North Carolina Supreme Court did not miss the opportunity to comment on precisely this. "In the new and embarrassing circumstances which exist the master is to be much commended, for that he forbore the exercise of his own undoubted powers over his apprentice and invoked the powers of the court."[104] In the midst of the early years of Reconstruction, John Beard restrained himself from acting violently in his attempt to recover his runaway apprentice, and evidently, this was laudable. Certainly, the state's antebellum apprentice code gave him the right to corporal punishment and to retrieve his ward, but the court acknowledged and commended Beard's prudence in seeking other avenues to solve his problem. Given the upheaval of the Civil War and the subsequent emancipation of slaves, the court believed "It is best that the colored population should be satisfied that they are liable to no unlawful impressments, and that they should see that what is required of them has the sanction of the law. It may then be hoped that they will be contented, and will cheerfully submit to what they

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[101] Ancestry.com. *1860 United States Federal Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2009. Images reproduced by FamilySearch. Year: *1860*; Census Place: *County North of the NC RR, Rowan, North Carolina*; Roll: *M653_912*; Page: *336*; Image: *340*; Family History Library Film: *803912*. *Beard v. Hudson,* 61 N.C. 180 (1867). State Library of North Carolina, Record Case Number 8888. Transcript, 2.

[102] *Beard v. Hudson,* 61 N.C. 180 (1867), 180.

[103] *Beard v. Hudson,* 61 N.C. 180 (1867), 181-183.

[104] *Beard v. Hudson,* 61 N.C. 180 (1867), 183.

might otherwise mischievously resist."[105] The law, of apprenticeship and otherwise, could and would be used to both control and care for North Carolina's African American population. Justice Reade and his fellow jurists believed state courts provided peaceful venues for doing this successfully and effectively, as long as proper procedures were put in place and followed. By invoking the archetype of the 'cheerful slave,' Reade made clear that he believed this was possible given his understanding of African Americans as a people.

The problem, it would seem from the *Beard* case, was not with the apprenticeship of black children; rather, it was ensuring that they and their parents acquiesced to the arrangements without a fight. Yet, this did not fully capture the beliefs of the North Carolina Supreme Court. In *Beard*, the initial apprenticeship was contracted legally, and the court believed that the child had no other suitable home in which he could live. However, in a case that arose after the war, regarding the state's new Black Code, the justices viewed the rights of parents and children far more capaciously. Many black families were alarmed by the adaptations made to the North Carolina apprenticeship codes during the Black Code period, and the justices of the state supreme court took the claims of wrongdoing seriously. In 1866, the General Assembly passed an "Act Concerning Negroes and Persons of Color or Mixed Blood," which included specific provisions for their apprenticeship. Section four of the statute dictated that former masters would be favored over others when it came to the indenture of African American children. The law read, "That in the binding out of apprentices of color, the former masters of such apprentices, when they shall be regarded as suitable persons by the court, shall be entitled to have such apprentices bound to them, in preference to other persons."[106] Even though apprentices were to receive an education and some monetary compensation as part of their arrangement, this particular section of the state's Black Code proved to be the most offensive to former slaves; it was a blatant attempt to reinstitute their bondage.[107]

The Supreme Court of North Carolina confronted this very provision *In the Matter of Harriet Ambrose and Eliza Ambrose*.[108] Harriet and Eliza Ambrose, who were thirteen and fifteen years old, objected to their apprenticeship to Daniel Lindsay Russell, Sr,. Russell himself was a prominent planter, judge, and state legislator in North Carolina.[109] He claimed custody of the two girls with an order from the Robeson County Court in December 1865, just months after losing his slave labor force to emancipation. Indeed, as historian Roberta Alexander writes, "Russell had kidnapped several black children and kept them in jail until the county court bound them out to him."[110] He did not bother to hide his actions, but he also did not foresee the actions of the enraged parents of Henrietta and Eliza Ambrose. The girls' mother and stepfather, Hepsey Saunders and Wiley Ambrose, had been Russell's slaves prior to gaining their freedom, and they vehemently opposed the new arrangement. They claimed that they had never given their consent to the indenture of their daughters, and they had been given no "notice of the proceedings against them, and were not present when the order of the county court was made" to apprentice the two

[105] *Beard v. Hudson,* 61 N.C. 180 (1867), 183.
[106] Public Laws of North Carolina, session of 1866, p. 99; and Senate Ex. Doc. no. 26, 39 Cong., 1 Sess., p. 197. March 10, 1866
[107] Alexander. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67*, 45.
[108] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867).
[109] Paul Finkelman. *Encyclopedia of African American History, 1619-1895: From the Colonial Period to the Age of Frederick Douglass. F-Q*. (Oxford: Oxford University Press, 2006), 265.
[110] Alexander. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67*, 118.

girls.[111] They would not stand idly by as their children were forced to work for their former owner.

Using lawyers provided by the Freedmen's Bureau, the black family claimed that the apprenticeship "violated the Civil Rights Act of 1866" because the children possessed rights as free citizens. Furthermore, the girls were part of an independent and established household that was legitimate under the law, and thus they could not be taken from their parents without consent. The arguments made by the Ambrose family demonstrate several things. First, Hepsey Saunders and Wiley Ambrose did not want their daughters to work for their former owner in conditions that resembled slavery. Second, they understood that they had the right to go to court to challenge the apprenticeship of their daughters as legal parents and guardians, and they believed that their children also possessed certain rights as legal persons. Even though Russell was clearly a man of power and means, these resolute parents, emboldened by newly acquired rights, had little problem taking him to court and insisting that he return their daughters. In short, the Ambroses were aware that a legal wrong had occurred and that as free people, they had the right and ability to challenge it. They asserted their legal rights on behalf of and in defense of their family.[112]

Their pleas did not fall on deaf ears. Though the North Carolina Supreme Court justices remained committed to apprenticeship as a legal enterprise, they also became increasingly aware of and disturbed by the abuses of white guardians. Yet, as was similarly made clear in the opinion to *Beard v. Hudson*, the court was also sensitive to the social changes wrought by the Civil War and emancipation. "The war has impoverished the country and made wrecks of the estates of orphans; its casualties have greatly increased their numbers; and one-third of the whole population are indigent colored persons."[113] The sheer number of children who might be bound out by the court had increased tremendously. "[T]he exceptional cases which we formerly had must be greatly multiplied, and the responsibilities and duties of the county courts must be increased in proportion."[114] Thus, we find a reaffirmation of the ruling in the *Beard* case; local courts were in fact responsible for and had jurisdiction over the relationship between master and apprentice. This obligation demanded that judges step in when necessary to review, regulate, and provide oversight of the relationship between master and apprentice. Furthermore, given the increase in the number of apprentices being bound out, the justices believed "the duties and the rights of both apprentices and masters, in the proceedings for binding, should be defined and understood."[115] In this regard especially, something was amiss in the Ambrose case.

Justice Reade, who again wrote for the North Carolina court, found the idea of a court-ordered apprenticeship being made without the presence of the parties it implicated completely contrary to law. The Ambrose family was legally entitled to more consideration than they received from the Robeson County Court. "We have no hesitation in saying that in all cases of binding apprentices, whether white or colored, it is the right of the persons to be bound to have notice, and it is the duty of the court to see that they have notice; and it is, to say the least, *prudent* in the court *to require* that the persons should be present in court."[116] Race could not be used to justify unique legal action to which white families would not be subjected. Justice Reade

[111] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 93.
[112] Finkelman, *Encyclopedia of African American History, 1619-1895: From the Colonial Period to the Age of Frederick Douglass. F-Q*, 265.
[113] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 95.
[114] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 95.
[115] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 95.
[116] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 95.

stopped just short of charging the lower court judge with negligence for failing to provide the Ambrose's with notice, but the implication was clear. He claimed that if Judge Gilliam of the County Court had bothered to hear from the petitioners, he would have found that Harriet and Eliza were "industrious, well behaved and amply provided for in food and clothing. They live with their mother and step-father, who are of good character and are well to do."[117] Given these rather ordinary circumstances, "What interest had society in having these relations broken up, and themselves put under the care of strangers, with no affection for them nor any other interest, except gain from their service?"[118] It was clear to the North Carolina Supreme Court that the original apprenticeship of Harriet and Eliza to their parents' former owner had little or nothing to do with providing for indigent children and everything to do with acquiring cheap labor.

The highest court in the Tar Heel State refused to allow the apprenticeship of Henrietta and Eliza Ambrose to continue. This was a family of free persons, who by virtue of the Civil Rights Act of 1866 possessed all the rights of citizenship that whites enjoyed – including due process of law. Thus, they had to be made aware of the original apprenticeship proceedings. "The Constitution and laws of the country guarantee the principle, that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made party to the proceedings in which it shall have been obtained."[119] Judge Gilliam of the Robeson County Court had not granted the Ambrose family the rights of free citizens when he ordered the apprenticeship of Harriet and Eliza without providing notice. The North Carolina Supreme Court thus believed, "If judgment be rendered…against a person who has no notice to defend his rights, it is no judgment at all….The binding was void, and therefore they are entitled to their discharge, and to go wheresoever they will."[120] As free persons and citizens of North Carolina, the Ambroses had the legal right to live as a whole family in the way that they wished.

The ruling in *Ambrose* had a great effect on North Carolina. Post-emancipation apprenticeship contracts made contrary to the standards put forth in this ruling were declared null and void.[121] Many other African American parents sought the release of their own children upon learning of the verdict. For its part, the Freedmen's Bureau continued to alert courts throughout North Carolina to other questionable apprenticeship orders.[122] This is not to say that the abuse of freed children stopped altogether, but the legal sanction of such actions would no longer be tolerated. In effect, the ruling in *Ambrose* effectively eviscerated the apprenticeship section of North Carolina's Black Code. At the same time, the ruling had merely required courts to uphold basic due process rights, which was not particularly radical. The justices on the North Carolina Supreme Court were not progressive, but they were committed to basic and well-established legal principles. In striking down the North Carolina Legislature's new apprenticeship law, even over the objection of both lawmakers and many former slave owners who hoped to receive the benefit of apprentice labor, the court refused to curtail due process rights on the basis of race.

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[117] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 95-96.
[118] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 96.
[119] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 93.
[120] *In the Matter of Harriet Ambrose and Eliza Ambrose,* 61 N.C. 91 (1867), 93, 97.
[121] Alexander. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67*, 118.
[122] Alexander. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67*, 118-119.

Consequently, the Supreme Court of North Carolina overrode the will of the (white) people of the state in favor of the rights of citizenship for former slaves.[123]

Inheriting from Former Masters

Unlike cases regarding interracial marriage and apprenticeship, cases involving inheritance from former masters were not necessarily directly tied to the preservation of black families, though many of the cases did indeed provide land and money to families of freedpeople, ensuring their livelihood and wellbeing. However, if we take paternalistic masters at their word, and accept that slave owners saw their slaves as part of their extended families, then these cases are indeed about family matters. No matter how we see these cases, they were unequivocally a part of post-bellum renegotiation of the relationship between Southern whites and African Americans. Most of these cases followed a specific pattern. In their wills, some slave masters provided for the emancipation and the compensation of their slaves. Often, the slaves themselves were aware of these provisions, and were intent on collecting what had been bequeathed to them when the time came. However, this was not always a straightforward process; there were several common complications that made inheritance difficult. For instance, some states, like Texas, forbade the emancipation of slaves in an effort to prevent the growth of a free black population. Since the ability to inherit was predicated on one's freedom and legal personhood, slaves had to move out of their home state or be sent to Liberia in order to collect the funds that had been promised to them. Some wills took this into account directly, and provided for the necessary journey. However this may have been stipulated in antebellum wills, it was no longer necessary in a post-emancipation United States. In addition, family members of the deceased or court appointed administrators regularly challenged provisions that provided for slaves in an attempt to secure greater wealth for themselves or for the estate more broadly. While enslaved, African American beneficiaries would have had little recourse available to them given their inability to sue. For the cases resolved during Reconstruction, it was unclear how emancipation would affect a freed slave's ability to inherit from his or her former master. Most of the wills in question emancipated slaves before bequeathing anything to them; if not emancipated in the manner stipulated, it remained unclear whether the rest of the provisions could be upheld.

Like so much else, these issues would be navigated on a case-by-case basis in the former slave South, making outcomes entirely contingent upon peculiarities of the case and on local law. As had been true during the antebellum years, state law had to be or be made malleable enough to meet the demands of highly unusual plaintiffs, because there was little positive or case law to direct judges in their rulings. Moreover, the confusion and destruction of property caused by the Civil War also frustrated the efforts of jurists. In some instances, legacies that had been promised could not be paid due to the newfound insolvency of an estate. In others, it was unclear whether the former slaves before the court were the same persons named in a will, or whether they were simply looking for a lucky break. Thus, for the freedpeople seeking to inherit, results were mixed. As has been seen in other cases reviewed in this chapter, the status of former slave worked to the advantage of some and to the disadvantage of others. Freedom ensured a windfall for some African Americans, while it prevented others from inheriting. The complicated reasons for this can only be demonstrated by examining the cases themselves.

In 1867, the North Carolina Supreme Court heard the case of *Hayley v. Hayley*. On June 13, 1864, Holiday Hayley of Northampton County, North Carolina died. In his will, dated

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[123] Alexander, *North Carolina Faces the Freedmen: Race Relations during Presidential Reconstruction, 1865-67*, 118-119.

August 5, 1857, he provided for the emancipation of some of his slaves and bequeathed land and money to them. William H. Hayley, Holiday's next of kin, became the court appointed administrator of the estate when the testator died in 1864.[124] The slaves who were named in the will, Alfred, Octavius, Jackson, Louisa, and Paul, requested their legacies from William Hayley, but he refused to grant them, seeking to keep the estate intact for the benefit of the late man's white relatives. Holiday Hayley never married, but the slaves named in his will claimed to be his illegitimate children, "begotten of the bodies of two of his female slaves."[125] It is unclear whether these claims were accurate, but all of the plaintiffs in the case – the former slaves – adopted "Hayley" as their last name, perhaps suggesting their direct relation to Holiday. Similarly, it is unclear whether the alleged paternal relationship had any bearing on Holiday Hayley's decision to bequeath land and money to them.

Whatever his reasons, Holiday Hayley's will was explicit. First, he wished "to set free" certain slaves, including the named plaintiffs, and two slaves who died before the case was settled. Second, he decided to "give and bequeath" the named slaves "half of the tract of land I now live on to them and their heirs forever, including the buildings."[126] Third, Holiday Hayley left to the named slaves "the sum of seven hundred dollars…to be paid to them by my executor." Finally, the will made clear that the executor of his estate should do everything within his power to ensure the freedom and wellbeing of the slaves. "It is my desire that if the above named liberated slaves can not remain in the slave states and enjoy their freedom, then in that case, my executor send or carry them to one of the non slave holding states, or to some other places, where they can be free."[127] Holiday Hayley was clear; he intended the slaves he named in his will to be freed at all costs, and that they should be provided for by the proceeds from his estate.

Though his will was unambiguous, the executor of the will, William Hayley believed that the persons named in the testator's will could not receive the legacies they were promised. When Holiday Hayley died in 1864, North Carolina was a member of the Confederate States of America, and thus the will could only be carried out according to the new national and state laws. During that time, the state passed a law that "declared void all directions for the emancipation of slaves made by will," making it impossible for the named slaves to be emancipated or to receive any legacy. They were not "persons *in esse*," meaning literally, they did not exist as legal persons. Moreover, contended the administrator, the slaves were not emancipated according to the provisions laid out in the will, "*ergo*" Holiday Hayley "did not intend to make any provision for them if they should be liberated in any other manner."[128] But the war, and Hayley's death intervened. Emancipation, though probable, was not a foregone conclusion in 1864. The laws in effect at the time of Hayley's death precluded the inheritance, but by 1867, when the case was decided, those laws had been nullified by the Union victory in the Civil War. Thus, one of the major questions before the North Carolina Supreme Court centered on the influence that the Tar Heel State's Confederate past had on the now freed slaves named in Holiday Hayley's will.

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[124] In some instances, the case file indicates that William Hayley was the son of Holiday Hayley. However, in other instances, he's referred to as the "next of kin." The former slaves who were suing William claimed that Holiday had never married, but had fathered illegitimate children with two of his slaves.

[125] *Hayley v. Hayley,* 62 N.C. 180 (1867). State Archives of North Carolina, Record Case Number 8865.

[126] *Hayley v. Hayley,* 62 N.C. 180 (1867). State Archives of North Carolina, Record Case Number 8865. Copy of Holiday Hayley's Will, 1.

[127] *Hayley v. Hayley,* 62 N.C. 180 (1867). State Archives of North Carolina, Record Case Number 8865. Copy of Holiday Hayley's Will, 2.

[128] *Hayley v. Hayley,* 62 N.C. 180 (1867), 182.

This legal predicament would not have arisen had the will been executed prior to secession or after 1866, when the ordinance of emancipation was passed by the North Carolina legislature. But because the testator, Holiday Hayley died in 1864, "during the war," it was possible that the timing "work[ed] the effect of defeating his will."[129] However, the majority of the justices of the North Carolina Supreme Court did not believe that it did. Rather, they concluded, that "the fact of being liberated is the essence of the thing, and the manner of its being done is a mere circumstance which does not affect the validity of the legacies."[130] Holiday Hayley intended for his slaves to be free, and though it did not happen in the manner prescribed, it did happen. According to Justice Pearson, "the paramount intention to make ample provision for these slaves if liberated, no matter how, and to give them a fair start in the world, is clear."[131] For the majority of the court, the intent of Holiday Hayley was of greater importance than any technical legal argument the administrator could make, for there was "nothing to show that the legacies were at all to depend on the manner in which their emancipation was effected."[132]

In his opinion, Justice Pearson noted that the instability and uncertainty of the wartime years played a role in the majority's ruling. Given the rapid change in public law, Pearson did not believe that Holiday Hayley knew about the new Act of 1861 that prevented the emancipation of the slaves he named in his will. He probably knew about Lincoln's Emancipation Proclamation, and assumed that abolition would end slavery if the Confederate Armies should fail. But, he did not change his will. This indicated to the court that Hayley intended explicitly "that the slaves should have the legacies" irrespective of the way they came by their liberation.[133] Moreover, the fact remained that the Act of 1861 would not, and could not be upheld by the state courts in 1867 because "none of the acts of the State government as then administered, were valid." The majority of the justices on North Carolina Supreme Court believed that the Confederacy itself had been illegal, and as a consequence, none of the laws passed while North Carolina belonged to it could be enforced. This echoed the US Supreme Court ruling in *Texas v. White*, made in 1869. The courts in 1864, when the testator died, were "part of a wrongful State government," and could not "have given effect to these legacies," but "the whole condition of things [had] changed" by the time the state Supreme Court heard *Hayley v. Hayley.*[134] Thus, those named in Holiday Hayley's will, were entitled to, and would receive their legacies.

Justice Battle wrote a dissent in this opinion. He believed that the laws in effect in 1864 had to be upheld. "It is admitted that the complainants were never under the control of the Federal forces before the death of their master, but on the contrary, remained with him until that event, serving him apparently as they had done before the commencement of the war. I conclude therefore, that they were his slaves at the time of his death."[135] Here, Justice Battle presaged the later decision of *Harrel v. Watson*, which determined the date of emancipation in North Carolina. The ruling, as was detailed in chapter two, relied on the fact that laws in effect at the time a contract was executed became a part of the contract itself. Justice Battle believed the same was true of wills, and because the will took effect in 1864, the 1861 law preventing the emancipation of Hayley's slaves ought to win out over other considerations. Thus, "as slaves, they were

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[129] *Hayley v. Hayley,* 62 N.C. 180 (1867), 181.
[130] *Hayley v. Hayley,* 62 N.C. 180 (1867), 181-182.
[131] *Hayley v. Hayley,* 62 N.C. 180 (1867), 182.
[132] *Hayley v. Hayley,* 62 N.C. 180 (1867), 183.
[133] *Hayley v. Hayley*, 62 N.C. 180 (1867), 184.
[134] *Hayley v. Hayley,* 62 N.C. 180 (1867), 185.
[135] *Hayley v. Hayley,* 62 N.C. 180 (1867), 188.

incapable of taking a devise or bequest under his will at that time."[136] While the majority opinion believed that the facts of each case should determine the outcome, Battle thought a more general rule ought to be applied. If a will were executed during the Civil War years prior to emancipation, slaves could not inherit under any circumstances. This was tied to a determination about whether or not they had been freed at the time the legal fight began, and was thus related to the date of emancipation.[137] Lucky for the former slaves who brought suit in *Hayley v. Hayley*, this rule was not applied. Their former slave status did not prevent them from receiving a significant legacy.

The North Carolina Supreme Court heard similar cases, *Whedbee v. Shannonhouse* (1868) and *July Todd v. Trott* (1870). The basic premises used to decide these cases came directly from the *Hayley*. The North Carolina Supreme Court remained consistent in their view that the emancipation ensured by Union victory in the Civil War did not invalidate a former slave's right to inherit from a former master's estate. In both *Whedbee* and *July Todd*, provisions in the testators' wills provided for the emancipation of specific slaves by sending them to Liberia, and in addition, promised substantial sums of money in order for the slaves to begin their lives as free people. The Civil War intervened, making the journey to Liberia unnecessary for attaining freedom. In both cases administrators of the respective estates argued that this effectively prohibited the named slaves from inheriting the funds they were promised, as the inheritance was predicated on their relocation to Africa. Yet the North Carolina Supreme Court was not persuaded. Rather, in 1868, they saw the unplanned emancipation as a "collateral advantage caused by what…was a mere accident." It should be viewed as a "'windfall' or piece of good luck to the freedmen."[138] In 1870, the court reaffirmed this position once again. "It is immaterial how [the slaves] obtained freedom. Although it was accomplished in a manner not contemplated by the testator, when he published his will, it would be a work of supererogation, …to adduce arguments to show that the plaintiffs are entitled to recover *something* in this suit."[139] The former slaves in both of these cases received both the sums they were promised *and* the money that had been set aside to pay for their relocation to Liberia. It was a windfall indeed.

Kentucky reached a similar conclusion to North Carolina, using nearly identical reasoning. In Kentucky, as in North Carolina, the date of emancipation had bearing on these inheritance cases, though the Bluegrass State was far more explicit about it. Once slaves had become free people, they became capable of inheriting, and that happened in Kentucky the moment the Thirteenth Amendment was adopted to the Constitution. When William Parish of Madison County, Kentucky died in 1860, he provided that after his wife Celia died or remarried, "I will that all my negroes, young and old, to be *set free, and* to have two hundred dollars given to each one, to be paid to them out of my estate; and they, the said negroes, *when freed*, to be conveyed to any place where they can enjoy the right of freedom."[140] In 1864, those slaves sued for the inheritance they believed was owed to them. Celia Parish had remarried, and they had become free. They "claim[ed] that they were entitled to their pecuniary legacies, with interest from the expiration of a year after probate, and to hire, and also an outfit for migration to some other country."[141] Celia Parish refused to honor her late husband's will.

[136] *Hayley v. Hayley,* 62 N.C. 180 (1867), 190-191.
[137] This was based in the earlier ruling of *Harrell v. Watson*, recounted in an earlier chapter. This case sent the standard for determining the status of African Americans in North Carolina before the Thirteenth Amendment was adopted to the Constitution.
[138] *Whedbee v. Shannonhouse,* 62 N.C. 283 (1868), 287.
[139] *July Todd v. Trott,* 64 N.C. 280 (1870), 282.
[140] *Parish v. Hill*, 63 Ky. 396 (1866), 397. Italics in original.
[141] *Parish v. Hill,* 63 Ky. 396 (1866), 397.

When the case landed on the docket of the Kentucky Supreme Court, the Civil War had ended, and the slaves had become free persons. Thus, the court believed "the amendment of the Constitution of the United States abolishing slavery has made them free and legally capable of taking and enjoying their legacies. And the fact that they became free, not by the will, but by law, "consistently with the end desired and provided for by the testator, is not material."[142] As North Carolina had ruled, how the slaves became free was not important; once they had been liberated, the slaves named in wills became entitled to the legacies that had been left to them. "As soon as they thus became free they were, therefore, entitled to the moneys bequeathed to them."[143] Moreover, they were under no obligation to leave the state, as "they may now enjoy their freedom as fully and securely as elsewhere."[144] The Kentucky court reaffirmed this ruling in *Neely v. Merrit* in 1873.[145] Former slaves of Kentucky would inherit, regardless of how they became free.

Freed slaves in other states were not as lucky as those in North Carolina and Kentucky. The justices of Virginia Supreme Court, for example, disappointed many of the former slaves seeking inheritance who came before them. One former slave, Ann Crouch, was denied the hefty sum of $20,000 by the court. Her case, *Crouch v. Davis* (1873) illustrates one of the potential problems some former slaves encountered when they demanded their bequests. When emancipation took effect, some estates were rendered insolvent; there was no money left to honor the wills of testators. When Richmond resident Hector Davis died in 1863, his 1859 will entered into probate. Davis had been a prominent slave trader, and he had amassed quite a fortune as a result.[146] In his will, he promised "to his servant woman Ann, her freedom, to be removed out of the State with her four children; and after their removal, the sum of twenty thousand dollars; Ann to have the interest on one-fifth of the amount, and the interest of the balance to be expended in raising the children until they come of age; then the principal to be given them."[147] However, when it came time for the estate's administrator to distribute the bequests spelled out in Davis' will, the Civil War interfered. In 1863, Virginia remained securely under Confederate control, making Confederate currency the only mode of payment available. Yet, "The creditors and legatees of Hector Davis, believing that his estate was a large one and perfectly solvent, and hoping to be paid at a future day in a better currency, generally refused to accept payments in Confederate States treasury notes."[148] The legatees were correct in their suspicions; Confederate currency did indeed become worthless even before the war ended in Southern defeat. With that loss, the estate of Hector Davis "perished in the general wreck," after the rest of the slaves had been emancipated and debts were tabulated.[149]

Whether or not Ann, Davis' former slave, ought to have collected her bequest became irrelevant at that moment; the money she was meant to inherit evaporated as soon as the

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[142] *Parish v. Hill,* 63 Ky. 396 (1866), 398.
[143] *Parish v. Hill* 63 Ky. 396 (1866), 398.
[144] *Parish v. Hill 63 Ky. 396 (1866)*, 398.
[145] *Neely v. Merrit*, 72 Ky. 346 (1873).
[146] "Statement of the case for the Appellee Davis ex'or, et.al." Virginia Supreme Court Library, 2. *Crouch v. Davis,* 23 Grattan 62 (1873).
[147] *Crouch v. Davis,* 23 Grattan 62 (1873). Cases Decided in the Supreme Court of Appeals of Virginia, Volume 64, 63. Statement of the case for the Appellee Davis ex'or, et.al." Virginia Supreme Court Library, 2. *Crouch v. Davis,* 23 Grattan 62 (1873).
[148] "Statement of the case for the Appellee Davis ex'or, et.al." Virginia Supreme Court Library, 2. *Crouch v. Davis,* 23 Grattan 62 (1873).
[149] Statement of the case for the Appellee Davis ex'or, et.al." Virginia Supreme Court Library, 3. *Crouch v. Davis* 23 Grattan 62 (1873).

Confederacy surrendered. This issue – the evaporation of white Southern wealth – will be explored further in the next chapter. For our purposes here, it is enough to acknowledge that Ann Crouch's freedom, along with the freedom of the other slaves on the Davis estate, prevented her from inheriting. If slavery had not ended, and the wealth of the estate had remained intact, Crouch may very well have enjoyed her large inheritance.

A second Virginia case from 1873, *Johns v. Scott*, prompted a discussion of yet another problem inheritance cases raised. It was sometimes difficult for judges to be certain of the identity of the persons named in the wills of former masters. The will of Joseph Glasgow, who died in 1856, provided for the emancipation and inheritance of certain slaves after both he and his wife Nancy E. Glasgow, and daughter, Elizabeth, had died.[150] The will stated, "It being my intention, and I so expressly declare it to be my will, that all of my slaves, together with all their future increase, shall be emancipated and forever discharged from slavery, whenever my wife and daughter Elizabeth have ceased to live."[151] The will included a detailed description of the slaves in question, but not their names.[152] Thus, the major task of the Virginia Court became determining whether or not the appellants in this case were in fact the same persons described in Joseph Glasgow's will.

If they were the persons described, the appellants may have been due to receive $3000 plus interest. The executrix of the estate was ordered to "set aside and invest $3000 *in her own name as my executrix*, and then receive and reinvest the interest and dividends thereon annually: so that the same may accumulate in the way of compound interest until such time as *my slaves* may be *entitled to their freedom under this will*."[153] Using this, the appellants believed they were entitled to "$ 5,716.84, as of the 1st of December 1870."[154] After all, the former slaves in question "continued faithfully to … [serve] the testator's family as slaves, till the very close of the war."[155] They held up their end of the bargain, and wanted the Glasgow estate to do the same. Regardless of how it occurred, "they acquired…an inchoate right to freedom" that entitled them to the bequests promised to them. "If the intention of the testator be the soul of the will, …how can the immediate payment of the of the testator's bounty be denied to the complainants?"[156] As many freedpeople were doing elsewhere, they asked the Virginia Supreme Court to uphold the spirit of the will, not its precise letter.

Elizabeth Johns, the petitioner in the case, representing her father's estate, protested. For one thing, she argued, the will stipulated that the legacies were to be paid out only after she and her mother had died. Yet, Elizabeth, Joseph Glasgow's daughter, appeared very much alive and capable of mounting a defense of her late father's estate. In addition, she claimed, "the legacy is

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[150] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92. University of Richmond Law Library, Virginia Collection. *Johns v. Scott,* 64 Va. 704 (1873).

[151] Grattan, *Reports of the Cases Decided in the Supreme Court of Appeals of Virginia*, 705. *Johns v. Scott,* 64 Va. 704 (1873). Joseph had been a farmer, and his real estate was valued at $37,000 in 1850. Seventh Census of the United States, 1850; (National Archives Microfilm Publication M432, 1009 rolls); Records of the Bureau of the Census, Record Group 29; National Archives, Washington, D.C., page *457B*; Image: *499*.

[152] As Leon Litwack has shown in *Been in the Storm so Long*, former slaves had just begun creating their own legal identities during Reconstruction, which, as far as a court was concerned, could produce a great deal of uncertainty.

[153] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92. University of Richmond Law Library, Virginia Collection, 10. *Johns v. Scott 64 Va. 704 (1873)*. Italics in original.

[154] *Johns v. Scott,* 64 Va. 704 (1873), syllabus.

[155] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92, 30. University of Richmond Law Library, Virginia Collection, 10. *Johns v. Scott*, 64 Va. 704 (1873).

[156] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92, 31. University of Richmond Law Library, Virginia Collection, 10. *Johns v. Scott,* 64 Va. 704 (1873).

void" because the emancipation "by supreme power makes the pre-condition [for inheritance] impossible"[157] As in cases elsewhere, the family of the deceased believed that unless the slaves in question attained their freedom through the means spelled out in the will, they were not entitled to the legacies. More than that, several of the slaves described in Joseph Glasgow's will "died pending suit, and their personal representative have, on petition been admitted in this suit. Your petitioner is advised, such personal representative have no possible interest in the said fund, and it was error to have admitted them as plaintiffs."[158] If the appellants in the case against her were not the slaves her father had described in his will, then they could not inherit a sum never intended for them.

The former slaves participating in the suit urged the court to consider the matter differently. Even though Elizabeth Johns was still alive, the defendants made an argument similar to former slaves in other cases. They "claim their right to freedom under another and higher power, and directly against the testator's will; and do not, therefore, pretend that they come within the liberal terms of the bequest. But it is insisted that they are within its spirit, that they were to be provided for, when free; and having successfully asserted their right to freedom, that it was immaterial whether they became free under the will or otherwise."[159] The freed persons believed it was their freedom that determined when and how the bequest ought to be made, not the death of the testator's daughter. They had become free by other means, and as such were entitled to inherit. This echoed the earlier decisions that were ultimately reached in the courts of other states and should not be overlooked; it did not matter how the slaves became free, it only mattered that they had. Once free, they could collect the money promised to them.

Ultimately, Elizabeth's arguments persuaded the justices of the Virginia Supreme Court. "The legatees to whom the bounty was to accrue," they wrote, "were not particular individuals, but elect characters. They were to be the testator's freedmen, his slaves, emancipated by him, under his last will, which, in this respect, was not to take effect until the death of the survivor of the wife and daughter."[160] The justices did not believe that Joseph Glasgow would have altered his will upon the emancipation of his slaves by "another and higher power" at the expense of the "prime objects of his affection and bounty – his wife and daughter."[161] Rather, the emancipation and legacy provided that the slaves not be emancipated until after their deaths, so that it would not negatively affect his family. Moreover, "to dispense with the plain description and character given to the legatees by the testator" would be a mistake.[162] "The terms of the will [did] not entitle them to demand the legacy," as the appellants in this case were not necessarily the same people described in the original will. "They not only do not answer the description and character required by the will, but present themselves in a character utterly variant therefrom, and in irreconcilable conflict therewith."[163] Whatever their relation to the original slaves described in the will, they could not benefit from the legacies. Only those specified could have enjoyed the bequests, and even if they had been present, the court would not have granted them their inheritance.

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[157] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92, 12. University of Richmond Law Library, Virginia Collection, 10. *Johns v. Scott,* 64 Va. 704 (1873).
[158] "Petition for Supersedeas" Supreme Court of Appeals of Virginia, record 92, 15. University of Richmond Law Library, Virginia Collection, 10. *Johns v. Scott,* 64 Va. 704 (1873).
[159] *Johns v. Scott,* 64 Va. 704 (1873), 714.
[160] *Johns v. Scott*, 64 Va. 704 (1873), 708.
[161] *Johns v. Scott,* 64 Va. 704 (1873), 714.
[162] *Johns v. Scott,* 64 Va. 704 (1873), 714.
[163] *Johns v. Scott,* 64 Va. 704 (1873), 714.

Conclusion

This chapter has not asked readers to consider topics unknown; the stories of miscegenation and post-bellum apprenticeship, for example, have previously garnered attention from historians. However, it has invited readers to examine these issues – and the sources from which we learn about them – with fresh eyes and in new contexts. While undoubtedly useful in some respects, treating the stories of miscegenation, apprenticeship, and inheritance separately obscures their importance during Reconstruction. All three issues developed out of the same problematic environment: a post-bellum South that had yet to resolve significant questions about the reordering of law and society in the wake of emancipation. The cases reviewed in this chapter were among the first suits to consider these questions and the new relationships freed slaves might have with their former masters once they were answered.

How courts ultimately defined these relationships depended on location. These cases represent common legal paths taken by post-emancipation courts, but ultimately, each state judiciary made its own determinations about how to proceed in post-emancipation slave cases, and no two were identical. There would be no single ruling paradigm; 'many legalities' of Southern jurisprudence existed during Reconstruction. This would not change until Jim Crow became more universally and firmly entrenched in state law and politics. Until that time, a multiplicity of options remained open to litigants, and in cases related to the family, results often favored emancipated slaves.

Critically, these cases were among the first that pitted black litigants against white. While blacks (free and slave) and whites may have crossed paths in courtrooms prior to the Civil War, they had never done so as supposed equals until Reconstruction. This immediate and forceful reordering of official space should be seen as an attempt by newly freed blacks to fully claim their legal personhood, transform customary practice into legitimate existence, exercise their rights as citizens, and challenge the traditional Southern social and legal order. African Americans in the post-bellum South had a clear idea about the rights to which they were entitled and the way in which they ought to be protected. We have seen resolute freedpeople take a firm stand about their lives and the way in which they were willing to conduct their relationships with other Southerners.

Nonetheless, there is more going on in these cases than the noble exercise of rights once forbidden. There was also a very practical attempt at defining and determining day-to-day existence. In that sense, going to court should be viewed in more personal terms, as freedpeople insisted their intimate relationships with whites be renegotiated to fit post-bellum circumstances. As the cases in this chapter have shown, it was personal relationships – between husbands and wives, parents and children, former slaves and the white families they used to serve – that prompted many to take their disputes to court. By renegotiating these interracial relationships, blacks resisted white attempts to replicate antebellum slave societies. Freedpeople rejected efforts by individuals they knew in their own communities who sought to treat them and their families as persons, or chattel, without rights.

Once in court, the personal matters between individuals became inevitably political. The verdicts in these cases implicated members of a larger community who were still in the process of coming to terms with the world the Civil War had made – a South without slavery. Despite attempts to circumscribe their newly won freedom, liberated slaves protested Black Codes and the abuses they suffered as a result of their enactment. Thus, the ramifications of verdicts rendered in state courts reverberated, and did much to shape and reshape post-bellum state policy.

It is for this reason that the judges' role in post-emancipation slave cases was so critical; they decided what would be acceptable social and political practice in Southern states. Simply put, the verdicts in cases about personal matters did much to mold post-bellum Southern law and society. Given these stakes and the complicated nature of the cases, it should not be surprising that judges struggled to come to unanimous conclusions that addressed the claims of all litigants. Indeed, Sally Catchings' case remained unresolved, even after the Texas Supreme Court had evaluated it. Her case was remanded back to lower court, at which point her trail goes cold. Even in cases that were decided, judges labored to substantiate their rulings. State and federal law had changed drastically, and these judges were among the vanguard of jurists to make sense of those alterations as best they could. Nonetheless, what the social relationships between whites and blacks would be in this post-bellum world were, at least in part, defined in Southern courtrooms.

For a time, the potential for realizing the promises of freedom was within reach for some of those who sought it. This is certainly not to say that fulfillment was easy or even permanent, as the subsequent onset of Jim Crow demonstrates. In some ways, the cases reviewed in this chapter confirm that freedpeople faced a great deal of difficulty achieving the full potential of their liberation, presaging the even greater challenges that lay ahead. Many were compelled to reveal their personal stories and intimate family details in order to protest continued oppression, knowing that whites would never have had to do the same. Cornelia Hart fought as a wife and as a mother to legitimate her family. Sarah Lacy refused to let her son be taken from her care and apprenticed to the Timmins family. Alfred, Octavius, Jackson, Louisa, and Paul Hayley, the former slaves of the deceased Holiday Hayley, demanded that their former master's bequests be given to them. In their years of servitude, they had earned it. Ultimately, though the litigants in these cases faced lengthy and arduous litigation, many still managed to prevail, demonstrating that the legal process of abolition continued well after the last shots of the Civil War were fired.

Chapter Four
The Price of Defeat: The Inherent Risk of Emancipation

In addition to the carnage of the battlefield, the Civil War wrought havoc on the Southern economy and on the personal finances of many Southern whites. Indeed, the war ruined many of the South's most prominent families, who up until this time had possessed the bulk of the region's wealth. Included among them was the infamous Calhoun clan, once led by fire-eater politician and ardent supporter of slavery, John C. Calhoun. By 1866, just one year after the end of the war, the family's beloved South Carolina plantation (Fort Hill) faced foreclosure, and the family was in financial ruin. How had it come to this? Quite simply, the plantation's slaves, as chattel property, were worth more than the real estate the family owned. Thus, when the Civil War ended simultaneously in Southern defeat and black freedom, financial catastrophe befell the family. With preexisting mortgages on both the land and the slaves, the estate became instantly insolvent. Court documents state unequivocally that Fort Hill had "been rendered by the result of the late revolution to its present condition of wreck and ruin."[1] In 1872, Fort Hill was put up for auction. The mighty had fallen.

Famous families were not the only ones to suffer financial ruin after the Confederate defeat. Less prestigious Southerners, who did not own dozens of slaves like the Calhouns, or who may not have owned any slaves at all, often lost their assets as a result of the economic collapse of the South. This outcome not only testifies to the thoroughness of the Union victory, it also demonstrates how foundational slavery was to the Southern economy and to the financial security of white Southerners. However, among them, there was not a universal acceptance of defeat, nor was there an understanding of precisely what military conquest meant for former Confederate supporters or for Southerners more generally. How thorough would Southern losses be? How would the abolition of slavery ultimately affect one's personal finances? Would any compensation be forthcoming for the loss of property (slave or otherwise)? In essence, white Southerners wanted to know, how much would military defeat and emancipation cost? Some Southern whites turned to their local courts in order to find answers to these questions.

The cases regarding the financial losses suffered by white Southerners asked much deeper questions about the nature of the American South than it might seem at first. These cases were not simply matters of economics or personal finance. At the heart of these cases were white litigants searching for ways to come to terms with a society without slavery, and to figure out precisely what that would mean for their region in the future. What would the South become without slavery undergirding society and the economy? Would former slave owners still enjoy the traditional social preference once afforded them by the peculiar institution, or would society be reordered to reflect the changes brought about by the Civil War? How would Southerners find their economic footing in the wake of disaster? While former slaves reconstituted their families, Southern whites worried about the financial security of theirs. While former slaves went to court emboldened by newly acquired legal personhood, whites wondered how they would fare in a forum they once dominated exclusively. What the customs of slavery had made certain, emancipation made dubious. But when Southern whites turned to the courts to settle their financial matters and try to recover some of their lost wealth, the 'rights' that once accompanied the status of slave owner, and the structure of a seemingly lost social order, they participated in

[1] Floride Calhoun et. al. v. M.M. Calhoun et al. Clemson University Special Collections Unit University Archives. Lee v. Simpson Mss 256, Box 1, Folder 3.

the process of determining the future of the post-bellum South and shaping the very meaning of emancipation itself.[2]

In an effort to protect their wealth, litigants turned to the courts to see just how much their world had really changed. Of course, much of the prosperity and the social advantages of the antebellum South had been generated by slavery itself. Through an oppressive regime of forced labor and the commodification of bodies, the South extracted its fortunes. It is not surprising, then, that so many litigants maintained the belief that slavery was an institution worthy of continued legal, and even moral sanction; it was simply taken as a given, even after the adoption of the Thirteenth Amendment. Many of the litigants who brought the suits that will be reviewed in this chapter assumed the property interest in the slave still existed, even after the end of the institution. Indeed, these plaintiffs actively sought ways to extend slavery's productive life, and wring every last cent out of their former property. Consequently, we must understand some of these post-emancipation slave cases as instances of individual protests against the demise of the peculiar institution, especially since it came as a result of military defeat rather than deliberate choice, but also as a sign that Confederate loss had not changed the hearts and minds of enslavers. Cases that reveal any judgment of slavery as an immoral scourge on society will be the exception, not the rule. If any such judgment was to be found, it came from Radical-leaning justices, not from the litigants asking for compensation or relief. White litigants and some jurists remained indignant that their slaves had been one of the costs of war, and they aired those grievances in open court.[3]

What litigants eventually found in many post-bellum courts was totally unexpected. According to some jurists, the end of slavery – its lawful abolition – had always been an inherent risk of slave ownership. This devastating assertion flew in the face of the longstanding Southern belief in the sanctity and security of contracts and their human property, which generations of legal culture and custom had supported. Prior to the Civil War, judges did not speak about the risk of abolition. Buyers assumed the risk that a slave might die (as was an inherent risk in all chattel property), but the institution of slavery never faced serious legal challenge during the antebellum decades. To the contrary, the power of the slave owner had been expanded in cases such as *State v. Mann* (1829), and protected explicitly in the Supreme Court's infamous *Dred Scott* (1857) ruling.[4] In his 1856 opinion in *Dred Scott*, Chief Justice Roger Taney used the Fifth

[2] For a discussion on the 'rights' of slave owners, see especially Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*.

[3] Legal scholar Cynthia Nicoletti argues that Southerners remained similarly committed to the righteousness – and even the continued legality – of secession. The loss of the Civil War had meant simply that one attempt to secede had failed, but it had not foreclosed the possibility of making future attempts. Nicoletti writes, "accepting the fact that a violent conflict had decided the question of secession's constitutionality proved neither an uncomplicated nor an automatic process for many nineteenth-century American thinkers." Many Confederates adopted the metaphor, "Trial by Battle" in order to "console themselves with the knowledge that the logical rationale for the right of secession had not been repudiated, even though the war had made exercise of that right impossible." In the end, "American theorists struggled to come to grips with the notion that a legal issue that had engendered such vigorous debate prior to 1861 could be definitively resolved in the crucible of war." Cynthia Nicoletti, "The American Civil War as a Trial by Battle," *Law and History Review* 28, no. 1 (February 2010): 71–110, 109. I argue that many white southerners felt similarly about the 'rights' that slave ownership had conferred, namely, the preferred legal standing and ability to profit from the business of bondage. I suggest that this is in part why so many went to court in order to recover these lost 'rights.'

[4] *State v. Mann*, a North Carolina case whose opinion was written by the infamous Thomas Ruffin, asserted that for slave ownership to be rendered perfect and complete, masters possessed full and total authority over their human property. Thus, law could not protect slaves from their masters' actions, no matter how violent or inhumane.

Amendment specifically to establish that no law could deprive a slave owner of his slave property (or property interest in the slave). Under this formulation, he declared, "the rights of property are united with the rights of person."[5] The very existence of the so-called "Slave Power" further corroborated the notion that slavery enjoyed greater legal protection in the antebellum period than it ever had before.[6] Even Northern anti-slavery judges remained committed to upholding the Constitutionally enshrined peculiar institution.[7] Slavery had never been more vehemently defended. Moreover, when, after the election of Abraham Lincoln, they perceived a threat to their peculiar institution, Southerners forged and fought for a new nation founded on the principle that all men were not created equal, and insisted that slavery was a natural, moral, and just institution that was and should always be protected by unalterable supreme law.[8] That it was, at least in part, this steadfast and uncompromised commitment to slavery and the property interest inherent in the institution that rotted away the Confederate States of America from the inside out, did not change the minds of most Southerners, precisely because the notion that slavery could be abolished seemed so unbelievable.[9]

But secession changed all that. Within the span of just a few years, slavery's safeguards – legal, martial, cultural, or otherwise – were vitiated by war. As a result, those who had had a financial stake in slavery (and even those who did not) were suddenly exposed to the full cost of their Confederate folly. It was, according to many judges, part of the risk they took when they became slave owners. This was the price of Confederate defeat. Yet, this inherent risk of abolition of which judges spoke could only have been realized – or even contemplated – because of that defeat. The revolution occasioned by the Civil War – emancipation itself – created the liability. In effect, judges expressed that slavery contained a latent risk: ever present, abolition had remained dormant until such a time when it could be triggered. That time, according to some Southern judges, had come.

Yet, upon closer inspection, what might seem like a revolutionary moment reveals itself to be far more conservative than first appearances suggest. The notion that there existed an inherent risk of abolition had not been articulated by Southern judges prior Confederate defeat. Why, then, did Southern judges invent this idea in the wake of the Civil War? They did so in order to avoid disrupting existing the Southern legal order, and add a measure of stability to an

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However, it could protect them from other persons who might harm the property of another. *State v. Mann* 13 N.C. 263 (1829).

[5] *Dred Scott v. Sandford,* 60 U.S. 393 (1857).

[6] In *The Slave Power*, Leonard Richards demonstrates that the "slave power" conspiracy was no conspiracy at all. Through Constitutional sanction – specifically the three fifths clause – slavery had provided the South with disproportionate political power. Southerners were over represented in Congress and the Electoral College. Leonard L. Richards, *The Slave Power: The Free North and Southern Domination, 1780-1860* (Baton Rouge: Louisiana State University Press, 2000).

[7] See especially, Robert Cover, *Justice Accused*, and *Prigg v. Pennsylvania* 41 U.S. 539 (1842).

[8] In his "Cornerstone Speech," Confederate Vice President Alexander Stephens proves the point: "Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition." Alexander H. Stephens. "Cornerstone Speech." (Speech, Savannah, GA. March 21, 1861). http://teachingamericanhistory.org/library/document/cornerstone-speech/

[9] See especially, Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South*. (Cambridge: Harvard University Press, 2010). McCurry argues that the demise of the Confederacy was not just due to military defeat; it was also the result of political failure. The absolute protection of slavery comprised one part of that failure.

otherwise volatile post-bellum Southern society.[10] There would be no great rupture in Southern courtrooms as there had been in state legislatures; there would be instead a judicial retreat to the familiar legal orders that had existed in what might otherwise have seemed like a very distant antebellum past. By invoking this newly-identified risk, judges could rule on slave contracts and other legal matters as they always had, preserving the established and accepted rules of law while still adhering to the letter of the new Constitutional amendment(s). A tweak (albeit a large one) in the way one thought about the inherent risks of slavery seemed far less disruptive than a major legal change that would have forced judges to betray established legal rules or nullify contracts, and such a move often allowed judges to preserve legal actions that had been undertaken prior to secession. Emancipation, the undisputed revolutionary outcome of the Civil War, made such a revision possible. Yet, instead of honoring the moment or seizing the promise that emancipation initially seemed to hold, the most common judicial response to the end of slavery was a retreat to the familiar territory of the antebellum past. This would produce a defeat of a different kind, and its price would be paid by the generations of African Americans forced to live without the promises of black freedom, namely the protection of equal rights, that might otherwise have been embraced.

Nonetheless, the cases initiated by Southerners hoping to secure greater financial gains resulted from one of the very real problems that stemmed from emancipation secured by the sword: the unanticipated economic consequences of emancipation without compensation. As this dissertation demonstrates, the necessary process of thinking through the difficult challenges – legal or otherwise – that emancipation prompted had simply not taken place. The cases in question in this chapter ought to be seen as instances of 'thinking out loud,' or doing the conceptual work necessary to reconcile the antebellum and Civil War past with the Reconstruction present. The business of bondage, whether it came in the form of slave contract, will, or other financial matter, remained unsettled in the aftermath of war, and needed to be resolved in order for the South, and the nation more broadly, to move beyond the slave past.

This chapter will specifically explore the cases that reveal the many ways in which white Southerners found themselves exposed to the risk of slave ownership. After a brief overview of the antebellum Southern economy, it reviews the cases in which judges make especially clear the inherent risk in slave ownership, the complication that arose with the use of Confederate currency, and the ways in which some states attempted to shield their citizens from losing everything. Finally, the chapter returns to the story of the Calhoun family. Remarkably, this case included elements from every other category explored, and encapsulates in dramatic fashion the economic landscape that former slave owners attempted to traverse. In the end, the cases reviewed in this chapter reveal that a diverse group of white Southerners from across the former Confederacy hoped that judges and juries would help salvage their finances and mitigate the

[10] For a detailed conversation on the rule judges have played in addressing issues related to public social stability, see Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," *California Law Review* 72, no. 2 (March 1984): 217–51. "[I]n the judicial confrontation of the problem of rule versus policy, one must take account not only of pragmatic concerns and vested rights; one must also contend with public rights. In a sense, the concept of public rights is a precursor, or pretechnocratic progenitor, of what we now call the "public interest." …Prior to the advent of modern administrative agencies and bureaucracies of public sector policy specialists and technicians, however, the state courts frequently understood to formulate and advance claims on behalf of the public; they derived such claims of public rights from the common law tradition, and they used judicial power in ways that gave vigor to a regulatory tradition American law alongside the better known pragmatic and vested rights doctrinal legacies." 250-251.

losses they bore as a result of their allegiance to the Confederacy and the elimination of the property interest in slaves.

Ultimately, the cases in this chapter exhibit a complicated mélange of economic, political, and social welfare problems. State supreme court judges were being asked by litigants to sort out the mess in ways that served their own personal interests and honored their slave-owning pasts. Indeed, most often at stake in these cases were individual families that strained under the weight of social change. Perhaps this ought to be understood as white Southerners receiving their just desserts after years of brutally enslaving others. Certainly, this is an obvious and even satisfying claim to make. Yet, taking this view obscures the fact that an incredible number of post-emancipation slave cases were really about the demands of whites, not the needs of freedpeople. When courts participated in sorting out their claims, they helped shape the policies of Reconstruction and the degree to which the true abolition of slavery would be fully realized. When it came to salvaging their personal finances, Southern white litigants exploited this fact as they attempted to bridge the divide between the old South, and the new one they would help construct. Judges were careful to ensure that the laws of the new South hewed closely to the old by inventing a way to limit the shock of emancipation to established jurisprudence. They declared that abolition had always been a risk to slave ownership, or, put more aptly, slave speculation. Carefully considering what the cases reviewed in this chapter meant to the white litigants who engaged in them and the judges who decided them reveals the emotions and sensibilities that ultimately sculpted the South in the years during and following Reconstruction. In the end, the New South that would ultimately be built in the years after 1877 in many ways reflected the perceived losses that whites experienced (or suffered, as they might say) during Reconstruction. These cases lay bare precisely what those losses were, and quantifies exactly how much they would cost Southern whites.

Sewing the Seeds of Disaster: The Economy of the Antebellum South

Understanding the changes that emancipation wrought on the post-bellum Southern economy demands a brief review of the antebellum financial landscape. Indeed, part of the reason abolition had such a devastating effect on the South was because of the way in which slavery was understood and practiced as the primary means for amassing wealth and social prestige. Most Southerners did not own any slaves at all, but those who did often invested more wealth in slaves than they did in land or other property. For elite planters, "wealth and wealth accumulation meant slaves, and land was distinctly secondary."[11] The Calhoun estate illustrates this point perfectly; before the Civil War, the Calhoun plantation, known as Fort Hill, had been valued at $49,000. Of that, the real property – the land itself – was worth $15,000, and other personal property amounted to an additional $5,000. But the bulk of the estate's value had been invested in the slaves who worked the plantation; they were worth $29,000.[12] Nearly sixty percent of the Calhoun's wealth was tied up in chattel property, and with emancipation, it vanished. This scenario is representative; the Calhouns were just one of the many wealthy families to experience this kind of sudden and dramatic loss of wealth. Indeed, emancipation had a disproportionate effect on the slave owning class because they had the greatest financial stake in the now worthless property upon which the region's economy had been built.

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[11] Gavin Wright, *Old South, New South: Revolutions in the Southern Economy Since the Civil War* (Baton Rouge: Louisiana State University Press, 1997), 19-20.

[12] Bond between Floride, M.M. and A.P. for the Purchase of the Fort Hill Farm, May 15, 1854. Clemson University Special Collections Unit University Archives. Lee v. Simpson Mss 256, Box 1, Folder 54.

More broadly, almost half the region's wealth was tied up in the bodies of slaves. For example, in 1860, Southern wealth amounted to $6.3 trillion. Of that, slaves totaled roughly $3 trillion and other real and personal property totaled about $3.3 trillion.[13] This means that as a whole, the price of defeat in the Civil War totaled nearly half of all Southern capital. Instead of investing in "physical capital" by buying additional real property, by improving existing property, or by developing their local communities, Southern elites had consistently diverted their funds for the purchase of slaves.[14] Consequently, when emancipation occurred, resources that had been invested in slaves instead of real property, schools, or roads, for example, became unrecoverable; they were sunk costs paid to the slave-owning past. This problematic capital allocation was only exacerbated by the unrelenting belief that the Confederacy would prevail despite all signs to the contrary; investment in slaves continued steadily until the very end of the Civil War. In some extreme instances, white Southerners attempted to buy and sell slaves well after the war had ended.[15]

Considering these facts, it becomes much easier to understand why some Southern whites attempted to use post-bellum courts to recoup some of the money they had invested in slave property. Given the traditional rate of return on investments in slaves, the continued reliance upon the peculiar institution throughout the antebellum era made sense. Individual white Southerners who managed to buy slaves were, on the whole, better off, both financially and socially. There was no apparent need to diversify as long as the goose continued laying her golden eggs. It was not until the election of Lincoln in 1860 that Southerners perceived a truly serious threat to slavery – one that was dire enough to prompt secession. That it was this act that would ultimately lead to emancipation and near total financial collapse was beyond

[13] Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006), 60.

[14] Wright, *Slavery and American Economic Development*, 61.

[15] For one example of a post-bellum slave sale, see the Texas case *Shearer v. Smith,* 35 Tex. 427 (1872).

Without any equivalent commodity, the North was able to channel its assets into more diverse capital investment. Due in part to its tax structure, the North generated the financial resources necessary to improve its cities and towns, attract a variety of industries, expand local and interstate transportation systems, and educate its people. When the Civil War began, Northern cities, business enterprises, railroad networks, and public school systems dwarfed anything the South had to offer. Northerners had the will and "entrepreneurial and political energies" to nourish and sustain *dynamic* economic growth that not only fueled the war effort but also fostered economic successes in future decades. The South, on the other hand, grew statically according to a colonial model that had been in place since the seventeenth and eighteenth centuries; more and more resources were pumped into plantation agriculture and the slave labor that sustained it. To be sustained, this model, of course, depended on the expansion of slave territory. However, the true pitfalls of this kind of political economy were only fully understood after the Civil War ended and slaves were freed. Without slavery undergirding the economy, and in the midst of the ruin of war, Southerners experienced a near total financial collapse because there were no other industries with the capacity to take up the slack left by emancipation. Robin L. Einhorn. *American Taxation, American Slavery*. (Chicago: University of Chicago Press, 2008). Wright, *Slavery and American Economic Development*, 67. Some Northerners also suffered economic losses as a result of emancipation precisely because so much Northern capital had been invested in the Southern economy. Northern individuals, corporations, and financial institutions played a significant role in the South, whether by direct land ownership, shipping and transportation of goods, supplying commodities, or lending the money necessary to finance the large plantations. Nonetheless, because Northern investment was far more diverse compared to the South, the losses tended not to be catastrophic. Moreover, many Northern carpetbaggers managed to recoup their wartime losses with post-bellum investment in the rebuilding of the South. See Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, chapter 10, and Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie 1850-1896*.

comprehension when one state after another declared its independence from the Union.[16] In other words, the risk of slave ownership, as it would be defined by post-bellum judges, remained obscured by the pre-war moment and the accompanying outburst of Southern states rights nationalism.

Gavin Wright has argued that "the roots of postbellum regional backwardness are plainly visible in the antebellum data." While certainly true in hindsight, the stilted development of the American South that would come to mark the post-bellum era was nearly invisible while slavery continued to make men rich.[17] Once Confederate defeat lay bare the true nature of their gamble, Southerners went to court in an attempt to prevent this "backwardness" from totally crippling their households and the regional economy more generally. More than that, a legal victory had the potential to salvage some of the ideals laid out by committed Confederates, even if only partially. Slaves might still possess some value, even after becoming free. By recovering some of the value in slaves, Southerners also hoped to re-secure their economic positions and recover some of the capital necessary to begin rebuilding and refashioning a Southern economy without slavery as the foundation.[18] Some succeeded, but others, like the Calhouns, did not. It was a previously unimaginable fate.

Seeking Relief: The Purpose of Litigating Slave Contracts

In Chapter Two, it was shown that state supreme courts undertook the job of determining if contracts regarding the sale or hire of slaves remained valid given the end of slavery and, if so, determining the date that emancipation took place. In states that accepted the validity of slave contracts, agreements that were made prior to the official date of emancipation were valid, but those made after, were not. The earlier chapter described why this was necessary from a legal standpoint, and explained how it was done in some states, but it said little about why litigants took these cases to court in the first place. Unsettled slave contracts had the potential to change fortunes, even though the object being conveyed in them – the slave – no longer counted as an object at all. Nonetheless, the original owner of the slave still had the opportunity to receive financial benefit from his former property, and many initiated lawsuits in order to plead their case against those parties who refused to pay. For instance, at the heart of the Texas case *The Emancipation Cases*, was a slave hire contract that had been made in January of 1865. The owners sought the full payment of the contract because, they argued, the agreement was legal at the time it was executed. The Texas court agreed, and ordered the hirer to pay the amount he owed the former slave owner. The case set the date of emancipation in the Lone Star state, but it

[16] Stephanie McCurry has shown that the outcomes of votes for secession were often corrupt or even fabricated. Georgia, for example, did not actually vote for secession. Nonetheless, the state joined the Confederacy. See McCurry, *Confederate Reckoning: Power and Politics in the Civil War South*, chapter 2.

[17] Walter Johnson's recent book *River of Dark Dreams* does explore some of the fears held by some white Southerners about the economic inequities between North and South. Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*. On the profitability of slavery, see especially Edward E. Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2014), and Sven Beckert, *Empire of Cotton: A Global History* (New York: Knopf, 2014).

[18] Though less obvious, slavery's demise also had a devastating effect on white Southerners who did not own slaves. Many of these whites owned land and operated smaller farms (the yeomanry), and they often hired the slaves of their wealthier slave-owning neighbors to help make their land profitable. In other words, slaves sometimes comprised the labor force of men who owned no slaves at all. Conversely, for those poor whites who did not own any land, employment could often be found on the large plantations of Southern elites. These landless whites were hired as overseers or to do other jobs for the region's wealthiest property owners. For non-slave owning whites, emancipation eliminated this labor market and, in many cases, their employment.

also awarded funds to one of the litigants – the original owner of the slave. In a war-torn South, those funds may have made considerable difference in the lives of litigants on the receiving end.

In these contract cases especially, we see the antebellum expectations of white litigants confronting the new legal boundaries of the post-bellum present. Some Southern whites expected to continue receiving the legal and social benefit of their status as a slave owner, despite emancipation. Antebellum courts had regularly reified their position by supporting their legal claims against those who harmed their property interests, and it was in Southern courtrooms where 'gentlemen' claimed their superior social positions, and those of the lower classes aspired to the title.[19] The Civil War had not undone these expectations. However, all of these cases examine litigants who had sold or hired out their slaves and now sought the full payment of their notes. A second type of case demonstrates that the buyers or hirers of slaves – the parties that owed the money – also turned to courts for relief. Nowhere is this impulse clearer than in the subset of slave contract cases that involved warranties or other claims of "unsoundness." White litigants who owed money on contracts, or who wanted a refund of the money they had already paid for a slave, insisted that emancipation violated the warranties they received as part of their slave contracts. These warranties typically stipulated that slave property was sound – or healthy – and that the slave was to be property for life. The warranties served as insurance for purchasers in the event that the slaves they procured turned out to be sick, maimed, or in some way incapacitated. In the post-bellum South, some white plaintiffs argued that emancipation breached these warranties, which required relief of some sort from sellers.

The use of warranties in antebellum slave contracts was common, but not ubiquitous. The practice arose in older slave societies as an exception to *caveat emptor*, or buyer beware. Warranty clauses were usually added to a slave contract to explicitly protect the buyer, but only if the seller were willing. Typically, without a warranty a buyer had no recourse to recover funds from a seller because of a slave's death or unsoundness. However, there were the exceptions to this rule. As Thomas Morris explains, North and South Carolina courts did accept implied warranties, though they were the only common law states to do so.[20] For its part, Louisiana, followed the civil Code Napoleon, which permitted *quanti minoris* – a reduction in price of an object because of some defect – or redhibition, which cancelled the sale altogether if the defect were significant enough to merit the action.[21] Because there existed a traditional use of warranties to protect slave buyers, it should not be surprising that litigants expected to receive relief from them in the post-bellum period.

Such issues were central to the North Carolina case, *West v. Hall*. On January 10, 1859, J.W. Hall purchased a slave from R.J. West for $500. Included in the bill of sale was a "warranty of title, soundness, and a slave for life."[22] West sued Hall in 1866 for defaulting on the note. The plaintiff's primary argument was that the abolition of slavery violated the terms of the contract the two men had executed in 1859; the slave was not a slave for life. As such, Hall refused to pay the money he had promised to West. In the initial trial in Rowan County Superior Court, the jury found for R. J. West and awarded him $1333.16, which included the penalty of the bond and additional damages. Though the jury instructions have not survived, it is clear that the men were

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[19] Indeed, slave ownership itself was a constitutive element of the gentleman's honor. It publicly distinguished social standing and private wealth. When a slave owner participated in a trial however, the legal system also commented on his position as master, by defining publicly "what it meant to be a white man, in Southern plantation society." Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, 99.

[20] Morris, *Southern Slavery and the Law, 1619-1860*, 109.

[21] Morris, *Southern Slavery and the Law, 1619-1860*, 110-111.

[22] *West v. Hall*, 64 N.C. 43 (1870). State Library of North Carolina, case 9571, transcript page 6.

unconvinced by Hall's argument. Emancipation came as a result of government intervention, not from any action or malfeasance by West.

This ruling suggested that some former masters might face a double loss – they no longer owned their slave property, and if Hall had his way, they might also lose the monies promised to them prior to emancipation. The jury in the initial trial found this to be more than they could bear, and the North Carolina Supreme Court agreed with them. "The evidence in regard to the warranty of title, was properly rejected…. Indeed there was no breach of the warranty. The negro was a 'slave for life,' and the contract could not, in any way be affected by the event of the late war, and the abolition of the institution of slavery."[23] In other words, the slave was a slave for the life of the *institution*, not necessarily for his life as a living being. The slave suffered a legal death, in that the property interest that made him or her a slave was extinguished. The institution that enshrined that property interest in law perished simultaneously. Given this interpretation, there was no breach of the warranty. Hall, and others like him, could not use the forced end of slavery to shield themselves from their debts. The slave at issue had remained in bondage as long as it was legally possible. West would keep his award.

In some of these contract cases, judges made clear that emancipation had always been a foreseeable risk of slave ownership. In such cases, courts illustrated the limits of a warranty, whether it was explicit or implied. For example, in the Kentucky case of *Thomas v. Porter* (1867), Judge Hardin made clear that there could be no relief for betting on slavery's continued survival.[24] In this case, Elijah Thomas hired a slave from Roley S. Porter for $100 for the year of 1865. However, the slave was emancipated shortly after the contract was executed. Judge Hardin ruled that "that contract did not import a guaranty of the service the slave might render; and the abolition of slavery, by the action of the government, was a contingency, like that of the death or escape of the slave to be risked by the purchaser."[25] The buyer took a risk when hiring a slave (as opposed to a free laborer), and in this instance – and by extension others like it – it did not pay off. The court was under no obligation to nullify the agreement between Thomas and Porter, especially since the contract itself had been executed legally. The courts – at least in the Bluegrass State – would not be in the business of making up for the gambles taken by individuals.

In reality, these cases demonstrate that in the minds of some judges, there had always existed a threat to the institution of slavery, no matter how minute it may have been or how unbelievable it once seemed to many Americans during the antebellum decades. The laws that enshrined and protected slavery could always have changed. Admittedly, without war, Lincoln and the Congressmen of free states would have been able to do little to immediately end slavery because the Constitution protected the institution, but the rupture of the Civil War transformed the rules of the game. Nonetheless, a change in the political will of the nation – no matter how it was secured – was all that had ever been necessary to force abolition through Constitutional amendment. In other words, when the majority of the nation no longer wished to hold the wolf by its ears, little else would be left to secure it permanently in place.[26] Ultimately, as we will see,

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[23] *West v. Hall*, 64 N.C. 43 (1870), 43-44.

[24] *Thomas v. Porter*, 66 Ky. 177 (1867). Kentucky Department for Libraries and Archives, Public Records Division, Kentucky Court of Appeals number 1595.

[25] *Thomas v. Porter*, 66 Ky. 177 (1867), 177.

[26] Here, the election of 1860 is worth considering. Contrary to popular Southern thought, the election of Lincoln alone could not have destroyed the peculiar institution. The President had no authority to undo that which was Constitutionally protected. War prompted Lincoln to issue the Emancipation Proclamation in 1862, but even its legality was open to question. This is precisely why Lincoln urged the adoption of a constitutional amendment barring slavery. The question over slavery's expansion was a Congressional one. It was only when the South

in 1872, The United States Supreme Court would weigh in on this issue in *Osborn v. Nicholson*, which will be described in Chapter Five. Prior to this ruling, Kentucky judge, Belvard J. Peters, articulated the argument of inherent risk succinctly in his opinion for *Bailey v. Howard* (1868). People who bought slaves "took them subject to any change in the laws by which such property was held that the people of the United States, or their legally constituted agents might make."[27]

Southerners who participated in slavery and in an expansive economy based upon it failed to recognize the reality Judge Peters described because it would not and could not have been realized without the revolutionary change wrought by the Civil War. Southerners had long been committed to a property-based, colonial style economy, yet they were also adept at navigating the complexities of the domestic and international markets. They had speculated on slaves, land, and cotton throughout the antebellum period, and prospered as a result. Moreover, Southerners certainly understood the risks of the modern economy; for example, they weathered economic panics in 1837 and 1857, though not without an increase in bankruptcies.[28] However, they did not perceive a palpable risk to slavery itself. Rather, as Jonathan Levy has recently illustrated, "many white southerners hedged against the perils of capitalism by owning slaves."[29] That is, slave ownership, according to the Southern worldview, would protect against economic panics and catastrophes alike. It was believed that the investment in human property was safer than other forms of financial investment precisely because it was protected by both the Constitution and state law. Because it was seen to be more stable than investments of other sorts, slave ownership came to be understood as insurance against the vagaries of the larger economy. Case in point: infamous slavery supporter George Fitzhugh believed "Slavery insurance never fails, and covers all losses and misfortunes. Domestic slavery is nature's mutual insurance society."[30] For Fitzhugh and others like him, this was just one of many reasons to prefer Southern slave societies to Northern "wage slavery."

The belief in slave ownership as a form of financial indemnity helps explain the economic calamity of emancipation. Rather than consistently internalizing the risk inherent in slave ownership that Kentucky Judge Belvard Peters explained, Southerners overwhelmingly believed that greater investment in slavery would insulate them from risk (a crop might fail, but ownership of slaves could absorb the loss). The failure to foresee or recognize emancipation as part of that risk served as the master class' downfall. If, as Jonathan Levy explains, "Owning wealth in the form of human chattel was the foundation of the Old South's form of economic security/insecurity," then the problem was that Southerners failed to see that the coin had two sides. Their certainty in slavery as a protected institution blinded them to the potential risks inherent in slave investments.[31] Put another way, in the new light of the post-bellum dawn (and only then), it became clear that slave ownership had only ever provided a false sense of security.

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seceded and instigated a war that a constitutional amendment banning slavery became a viable possibility; the national legislature was left without the traditional opposition to abolition to block its passage. See McPherson, *Battle Cry of Freedom*, and Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*.

[27] *Bailey v. Howard,* 2 Ky. Op. 294 (1868), 295.

[28] Those who mortgaged their slaves were at particular risk during times of financial panic. Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge: Harvard University Press, 2012), 94.

[29] Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*, 62-63.

[30] George Fitzhugh. *Sociology For The South: Or The Failure of Free Society*. (Richmond: A. Morris Publisher, 1854), 168.

[31] Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*, 95.

That which had been accumulated to protect against financial disaster had only made matters worse in the post-emancipation era. Southerners never saw it coming, and judges only articulated it after emancipation had been foisted upon the law.

Though the Confederacy may have crumbled, the belief that the property interest in the slave ought to be protected at all costs remained very much intact. It had been, after all, the basis for Southern financial security for generations. As the warranty cases illustrate, many white Southerners failed to anticipate what emancipation would come to mean. Once the property interest in the slave had been extinguished by liberation, the effect of any slave contract became limited, and in some cases invalidated outright. A warranty could only be legally enforced while the slave was considered lawful property, and emancipation had altered this equation irrevocably. By recognizing the legal personhood of former slaves, the law nullified all warranty protections; there no longer existed any "thing" to guarantee. On the one hand, the hubris of litigants' claims is remarkable; many believed they ought to be protected and continue to enjoy some of the benefits of slave ownership, despite the total collapse of the Confederacy and its pro-slavery cause. On the other hand, this cognitive lapse is not surprising; it came in part because the precise meaning of emancipation had yet to be fully worked out by anyone in the immediate aftermath of war. Thus, when litigants went to court seeking compensation for their own individual lost causes, they participated in the process of determining the meaning of black freedom, and by extension, the shape of and cost to the post-emancipation Southern economy.

The Currency Complication: Loss Compounded

State courts had to contend with an additional financial complication when rendering verdicts in some of the cases that originated from the Confederate period – especially slave contract cases. Many of these contracts were to be paid in Confederate currency, or, sometimes, in "current funds."[32] In fact, many cases involving slave sales or hires only reached the post-bellum state courts because the payment specified in the contract had potentially become as valueless as the slave property itself. Buyers tried to avoid paying anything not just because the slave property being conveyed had become worthless, but also because Confederate currency had lost all value, and could no longer be legally circulated. Sellers, on the other hand, demanded Confederate dollars be converted directly into US dollars or specie (1:1) in order to receive the maximum value of the transaction – the original face value of the note plus late charges, court fees and damages. There were few legal rules that helped judges know how to how to deal with the currency complication, which only added complexity to cases. State courts would have to wrestle with this obstacle on their own, while anxious litigants contemplated what judges' rulings would mean for their personal finances.

Yet currency cases clearly exhibit additional elements of financial risk, which only compounded already dire post-bellum financial problems. For one thing, even before the Civil War, paper money had always been volatile. As Stephen Mihm has shown, during the decades before the war, paper "money inspired not careless faith and trust, but nagging doubt and scrutiny."[33] The federal government itself had only passed the Legal Tender Act in 1862, which gave the government authority to print paper money (greenbacks). Indeed it was not until

[32] This rather ambiguous term, "current funds," found its way into many contracts made during the Civil War. It was a way for buyers and sellers in the Confederacy to protect themselves against the economic uncertainty and scarcity of specie that plagued the South. Litigants would argue over the meaning of the term in their own best interest.

[33] Stephen Mihm. *A Nation of Counterfeiters: Capitalists, Con Men and the Making of the United States*. (Cambridge: Harvard University Press, 2009),1.

Reconstruction that this was finally deemed legal by the Supreme Court in *The Legal Tender Cases*.[34] Second, even if many chose to overlook it in 1861, there was an inherent financial risk in secession and the establishment of a new nation. Despite early victories, there was no guaranteed military victory that would make the Confederacy anything more than a contingent government. Accepting currency from a nation that had not yet established its independence required an element of faith on the part of those who used Confederate currency. Third, as many of the currency cases make clear, as the tide of war shifted and the outcome became increasingly certain, faith in Confederate currency understandably waned. At that point, any further use of the scrip became subject to the discretion of individuals who would have to decide whether it was worth the risk of accepting it.

Nonetheless, the very presence of cases involving the problem of Confederate currency attests to the commitment to the Southern cause. Many Southerners proceeded in their daily business assuming without question that the Confederacy was, for all intents and purposes, a separate nation, independent of the United States. After the war ended, the US Supreme Court ruled that secession was, and had always been a legal impossibility, but this assertion depended on Union victory. Yet, the reality remained that the Confederacy behaved as an independent nation, and printing and circulating of its own legal tender attested to the fact. Moreover, regardless of how state judges understood the legality of secession, they would be forced to confront cases involving the currency minted without the authority or permission of the United States.

The currency cases served an important function in legal Reconstruction; the rulings helped eliminate one of the remaining vestiges of the Confederacy and, in so doing helped facilitate reunion. As Stephen Mihm describes, even before the end of the Civil War, Southerners favored greenbacks to their own nation's "graybacks." The preference signaled the beginning of "a process by which the South was absorbed once again into the nation – not through brute military force or territorial conquest, but via the green slips of paper that denoted a reinvigorated Union." In other words, as state courts converted defunct notes into currency of value or rejected them outright, they were tying up one of the Confederacy's remaining loose ends, and helping to reincorporate Southerners back into the Union. Resolving cases like these helped wipe legal dockets clean of both slavery and of the remnants of the legal order of the defunct Confederacy. Yet, in practical terms, the currency complication had one of the most direct effects on personal account books of Southerners who had once considered Confederate notes legal tender.

The Texas case of *Williams v. Arnis*, introduced in Chapter Two, not only illustrated the need for legal specificity as to the date of emancipation in the Lone Star State, it also brought the currency complication to bear on the Supreme Court of Texas. The case involved a slave hire contract that was deemed valid according to the court.[35] As previously recounted, P. Williams and H.J. Meadow had hired the slaves Ben, Charles, and Eliza from Henrietta Arnis. The contract stipulated that Williams and Meadow would pay Henrietta Arnis $700, "in current funds," on January 1, 1866. Annual interest of 8% would be added if the note were not paid on time.[36] But the parties differed on the meaning of "current funds." Williams and Meadow, who owed Arnis for the hire of the slaves, argued that current funds meant Confederate currency,

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[34] The decision reversed an earlier ruling on the legality of paper money.

[35] The details of the court's view on the contract was chronicled in an earlier chapter. The judges ruled that slavery was still legal at the time the contract was made, thus it had to be enforceable in the Reconstruction era court, despite emancipation. To do otherwise would eliminate the remedy.

[36] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, case file page 2.

which was legal tender when the contract was signed on January 1, 1865. They said this was the common meaning of the phrase when the contract was made. Thus, the Texas court had no jurisdiction over the "matter in controversy" because the total value of the bond had been reduced to $100 in the now almost worthless money. Even if William and Meadow owed Arnis money, the amount was so negligible that a trial in state court was not appropriate.

Henrietta Arnis felt differently. She believed that the meaning of the ambiguous phrase meant to convey funds that were currently in circulation at the time the note came due. If the two men had paid in full for the hire of her three slaves at the time they signed the contract, Confederate currency would have been acceptable. Because they did not, they owed in funds that were legally recognized at the time the note matured. This, of course, protected her in the event that the Confederacy were defeated between the time the contract was signed – January 1, 1865 – and the date the note came due one year later. Since the Confederacy had been vanquished during that time, and it was near defeat in January 1865, Arnis' claim seems not only reasonable, but also financially savvy. In the initial trial, it was up to a jury to decide if Arnis had changed her interpretation after it became certain that Confederate notes would be worthless or whether her interpretation of the phrase had been agreed upon at the time the contract was signed.

In the original jury trial in Cherokee County, Texas, district court Judge Rueben Reeves instructed the jury to determine the meaning of "current funds." The note entitled the plaintiff to "recover the amount of the money therein agreed to be paid unless the evidence shows that the parties intended by the expression of 'current funds' that the same was to be paid in Confederate money."[37] Simply put, the meaning of the elusive phrase determined the outcome of the case, and the original contract did not make that meaning clear. According to the court, in order for Williams and Meadow to prevail, they had to prove the meaning of "current funds." Yet, they could only prove that "there existed laws of the Confederate congress which punished the dealing in the United States treasury notes," but not whether the note was to be paid in Confederate currency or some other form of money, such as specie. Because they could not do so, the jury awarded Henrietta Arnis $487.62. However, this was a far cry from the $1500 Arnis originally sought. The jury "concluded the note was payable in the United States currency, which was proved to be in circulation here at the maturity of the note, [and] deducted the amount of the depreciation."[38] Greenbacks were the only legal paper money circulating in Texas at the time the note came due, and the jury converted the amount listed in the original contract to reflect that fact. Both parties left the courtroom unhappy with the verdict.

The use of Confederate currency might have had more widespread implications than it would seem from the basic facts of the *Williams* case. It was possible that the use of rebel notes rendered contracts null and void because the contract could then be deemed "an illegal dealing."[39] In other words, contracts that required payment in Confederate currency might not be enforceable at all because the notes had not been issued by a lawful or proper authority. If the Confederacy itself was illegal, then so too was its currency. The attorneys for Williams and Meadow asked "whether a contract to be discharged in 'current funds,' which was proved to have meant 'Confederate treasury notes,' and for over two years preceding the contract, could

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[37] *Williams v. Arnis,* 30 Tex. 37 (1867). Texas State Archive, Box 201-4046, file M-3864, case file page 15.

[38] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 49.

[39] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 42.

have meant nothing else in Texas, was such an illegal dealing as rendered the contract null and void?"[40] However, the Supreme Court of Texas sidestepped this issue altogether. The justices had "little doubt" that "current funds, in which the note is made payable, does not mean specie, but the representative of it."[41] But, they did not accept the second part of the appellant's counsel's question. Instead, they applied an established legal rule that left the original contract intact.[42]

Ordinarily, "an obligation payable in specific property" would require payment no "less than the amount in specie or its equivalent in property." But, when contracts are "made payable in 'bank notes,' 'currency of the country,' or any other paper currency whether circulating at par [face value] or not," the rule no longer applies precisely because paper currency in any form is subject to changes in the market.[43] Especially without any regulation of currency, there was no way to ensure parity. Indeed, the justices declared, "The difference between a note stipulating for $1000 in property, and one calling for the same amount in Texas promissory notes, is so obvious as to strike the understanding without reasoning or illustration."[44] Instead, the justices of the court would construe the contract "according to usage of the community, as the best evidence of the intention of the parties."[45] Because the jury in the original trial had simply converted Confederate dollars into greenbacks to determine the value of the note, it had rendered a proper verdict that the Texas Supreme Court upheld. In Texas, contracts payable in Confederate currency became uncomplicated; a currency conversion determined by a jury would suffice.

In rendering their verdict, we find justices of the Texas Supreme Court retreating to the comfort of antebellum common law, avoiding almost entirely the magnitude of the thorny issue before them. They treated the Confederate currency at issue in *Williams* as if it were any other form of circulating bank note in Texas. But rebel dollars were anything but; they were the notes issued by an illegal and treasonous government. So why, then, would a simple currency conversion be enough? The answer is threefold. First, the cases that would later clarify just exactly what the Confederacy was as a matter of law were not decided until after *Williams v. Arnis* concluded. Neither Texas' *The Emancipation Cases* nor the United States Supreme Court case of *Texas v. White* had yet established that the Confederacy had never existed as a separate legal entity. Thus, it was plausible, at least for a time, to treat Confederate currency as foreign bank notes. Second, the Texas Court's willingness to rule on cases like this one – idiosyncrasies and all – attested to the firm and unwavering commitment to uphold contract rights. As we have

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[40] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 42.

[41] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 48.

[42] Paschal's Digest, Article 220. George W. Paschal, *A Digest of the Laws of Texas: Containing the Laws in Force, and the Repealed Laws on Which Rights Rest, from 1754-1874*, vol. I (Houston: E.H. Cushing, 1875), 144.

[43] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 48.

[44] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 48.

[45] *Williams v. Arnis,* 30 Tex. 37 (1867). Paschal and Texas Supreme Court, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868*, 48.

seen, most states, Texas included, remained consistently faithful to upholding contracts that were made according to the laws in effect at the moment they were executed, even when they included slavery or other elements that had become illegal as a result of Confederate defeat. However, part of this commitment required some modification in judges' rulings, and when it came to currency, a basic conversion did the trick in Texas. Finding a way to handle the currency complication allowed judges to leave the sanctity of contract intact. Finally, the judges were responding to the practical necessity of the moment. Litigants needed financial security, and this method of ruling accomplished that, at least in part. It set a standard for how to deal with ambiguous contracts made during the Confederate period, and provided citizens with the power to enforce them in local courts. Though a plaintiff like Henrietta Arnis would not necessarily get the full amount she had hoped to receive, defendants like Williams and Meadows could not abandon their obligations due to questions over currency. Contracts made lawfully would be honored in ways that respected the original terms of the agreement as closely as possible.

Virginia courts also dealt with the use of Confederate currency. In the 1873 case *Penn v. Reynolds*, the issue was slightly different than in *Williams*, because payment had been attempted. On December 29, 1862, Thomas H. and Jackson Penn purchased 125 acres of land for $3,025 and one slave named Mary for $2,168 from Elinder W. Reynolds.[46] The parties agreed to a price of $5,193, to be paid, once again, "in current funds."[47] The Penns contended that "these debts were contracted with reference to Confederate State Treasury notes as a standard of value." The buyers secured two bonds for their purchase, and agreed to pay Reynolds one year from the date of the note's execution. Unlike *Williams*, the notes matured prior to the end of the war – in December 1863. At that time, Confederate notes would have been considered legal tender, and could also be construed as "current funds." (A Confederate law prohibited the use of US money, as attorneys in the *Williams* case explained.) Consequently, when the contract came due, Thomas and Jackson Penn attempted to "pay to the said Reynolds the full amount thereon." However, Reynolds refused to accept the payment, "upon the ground that it was Confederate money."[48] Court records do not indicate what he wished to receive instead.

Here, it was the seller who refused to accept payment, rather than the buyers refusing to pay. Yet, the central problem remained: contracts that stipulated (explicitly or implicitly) the use of Confederate currency became increasingly troublesome. "Graybacks" were legal tender according to the Confederacy and the state of Virginia, but over the course of the Civil War, they became increasingly worthless, putting sellers at a particular disadvantage. The Penns asserted that in the year that had passed, "there had been no substantial, or in fact any depreciation in said currency."[49] But, by the time the note came due, the Union Army had won at Gettysburg, and the Emancipation Proclamation had gone into effect. It was a mere six months before the Battle of Atlanta. It would not be a stretch for a shrewd Southerner to anticipate the coming Confederate defeat. Therefore, it is not completely surprising that Reynolds refused Penn's payment. Rather, it is surprising that given the state of affairs, Reynolds, and others like him, failed to specify a

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[46] This is a surprising amount to pay for a slave at such a late date. The Preliminary Emancipation Proclamation had already been issued. That such a contract was made at all testifies to the confidence that Southerners continued to have throughout 1862. Indeed, in a court deposition, one William T. Akers testified that the Penns overpaid for both the slave and the land. He estimated the slave was worth $1000, and the land worth "8 or $900." Later testimony suggests that Jackson Penn was willing to overpay for the land because it adjoined his other property. *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 12.

[47] *Penn v. Reynolds*, 23 Grattan 518 (1873). Virginia State Law Library case file #88, 1

[48] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 1.

[49] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 4.

currency that they *would* accept in their original agreements – one whose value was not tied to the military success or political stability of the Confederacy.

Without this clarity, the case found its way to court. In 1867, Fleming Reynolds, the executor of now deceased Elinder W. Reynolds' estate, sued Thomas and Jackson Penn in the Patrick County Court for the money owed to Elinder. There, the jury sided with Reynolds, and awarded him $3,000 in currency that had value when they reached their verdict. The Penns conceded that the sum was "about the amount due on said bonds, if scaled by the value of Confederate money on the date it was entered into."[50] However, they were nonetheless troubled because they did not know "upon what principle the Jury arrived at the amount of their verdict."[51] The claim made here by Thomas and Jackson Penn highlights the primary problem courts faced when handling cases dealing with Confederate currency. Even if a court accepted the contract as valid even with the use of defunct notes – as Virginia's courts did in this case – there was no set rule for determining the post-bellum value of the agreement. The members of the jury in the county court trial simply determined an amount they believed to be fair given the circumstances. This was far from unassailable.

As appeals court records later revealed, the Penns had a point. Calculating the value of the contract had been difficult for the jury. During the appeal, William Witt, one of the members of the original jury, testified to that fact. "There was a good deal of confusion on the jury. There was a proposition to scale the debt. – I didn't think the regular scale was applied." The "regular scale" was not specified in court records; instead, the jury in the Patrick County Court arrived at the $3,000 sum because "two witnesses who testified said the land in controversy was worth $3,100 in gold, and we of the jury concluded to lump the verdict at $3,000, without regard to anything whatever."[52] It hardly seemed official, and the Penns exploited the fact. On appeal, the Penns' chief complaint was that the wrong court heard the initial suit; the case should have been handled by a court of equity that could have better determined the amount they currently owed to Reynolds. They argued that the initial court should "have ordered an enquiry, before a Commissioner, to ascertain [the] value [of the note] on that day and have ordered a decree accordingly."[53] This, they argued, would have been far more accurate, and far more equitable.

The case highlights a second problem faced in some of the cases detailed in this chapter, not just those related to Confederate currency. Though in 1863 Thomas and Jackson Penn had the funds in Confederate notes to pay the debt they owed Reynolds, they were no longer in that position in 1867. "Being unable to pay said bonds in the currency of the country at said time, they could do nothing but await for a time when they could be settled."[54] Once the war ended, the Confederate dollars the Penns had accumulated had become worthless. Their wealth, like that of so many other white Southerners, had vanished with Southern surrender. Given those circumstances, and the haphazard jury determination, they felt compelled to appeal the circuit court's decision. However, Reynolds would have likely been in a similar financial position, and the verdict left him with substantially less than the price the men originally agreed to pay in 1862. "If any party was at all injured by the judgment of the said Court at law," it was Reynolds himself, "and not the plaintiffs, as the judgment was rendered for a great deal less than he

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[50] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 1.
[51] *Penn v. Reynolds*, 23 Grattan 518 (1873). Virginia State Law Library case file #88, 1.
[52] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 14-15.
[53] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 3.
[54] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 5.

contracted."[55] It was a foregone conclusion that neither party would emerge from the litigation with all they had hoped for, but it would be up to the Supreme Court of Virginia to determine exactly what that meant.

Ultimately, the high court in the Old Dominion sided with Reynolds. However, the justices did so by sidestepping the currency issue altogether. No steadfast rule for handling the Confederate currency complication would be forthcoming. Instead, the justices in Virginia ruled on a procedural matter. The Penns had appealed to the wrong court. When the "debtors apprehended that an execution would be issued against them upon the judgment, they applied to a court of equity for relief, …and obtained an injunction to the judgment. In other words, having been once relieved in a court of law, they applied to be relieved again in a court of equity--that is, for double relief." This, the court believed, the Penns had no right to do; the original trial had reduced the amount they owed, offering the men some of the relief they sought. "It appears from the evidence in the cause, that the debt was not, in fact, scaled to its true value as of the date of the bonds." However, the members of the original jury "thought, that under all the circumstances, the fair value of the property sold, would be the most just measure of recovery in the action; and therefore adopted that principle as the measure of the recovery." The court acknowledged that the judgment against the Penns had likely been too much, but "whatever, and however erroneous, the principle adopted by the jury may have been, the judgment in the action at law cannot be questioned in this collateral way, but is conclusive until reversed by an appellate court."[56] As for the purchase of Mary, the slave, the court relied on the previous ruling that set the standard for judging slave contracts, *Henderlite v. Thurman* (See Appendix A). Since the contract was made legally, the Penns would have to pay the full amount of the bond. The judgment in the original trial would stand.

Once again, we find Southern courts unwilling or unable to devise a single procedure for dealing with Confederate currency in post-bellum cases. Yet, the courts in both Texas and Virginia deferred to common sense solutions devised in lower courts. Perhaps Laura Edwards' work on the antebellum period offers the best insight into why this might be so. Deferring to the lower courts allowed decisions, rendered by members of local communities, to remain intact. In the long run, this form of flexible jurisprudence simply made the most sense. It permitted judges to sidestep the thorny issue of Confederate legitimacy, and it allowed justice – in some fashion – to be served. After all, currency cases would not be an ongoing legal problem; Confederate notes had only circulated for the short life of the rebel nation. In essence, the problem would resolve itself.

While there would be no single rule for judging cases that included Confederate currency in most states, there was – at least for a time – a directive for dealing with such cases in those states that committed to a more radical Reconstruction and refused to handle matters of slavery in post-emancipation state courts. Louisiana, for example, made it clear in *Wainwright v. Bridges*, reviewed in Chapter Two, that all of the institutional structures that had supported slavery had been destroyed with abolition. Thus, the courts of the Bayou State no longer had any authority to rule on matters related to slavery. In addition, the state constitution adopted in 1868 included a provision that prohibited the legal recognition of any contract in which Confederate currency was used.[57] As a result, there is only one post-emancipation slave case from Louisiana that includes any mention of Confederate notes. Not surprisingly given the court's record, the justices

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[55] *Penn v. Reynolds,* 23 Grattan 518 (1873). Virginia State Law Library case file #88, 11.
[56] *Penn v. Reynolds,* 23 Grattan 518 (1873), 524.
[57] Article 128, Louisiana Constitution of 1868.

declared the currency "illicit" and voided the transaction outright. The 1869 case *Porter v. Brown* involved a bequest made by white slave owner William Porter to a former slave boy who was owned by another man. The will instructed Porter's executors to purchase the boy, named Victorin, send him to school, and pay him $1000 when he turned eighteen.[58]

The executors followed these instructions, and they did give Victorin $1000 when he turned eighteen. However, the bequest was made in March of 1863, and was thus made in Confederate dollars. For this reason, the Louisiana Supreme Court voided the transaction. Not only was Victorin under eighteen when the executors of Porter's estate paid him, but "He cannot be held to have given a legal consent to the payment and thereby bound as equally participating in the circulation of an illicit currency."[59] Thus, "there was no payment in law," and Victorin would have to be paid again, this time in currency the court deemed valid. Since the Supreme Court of Louisiana considered the Confederacy and its currency illegal, and the Reconstruction constitution of the state banned the enforcement of contracts made in in such notes, lower courts in the Bayou State would have considerably less difficulty deciding cases that included a currency complication. There would be no case-by-case assessments; there would be no conversions or jury estimations. The transactions would simply be deemed illegal on their face.

Given the US Supreme Court's ruling in *Texas v. White* – that the Confederacy itself was never an independent nation – judges in state courts might have followed the lead of states like Louisiana. If the Confederacy had never enjoyed the sanction of law, then how could its currency? Ultimately, when it came to the currency complication, the path that many states charted straddled both sides of the line. More often than not, state courts respected the fact that most litigants took the legal status of the Confederacy and its currency as a given. Moreover, for those states that demanded the review of all slave contract cases (in this study, all but Louisiana), judges needed enough room to maneuver. They devised practical measures to handle the problem that allowed the preservation of the contract in question and permitted the court to rule. Slavery, and the Confederacy, it would seem, would remain relevant in much of the South. However, it was no longer worth nearly as much as it once had been. In the end, the United States Supreme Court would settle the matter by ruling specifically on the use of Confederate currency in *Thorington v. Smith*, a case that will be explored further in Chapter Five.

Taking Exception to the Rule: The State Steps In

In the wake of Confederate defeat and economic implosion, Southerners sought to mitigate the effects of the physical and financial destruction caused by the war. In Virginia, the legislature itself attempted to prevent the sort of calamity that befell the Calhouns and others from ruining entire states. It became clear that Southerners of all colors and classes faced destitution and dependency, and the states could not afford to care for their citizens any more than the individuals could themselves. Virginia, a state hard hit by the physical destruction of the Civil War, attempted to forestall total economic collapse by adopting a retroactive homestead provision in its new state constitution. The homestead exemption was not a new legal device; other states in both the North and South had adopted them during the antebellum period to help protect small independent property owners against periods of economic panic and the creditors who preyed on them during such times.[60] The goal of such a measure was to provide security for

[58] *V.W. Porter v. Brown,* 21 La. Ann. 532 (1869).
[59] *V.W. Porter v. Brown,* 21 La. Ann. 532 (1869), 533.
[60] In other states, such exemptions were called "Poor Man's Laws." Texas was the first state to adopt a homestead exemption, doing so in 1839. This should not be surprising, since the device was far more common in Spanish Law

households; families would keep their homes and means of production despite economic variables, crop failures, or derelict husbands who failed to provide adequately for wives, children, and other dependents.[61] Yet, Virginia was a latecomer to this game; it was one of only two Southern states (Kentucky was the other) that failed to adopt a homestead exemption prior to the end of the war.[62]

The adoption of a homestead exemption in Virginia signaled a new political willingness to protect the yeomanry. In a state once dominated by large slaveholders, this was only possible because, in the wake of the Confederacy's collapse, smaller planters had managed to wrest control of the state constitutional convention and the legislature away from planter elites.[63] This was antebellum Southern society inverted; small landowners and African Americans seized the opportunity to create a political and legal order that would guard and consider equally the less affluent. As Eric Foner poignantly depicts, at Virginia's Constitutional Convention in 1867, "an interracial group of Virginia Republicans," who referred to themselves as "the $1000 or $500-men," professed their support for the protection of the lower classes, as Andrew Johnson had already taken care of the so called "$20,000-men."[64] They were Reconstruction's 99%, the "registered voters of the First Congressional District of Virginia", and their indictments and demands were specific and politically pointed.[65] They declared,

> The courts re-established under the auspices of the last Legislature, through their law officers, are now demanding the heart's blood of the poor debtors – and for whom? No one, save the capitalists and landed proprietors who were and are the secessionists of Virginia. We ask, in the name of High Heaven, shall these men, thousands of whom are under the ban of Congress – disfranchised – continue to be the ruling class, the owners of the land and masters of the people? As long as they are allowed to control the people by the ledgers, just so long with they be the greatest enemies the Republican party will have to contend with.[66]

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than in English or American law. See Goodman, "The Emergence of Homestead Exemption in the United States." "The ten Southern states passed their first homestead exemption laws in the following years: Texas in 1839; Georgia in 1841; Mississippi in 1841; Alabama in 1843; Florida in 1845; South Carolina in 1851 (repealed seven years later); Louisiana in 1852; Tennessee in 1852; Arkansas in 1852; and North Carolina in 1859. The remaining four states—Missouri, West Virginia, Kentucky, and Virginia—did not pass their first laws until 1863, 1864, 1866, and 1867, respectively." Alison D. Morantz. "There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family, in Nineteenth-Century America" *Law and History Review* 24, no. 2 (2006): 253n24.

[61] Paul Goodman. "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880." *Journal of American History* 80, no. 2 (September 1993): 470-498. Goodman argues that antebellum homestead provisions were adopted to support the republican ideal of self-sufficiency that was threatened by tenant farming, wage slavery, and the market revolution. It's worth noting that there was a negative side to adopting homestead exemptions. Creditors were less eager to loan money without strong assurances that the note would be repaid. This meant that often, the economy was constrained by a lack of financial liquidity.

[62] Kentucky was the other state. It adopted a homestead exemption in 1866.

[63] There was a $500 exemption that existed in Virginia before this was passed, but it was not a homestead exemption.

[64] Foner, 327.

[65] W.H. Samuel, *The Debates and Proceedings of the Constitutional Convention of the State of Virginia, Assembled at the City of Richmond, Tuesday, December 3, 1867* (Richmond, VA: Office of the New Nation, 1868), 87.

[66] W.H. Samuel, *The Debates and Proceedings of the Constitutional Convention of the State of Virginia, Assembled at the City of Richmond, Tuesday, December 3, 1867*, 88.

The purpose and vision of these petitioners were as clear as their political leanings. The courts were the venues where debts were settled, and these small property owners sought new advantages when they entered that official space. They demanded that both the legislative and judicial branches of Virginia's government adjust to meet the needs of all social classes in the post-bellum state – so that those who had not been instrumental in the Confederate cause of maintaining slavery could find relief from the disaster of war and defeat. They refused to take the blame for the Old Dominion's current predicaments or pay the price for Confederate failures; culpability lay at the feet of the former slave owners who had once made up Virginia's ruling class. Whether or not the Supreme Court of Virginia would support this active new political group or cease "demanding the heart's blood of the poor debtors" was less certain, as the retroactive nature of the exemption provoked controversy right from the start (and in all states where such an exemption was adopted). The fate of the exemption would be decided in 1872 in *The Homestead Cases*.

On the one hand, it is not surprising to see the new Virginia legislature stand up for small farmers and members of the middling classes; class conflict between planters and the yeomanry had existed in the Old Dominion long before the outbreak of the Civil War, and this was the moment to level the political playing field.[67] Certainly this fraught history helps explain the degree of outrage expressed in Virginia's constitutional convention during Reconstruction. On the other hand, lawmakers were responding to a unique set of circumstances in the years following the war; Virginians of all classes faced financial ruin. Though new lawmakers took special care to protect the yeomanry, the state was experiencing a social and financial crisis that transcended class-based distinctions. Whatever slavery's inherent risk may or may not have been, the economic effects of emancipation were as undeniable as they were unexpected. Moreover, Virginia was not the only Southern state to pass a retroactive homestead exemption. For instance, North Carolina, Georgia, and Alabama, and Mississippi also did the same. The courts in all of these states upheld the retroactive exemption, but the United States Supreme Court would ultimately strike it down for the same reasons Virginia's Supreme Court ultimately would: it violated the Constitutional protection against the impairment of contract. Yet, this did not happen until 1877 in *Edwards v. Kearzy*.[68] Finally, homestead exemptions safeguarded members of all classes; they were enacted to protect debtors large and small. In this way, Virginia's homestead exemption (and others like it) ought to be viewed as a reflection of the debtor-based agricultural economy of the South, which was grounded entirely on property ownership.[69] Given these circumstances, it would be shortsighted to dismiss *The Homestead Cases* as a mere reflection of an older class-based issue; while elements of class conflict are certainly present, the case, and the exemption itself, only existed because the revolutionary effects of Civil War and emancipation made such a provision appealing and seemingly necessary to help many weather the post-bellum economic storm. It was, more than anything, an act of desperation to protect the antebellum agricultural economy, and the indebted landowners of all classes along with it.

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[67] William W. Freehling, *The Road to Disunion Volume I: Secessionists at Bay, 1776-1854*. (Oxford: Oxford University Press, 1991). See especially Part III.

[68] Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," 492. Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 94-97. *Edwards v. Kearzey,* 96 U.S. 595 (1877).

[69] James W. Ely, Jr. "Homestead Exemption and Legal Culture." In *Signposts: New Directions in Southern Legal History*, ed. Sally E. Hadden and Patricia Hagler Minter. (Athens: University of Georgia Press, 2013), 294.

Once established, "Homestead and other Exceptions", under Article XI of Virginia's Constitution of 1870, protected $2000 worth of property from creditors – a high amount compared to antebellum standards.[70] Section 1 of Virginia's homestead exemption read,

> Every householder or head of household shall be entitled, in addition to the articles now exempt from levy or distress fore ret, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order, or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him….[71]

Virginia Assembly Act of June 27th, 1870, known as the Homestead Exemption Laws was subsequently passed to pursuant to this provision.[72] The constitutional provision and succeeding statute ought to be understood as part of the social relief deemed necessary by some statesmen to help the recovery of the Southern economy and aid in the protection of individual Virginians. It was meant to serve as a buffer for those facing indigence, because, according to lawmakers, the cost of defeat should not be so high as to render the state's citizens destitute.

As a result of the legal change, debtors in Virginia could suddenly shield $2000 worth of property from their creditors, even if their note were already overdue, because the provision was retroactive; it covered "any debt heretofore or hereafter contracted."[73] Virginia's Constitutional Convention intentionally structured the exemption in this way in order to foster greater stability and economic security in the post-bellum years; it protected those whose financial vulnerability had only been exacerbated by the war and the destruction of slavery.[74] Indeed, as historian Paul Goodman notes, homestead exemptions were passed in part to "revive" Southern agriculture.[75] It was necessary for the business of the South – plantation and small farm agriculture – to resume production in order for economic recovery to take place. Many Southerners believed this recovery could only happen if planters retained possession of their land. But the lending of

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[70] Virginia adopted a Constitution in 1864, though its legitimacy was disputed. The Constitution of 1870 was the only one formally adopted during the Reconstruction period.

[71] Acts of the General Assembly of the State of Virginia, Passed at the Session of 1869-70. Richmond: James E. Goode Printer, 1870, page 627.

[72] See Chapter 157 – "An ACT to Prescribe in What Manner and on What Conditions a Householder or Head of a Family shall Set Apart and Hold a Homestead and Personal Property, for Benefit of Himself and Family, Exempt from Sale for Debt." *Acts of the General Assembly of the State of Virginia, Session of 1869-70.* Richmond: James E. Goode, Printer, 1870, page 198.

[73] Article XI, Section 1 The Constitution of Virginia of 1870. This amount was significantly higher than similar antebellum provisions in other states. In 1852, for example, Indiana only exempted $300; however, there was a general trend toward more liberal exemption laws during Reconstruction. Goodman. "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," 492.

[74] Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," 492-493. Goodman notes that regardless of intention, the homestead exemption laws ended up helping the planter elite as well as the yeomanry. In theory, the exemption would have protected free African American property owners as well as whites. However, I have not found a case that fit these circumstances nor seen any scholarship on the matter. James Ely suggests that post-bellum homestead exemptions had a racial dimension to them; they prevented whites from losing their land, thereby reducing the amount of land available for purchase by newly freed blacks. Ely, Jr., "Homestead Exemption and Legal Culture," 294.

[75] Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," 491.

money would also be necessary to accomplish this task, and the homestead exemption placed creditors at greater risk for financial loss, restricting the amount they might be willing to lend. This was not a primary consideration of politicians when the Virginia Constitution of 1870 was adopted, but it certainly would become a serious concern for individual lenders. For the courts, it was the retroactive nature of the provision that would be particularly problematic.

Not surprisingly, the yeomanry in control of the Virginia statehouse were not sympathetic to creditors; the population that stood to lose a great deal as a result of the new homestead exemption. Yet, creditors had also taken financial risks on slavery; they had lent the money necessary for individuals to buy the slaves that toiled across the region, and they too, as institutions or individuals, faced insolvency after the end of the Civil War. *Tackett and Stone v. Ford, Goode v. Boyd's Executors*, and *Hill v. Burging*, which became known collectively as *The Homestead Cases* (1872), dealt squarely with Virginia's new constitutional provision.[76] At issue was the interference with contracts through the adoption of a retroactive homestead exemption, yet, as we shall see, slavery proved to be integral to the case.

That it would be small property owners who crafted Virginia's homestead exemption seems only fitting, for they were indeed at the heart of *The Homestead Cases*. James W. Ford and John E. Tackett were themselves men of the middling class, and they reinforced the claims made at Virginia's Constitutional Convention. Counsel for Ford and Tackett declared to the Virginia Supreme Court,

> That truth is, that the creditor class of the community have moulded the legislation, and even the public sentiment, of the States, on the subject of contracts. They have applied their own commercial code of morals to the subject -- a code which ignores all other relations and obligations but that of creditor and debtor….[77]

In other words, they implored the Court to consider the post-bellum circumstances in which Virginia found herself. The recklessness and moral bankruptcy of antebellum elites had helped lead the state to war and subsequent defeat, and their interests should no longer be protected at the expense of others. Here, we find a post-bellum condemnation of the "slave power," made by Southerners themselves. The court should recognize, the litigants argued, that there were "relations even more important than that of creditor and debtor to the well-being of a State, prior in time, and based upon higher sanctions."[78] By invoking God, counsel appealed to higher law to prove just what was at stake in *The Homestead Cases.* Regardless of where one stood, society had changed, laws had changed, Virginia's Constitution had changed, and the appellants hoped that the Virginia Supreme Court would reflect precisely that evolution.

The high stakes of *The Homestead Cases* contrasted greatly with the basic contractual disagreement at the center of the case. Ford and Tacket had entered into a contract with Hankin Stone on August 4, 1860; the original value of the note was $980.75 plus an additional six percent interest that would accrue from August 7, 1861.[79] However, when it came due, Ford and

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[76] *The Homestead Cases,* 63 Va. 266 (1872). In addition to the published opinion, the case files from *Tackett and Stone v. Ford* and *Hill v. Burging* exist in paper form at the State Law Library of Virginia, the library for the Supreme Court of Virginia.

[77] *The Homestead Cases*, 63 Va. 266 (1872). Grattan, for the appellants.

[78] *The Homestead Cases,* 63 Va. 266 (1872). Grattan, for the appellants.

[79] Frustratingly, the extant records do not indicate what the original contract was for or what the relationship between the parties actually was. They merely articulate the terms of payment and the amount owed.

Tackett did not repay the loan. They defaulted not because they were unwilling to pay, but because they were unable.[80] War and emancipation had made repayment impossible. The attorney for the duo argued,

> [T]he war having swept off their slaves and nearly all their personal property, leaving them little less than their lands, these lands are insufficient to pay their debts; and therefore they ask for some relief from the overwhelming ruin which has been brought upon them, not by any misconduct or extravagance of their own, but by a calamity for which creditors and debtors are alike responsible.[81]

As would be the case for so many others, the destruction of war and the emancipation of slave property without compensation had left Ford and Tackett all but insolvent –"Ruin…[had] been brought upon them" by a "calamity" that they didn't cause. No slave had been mentioned in the original contract made between the litigants, but the institution, so intertwined with all levels Southern economy and society, remained central to this case and to the personal finances of all of the litigants.[82]

While Ford and Tackett attempted to avoid financial ruin and keep their estates intact, Hankin Stone, the creditor in this case, sought to recover the monies owed to him, "payable long before the institution of this suit."[83] His livelihood, and the livelihood of others like him, was also at stake; he had lent funds only under the condition that he would be repaid, or in the event that he was not repaid, that he could turn to the courts for legal enforcement of the contract. Stone himself may have become a debtor for the same reason that Ford and Tackett were unable to pay their loan – emancipation and wartime destruction. Or, he may simply have wished to have the contract honored in order to settle his finances. Whatever the reason, Stone demanded relief, and decried Virginia's homestead exemption as "contrary to article I. sec. 10th constitution of the United States," which prohibits the states from impairing contracts.[84] Indeed, the exemption appeared to prevent him from collecting any of the funds owed to him because the court had assessed the value of Ford and Tackett's wealth at less than $2000 each.[85] The total worth of James Ford, for example was calculated to be a mere $191.75.

Before the case reached the Supreme Court of Virginia, the lower courts had agreed with Stone and his fellow plaintiffs; the homestead exemption was unconstitutional. In a final act of desperation, the debtors hoped that the Supreme Court of Virginia would find differently. After all, said the counsel for Ford and Tackett, "the principle of exempting absolutely some of the

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[80] Ford and Tackett were arrested in 1870 for both failing to appear before the court, which automatically rendered the judgment of the lower court for the plaintiff, Stone. Case file 458, *The Homestead Cases,* 63 Va. 266 (1872), 9.
[81] *The Homestead Cases,* 63 Va. 266 (1872). Grattan, for the appellants.
[82] The original contract read: "Twelve months after date we promise to pay to the order of Hankin Stone, payable and negotiable at the office of discount and deposit of the Farmers' Bank of Virginia, at Fredericksburg, without effect, nine hundred and eighty dollars and seventy-five cents, for value received." Case file 458, *The Homestead Cases,* 63 Va. 266 (1872), 10.
[83] Case file 458, *The Homestead Cases,* 63 Va. 266 (1872), 9.
[84] Case file 458, *The Homestead Cases,* 63 Va. 266 (1872), 2. Article 1, Section 10 reads: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."
[85] The court's officer listed the possessions of each original defendant. The list included furniture, household items, and clothing. The plaintiff, because he believed the homestead exemption to violate the US Constitution, refused to acknowledge the appraisal.

property of the debtor from the grasp of his creditor has always been recognized and acted on."[86] There was nothing unusual, they argued, with a state restricting the property that could be legally seized by a creditor; courts across the country had accepted this in the past. Furthermore, they continued, "there is a distinctive difference between the obligation of a contract, and the remedy for the breach of the obligation."[87] In other words, the right to contract had not been impaired; rather, the Constitution and Legislature of Virginia had merely limited the legal remedy, a method, the plaintiff's attorney's noted, the Supreme Court had upheld in the 1843 case *Bronson v. Kinzie*.[88]

In the companion case of *Hill v. Burging*, the appeal by the debtors was even more ambitious. In his brief, the petitioner demanded that the judges "defer to the political power of the convention and the will of the people in adopting the constitution."[89] Or, in other words, respect the new political order that had come to represent the people of Virginia. The $2000 homestead exemption was a political issue settled by the constitution of the state, and unless the law violated "a vested right," "the courts should not and cannot declare the action of the conventional power to be null and void on the ground that it is contrary to public policy."[90] Simply put, the will of the people of Virginia superseded the terms of the individual contract at issue in the case. Going even further, counsel argued that despite the ruling in *White v. Texas*, Virginia was not a state at the time the Constitution of 1870 was ratified, therefore the argument that the homestead exemption violated Article 1, section 10 of the US Constitution was moot – Virginia was exempt from Constitutional restrictions on states until formally readmitted, which had not yet happened. Instead, the federal judgment that proclaimed Virginia had always been a member of the union conflicted with the political necessity of readmission. The paradox is impossible to miss, and it pushes the question, what exactly was the Confederate States of America? In this case, it would be up to the Virginia court to decide. For these reasons, attorneys argued, the court should find for the debtors; it was legally justifiable and in the public interest of the state of Virginia.[91]

Ultimately, the Supreme Court of Virginia disagreed with the debtors in their respective cases. They ruled first on the matter of state status, and dispensed with the issue quickly by appealing to precedent. Justice Christian cited *Texas v. White*, "This decision upon a constitutional question, made by the highest tribunal in the land, specially constituted and clothed with the authority to adjudicate questions of this character, is binding upon this court; and while we do not adopt its language or its reasoning in all respects, its conclusions must be adopted as settling the status of the seceding States."[92] Once statehood had been (re)established, Justice Christian moved to the heart of the issue before the court. Did the Virginia homestead exemption infringe upon the right to contract spelled out in Article 1, section 10 of the United

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[86] Counsel for the Appellants (Ford and Tackett), *The Homestead Cases,* 63 Va. 266 (1872). As the attorney went on to note, property owned by a wife prior to marriage was protected from her husband and her husband's creditors. See Deborah A. Rosen, "Women and Property across Colonial America: A Comparison of Legal Systems in New Mexico and New York," *William and Mary Quarterly* 60, no. 2 (2003): 355–81.
[87] Case file 458, Brief for Ford and Tackett, *The Homestead Cases, 63 Va. 266 (1872)*, 2
[88] The argument was grounded on Taney's assertion that state could alter the remedies of a contract without impairing it based on "its own views of policy and humanity." Taney quote from *Bronson v. Kinzie* 42 U.S. 311 (1843). See also, Ely, Jr., "Homestead Exemption and Legal Culture," 296.
[89] Case file 458, Brief for Hill, *The Homestead Cases,* 63 Va. 266 (1872), 3.
[90] Case file 458, Brief for Hill, *The Homestead Cases,* 63 Va. 266 (1872), 3.
[91] Interestingly, in this instance, not being considered a state would have worked in the favor of some litigants. It suggests that the issue may not have been fully settled despite the US Supreme Court's ruling in *White v. Texas.*
[92] *The Homestead Cases,* 63 Va. 266 (1872).

States Constitution? It did. Just as the courts in Texas, North Carolina, and other states had done, Justice Christian reasoned that the laws in place at the time a contract was executed became an inherent part of the agreement. The homestead exemption had not been passed at the time Ford and Tackett entered into the contract with Stone, therefore it could not retroactively alter the remedy specified therein. This was indeed a violation of Article 1, section 10 of the US Constitution; the state had passed a law that impaired the obligation of contract. He stated unequivocally that the Virginia Legislature

> Cannot, by retrospective legislation, annul the force of prior obligations. If it could do this, then the integrity of contracts, and the security for their faithful execution, in every State in the Union, would no longer be placed under the protection of the constitution of the United States, but would rest entirely upon the discretion of the legislatures or conventions of the several States. And where would be found the limit upon that discretion?[93]

The Constitutional protection of contract rights could not be undone by unilateral state action. In effect, the ruling in *The Homestead Cases* reaffirmed one of the results of the Civil War; the Constitution, and by extension, federal power, had always and continuously superseded that of the states.[94]

According to the Virginia Supreme Court, the state legislature would have to find means other than a retroactive homestead exemption to protect citizens from economic disaster. Yet, by 1872, when this case was decided, Radical Reconstruction was rapidly giving way to Redemption, and the chances for progressive change or social relief that would include the needs of the yeomanry or African Americans were dwindling.[95] Nonetheless, the case did permit a true accounting of the cost of war. In other words, people could learn what war had truly cost them – to how much risk they were exposed – with some finality. Though the outcome threatened the livelihoods of many, rendering a verdict – any verdict – in *The Homestead Cases* had the potential to reinstitute some semblance of certainty to the Virginia economy because it settled an open question. Yet, as is all too clear, the bulk of the cost of the court's ruling would be borne by those small property owners that the homestead exemption had been instituted to protect; those who were left with few resources – many as a result of the war and emancipation – would indeed be left open to the vagaries of Virginia's post-bellum economy, and the demands of creditors.

In Kentucky, the Court of Appeals actively sought to provide relief for white litigants. Instead of attacking the acts of the state legislature as Virginia had done, the Kentucky court took aim squarely at the US Congress. In Kentucky, the Court of Appeals tended not to oppose the state legislature because the two branches were united in their positions about emancipation. Neither accepted that Confederate defeat in the Civil War would also have repercussions for a slave state that had not seceded. As was detailed in Chapter Two, Kentucky had a difficult time accepting emancipation precisely because many believed that the state's decision to remain loyal to the Union during the Civil War would prevent the end of slavery there. The adoption of the Thirteenth Amendment dashed the hopes of slave owners in the Bluegrass State and incited

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[93] Opinion, *The Homestead Cases,* 63 Va. 266 (1872).
[94] Interestingly, though the problem of a retroactive exemption seem obviously problematic, Virginia was the only state whose court invalidated the retroactive homestead exemption. Courts in other states upheld similar provisions.
[95] Virginia was "redeemed" in 1873. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 539.

vitriolic backlash; the opinions of the Court of Appeals, especially from the earliest year of Reconstruction, proved the point.

Decided just days after the adoption of the Thirteenth Amendment, *Corbin v. Marsh* (1865) should be read as a political statement denouncing the United States Congress as overreaching and tyrannical.[96] In *Corbin,* the Kentucky court took specific aim at the 38th Congress, which passed a wartime act on March 3, 1865 that provided for the emancipation of the families of slaves who enlisted in the US Army or Navy. Congress hoped the act would encourage the enlistment of slaves, and, though not explicitly stated, encourage more and more slaves to leave their masters or even the Confederacy itself, further destabilizing the rebel states.[97] But Kentucky had not rebelled, and slave owners in the Bluegrass State believed the federal law punished them for crimes they had not committed. It seemed to them that law-abiding slave owners were to bear a unique financial burden for the Union's war effort that would cost them their slave property. Indeed, Kentucky's slaves were emancipated despite the state's loyalty. In *Corbin*, the disputed issue was the slave status of the wife of a Union soldier (not the soldier himself, as had been the case in *Hughes v. Todd*, detailed in a previous chapter). Benedict B. Marsh sued Abram F. Corbin for the return of his slave, Milly. Marsh alleged that Corbin "unlawfully took the said slave Milly from [his] possession and has detained said slave without right."[98] Marsh sought the return of his slave plus $500 "for the taking and detention of her and for other proper relief."[99]

For his part, Corbin argued that Milly was the wife of a slave named Joseph Warren (Joe), who enlisted as a soldier in the US Army, and as such became free by the provision of a federal law passed on March 3, 1865.[100] It was Milly's purported husband Joe, "mustered into the military service of the United States," who brought his wife to Corbin on March 14, 1865, just days after Congress passed the law that he believed had freed her.[101] Thus, "as a free woman, by her own voluntary consent," Corbin employed Milly. Corbin, it seems, was the lucky beneficiary of the new federal law. Without dealing with Milly's purported owner, Corbin availed himself of her labor. Whatever price was paid for that labor belonged – as wages – to Milly herself, bypassing Marsh entirely. Consequently, Marsh's suit not only demanded the return of his slave property, but also insisted that the value of her labor also be returned to him. Marsh believed that

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[96] The case was decided along with *Hughes v. Todd*, a case reviewed in an earlier chapter on setting the date of emancipation.

[97] William MacDonald, *Select Statutes and other Documents Illustrative of the History of the United States, 1861-1898* (New York: The Macmillan Company, 1909), 132. "Freedom for Soldiers' Families, March 3, 1865."

[98] *Corbin v. Marsh*, 63 Ky. 193 (1865). Court of Appeals transcript, 1-2. Kentucky Court of Appeals #106, Kentucky Department of Library and Archives, Public Records Division. Copy of the case file prepared and provided by Jennifer Patterson at the State Archive of Kentucky, August 13, 2012

[99] *Corbin v. Marsh*, 63 Ky. 193 (1865), Court of Appeals transcript, 2.

[100] *Corbin v. Marsh*, 63 Ky. 193 (1865), 203. Interestingly, the law allowed for the fact that slaves would not have been married under Southern state law. Thus, it read, "in determining who is or was the wife and who are the children of the enlisted person herein mentioned, evidence that he and the woman claimed to be his wife have cohabited together, or associated as husband and wife, and so continued to cohabit or associate at the time of the enlistment, or evidence that a form or ceremony of marriage, whether such marriage was or was not authorized or recognized by law, has been entered into or celebrated by them, and that the parties thereto thereafter lived together, or associated or cohabited as husband and wife, and so continued to live, cohabit, or associate at the time of the enlistment, shall be deemed sufficient proof of marriage for the purposes of this act, and the children born of any such marriage shall be deemed and taken to be the children embraced within the provisions of this act, whether such marriage shall or shall not have been dissolved at the time of such enlistment."

[101] *Corbin v. Marsh*, 63 Ky. 193 (1865), Court of Appeals transcript, 2-3.

if his slave were to earn any money as a result of her toils, it rightfully belonged to him as her owner.

The Kentucky court did not accept Corbin's defense. Rather, Judge George Robertson nullified the federal law, even though it no longer remained in effect, and appealed to the longstanding tradition of states' rights to do so. The Constitution had left the issue of slavery up to the states, and protected absolutely the property interest in the slave.[102] Moreover, it "certainly [gave] to Congress no power over slavery in a slaveholding State."[103] Slavery was legal in Kentucky, and had remained so throughout the duration of the war, since the Emancipation Proclamation did not apply to the Bluegrass State. According to Judge Robertson, "When slavery is legalized, a slave is legal, substantive, and appreciable property, as much entitled to the protection of the Constitution as land, or any other property, moveable or immoveable." The Civil War did not change this, as the framers of the Constitution "never contemplated the exercise of belligerent power conflicting with the limitations or the guarantees which they were careful to adopt as fundamental securities of liberty and property."[104] In other words, "What the Constitution prohibits, war cannot legalize." The seizure of property without compensation had never been legal, and could not be made so by war or federal law.[105]

The Kentucky Court believed that there was no conceivable reason for Congress to pass an act emancipating the families of mustered "slave soldiers." Robertson's term "slave soldiers," is itself revealing; he believed that service in the military did not abrogate one's slave status. Furthermore, Robertson believed slave families provided nothing to the Union war effort. He was not willing to admit or even consider the effect of droves of slaves leaving for Union lines. Nonetheless, if the federal government had provided Marsh with "a full indemnity" for Milly, the action *might* have been considered legal if the confiscation could be shown to be in the public interest. To do otherwise, the court reasoned, "would frustrate the object of the guarantee [of private property], install anarchy, and only mock the deluded citizen." After the same court nullified the Militia Act of 1862 in *Hughes v. Todd*, *Corbin*'s companion case detailed in a previous chapter, this ruling should not be surprising.[106] Without conceding the right to emancipate even the slaves who served in the Union Army, there was no way for the court to see a valid rationale that would justify the emancipation of a soldier's family. Abram Corbin owed Benedict Marsh for his former slave named Milly. But the victory was pyrrhic. Emancipation ensured that Marsh could not recover the property interest in his slave or any longer lay claim to her labor.

Between the time *Corbin* was filed with the Nicholas County Court and the time the case was heard by the Kentucky Court of Appeals, the Thirteenth Amendment had been adopted, abolishing slavery and effectively rendering the suit moot. However, this did not seem to matter to the Kentucky court. As their opinion makes clear, Robertson, and the other justices of the majority shared Marsh's opinion, and continued to view slaves as property despite the end of slavery. Of the federal law in question, they were convinced that "the object was, not to supply soldiers that could not be otherwise as certainly obtained, but only to cripple slavery, and inaugurate the ultimate abolition of it." In this, Robertson was correct; by March 1865 when the

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[102] *Corbin v. Marsh*, 63 Ky. 193 (1865), 196.
[103] *Corbin v. Marsh*, 63 Ky. 193 (1865), 197.
[104] *Corbin v. Marsh*, 63 Ky. 193 (1865), 195.
[105] *Corbin v. Marsh*, 63 Ky. 193 (1865), 195
[106] In *Hughes*, the court suggested that if slaves were enlisted in the Union military, they either needed to be returned to their owners after the war or their owners ought to receive compensation for the loss of property.

law was passed, it should have been clear to all that abolition had become the policy of the federal government. However, even if the court had recognized that fact, they still would have objected to the inequity they perceived. "That costly and invidious burden, imposed on comparatively a few men for the benefit of all the public, was not only unnecessary, but was unconstitutional on account of its glaring inequality."[107] Only slave owners paid a price, and it was a hefty one. The court figured, "the children and wives of some of those soldiers might have been worth many thousands of dollars—and why should the owner of such a family be required to contribute so large a sum for the enlistment of one black soldier who might have been enlisted for no more than the much lighter cost of a white soldier?"[108] The majority of justices on the bench of the Kentucky Court of Appeals still believed the Civil War ought to be a white man's fight; they evidently were unwilling to concede that the war had become much more. Indeed, Robertson believed that even black "slave soldiers" ought to have been returned to their masters once their term of service had ended. For him, emancipation by any means could not be a legal wartime measure.

The Mighty Fall: The Calhoun Story

No other case better exemplifies the interrelated issues discussed in this chapter than *Calhoun v. Calhoun*. It touches on state politics, currency, and the inherent risk of slave investment. The story that emerges from this sensational case also reveals the true scope of the financial risks to which Southerners were exposed in the wake of Confederate defeat, in what ways that was so, and, poignantly, what that meant for the future of Southern families. During the antebellum years, the Calhouns were one of South Carolina's wealthiest and most famous families.[109] The family patriarch, John C. Calhoun was a well-known politician, who served in the House of Representatives, the US Senate, and as Vice President for both John Quincy Adams and Andrew Jackson. When he died in 1850, he bequeathed his sizeable estate, which included the Fort Hill Plantation, slaves, and other valuable possessions, to his wife (and first cousin), Floride Bonneau Colhoun Calhoun. However, not all was as it seemed. By the time Mr. Calhoun died, the estate had taken on a considerable amount of debt. Ultimately, Charleston friends raised the necessary funds to save the family from ruin and paid off their debt as a symbol of appreciation for the work John C. Calhoun had done on behalf of the Palmetto State. For the moment, the family had staved off fiscal disaster.

No longer financially beleaguered, the aging Floride decided she was no longer willing to oversee and maintain the large estate. Thus, in 1854, Floride and her disabled daughter, Martha Cornelia, sold the plantation (1,110 acres), fifty slaves, and all the personal property on the estate to her son, Andrew P. Calhoun for $49,000.[110] (In 2013, this would have been worth approximately $1,400,000.[111]) The real estate that made up the Fort Hill Plantation had been valued at $15,000, the slaves had an estimated worth of $29,000, and additional tools and equipment amounted to $5000. That the slave property made up the majority of the price is worth emphasizing; it fits the common pattern of Southern investment that Gavin Wright has

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[107] *Corbin v. Marsh*, 63 Ky. 193 (1865), 197.
[108] *Corbin v. Marsh*, 63 Ky. 193 (1865), 198.
[109] The family wealth came from the legacy of family matriarch Floride Bonneau Colhoun Calhoun. Her family had owned the land prior to John C. Calhoun. The Bonneaus made their fortune as the owners of rice plantations in the low country, and from opportunistic purchases of Cherokee lands after the American Revolution. Lander, 12.
[110] Martha Cornelia Calhoun was known simply as Cornelia to her family, and records often cite her as Cornelia M. instead of Martha Cornelia.
[111] Calculation determined using http://www.measuringworth.com/index.php.

identified. Critically, the imbalance left the elite family open to financial disaster should slavery be abolished.[112] In 1854, however, this hardly seemed possible.

In order to buy the expensive property – real, chattel, and personal – Andrew P. Calhoun "executed two separate mortgages, one for the Fort Hill plantation, and the other for the fifty negro slaves, each, by its terms, to secure the payment of the whole amount of the bond to Floride Calhoun and Cornelia M. Calhoun."[113] In other words, Andrew's mother and sister owned the mortgage he had secured to purchase the estate.[114] The family members agreed that Andrew would pay back the loan plus interest in regular installments, over a fifteen-year period. Under ordinary circumstances, this would have been unremarkable. The bond stipulated a five and half percent interest rate for the first ten years and a three percent interest rate for the remaining three years. By 1869 when the final payment of the mortgage was due, Andrew Calhoun was slated to pay a total of $88,720 for the estate.[115] This was certainly a hefty sum, but given the property he received, the cost seemed reasonable. And then the war came.

Even before the war ended, the Calhoun family suffered a tragic blow. Andrew P. Calhoun died suddenly of a heart attack in March of 1865. At that time he had only paid $9000 of the money he owed on the Fort Hill mortgage, and was behind on his payments. In addition, when his estate was appraised after he died, the extent of his other debts came to light. Throughout the war, Andrew continued to put all his eggs in the precarious Confederate basket. He had amassed $150,000 of worthless property, which included $87,000 in Confederate bonds, $3,600 in Confederate currency, and $60,000 in chattel slaves. The feckless Andrew managed to sell his Alabama Plantation in 1863 with the hope of paying off some of his obligations, but he had accepted $100,000 in Confederate currency for it. Not surprisingly, his creditors refused to accept the nearly worthless Southern notes. Consequently, he ended up deeper in debt than he had been before unloading the Alabama property, and all the while, he fell further behind on his payments to his mother and sister. The accounting done at the time of his death did not include the all debts he owed, nor did it take into account the impending end of the Civil War and the final death knell of slavery. It would be these events, outside the control of any remaining

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[112] Wright, *Slavery and American Economic Development*, 61.

[113] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 2. This information was included in the Circuit Court's Decree, which was reported with the South Carolina Supreme Court ruling.

[114] As Bonnie Martin has shown, this arrangement was standard practice, and had been for generations. Mortgages on slaves were often secured from individuals in one's local community rather than from financial institutions; "banks were used as facilitators and as places for repayment, rather than the primary lenders." (819). This was precisely the arrangement into which Andrew and his mother entered; he paid his debts to the Bank of Charleston into her account. This particular practice had been firmly established during the colonial years. A slave might be mortgaged in order to raise the funds to purchase the slave (the slave became the collateral) or as a way to use one's equity more efficiently. Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76, no. 4 (2010): 817–66.

[115] "Whereas I the said Andrew P. Calhoun in and by my certain bond or obligation bearing date the 15th day of May one thousand eight hundred fifty four stand firmly held and bound with Floride Calhoun and Cornelia Calhoun of the same state and District in the penal sum of ninety eight thousand dollars and determined for the payment of the full and just sum of <u>Forty nine Thousand Dollars</u> that is to say forty thousand two hundred dollars to the said Floride Calhoun and eight thousand eight hundred dollars to the said Cornelia M. Calhoun the whole amount to be paid in fifteen years from the first day of April AD one thousand eight hundred and fifty four, payment to commence in ten years from that date and to be fully completed in five equal annual installments there after with interest on the whole amount for the first ten years at the rate of five and one half per cent per annum, and for the remaining five years at the rate of three percent per annum upon the installments as they fall due…." Bond between Floride, M.M. and A.P. for the Purchase of the Fort Hill Farm, May 15, 1854. Clemson University Special Collections Unit University Archives. Lee v. Simpson Mss 256, Box 1, Folder 54.

member of the Calhoun family, which would ultimately put the ownership of Fort Hill at greatest risk. [116]

Though the trouble may have begun before the end of the war, it was emancipation that ultimately doomed Fort Hill. The destruction of slavery negated the largest component of the Calhoun estate; all the monetary value that had been invested in slave property evaporated in an instant. Without the slaves on the books as assets, the Calhoun estate became insolvent. It was obvious that the newly widowed Margaret Calhoun, wife of Andrew, would not be able to pay her mother-in-law the debt her husband had incurred, especially since the account was already delinquent and her husband had accrued other sizeable debts before he died.[117] Thus, on March 12, 1866, Floride Calhoun and her son-in-law Thomas Clemson (on behalf of Martha Cornelia Calhoun) initiated foreclosure proceedings against Andrew's family. If her son's family could not repay his loan, Floride was unwilling to let her daughter-in-law or her grandchildren remain at Fort Hill. Of the complicated family matter, the Circuit Court's decree from 1866 stated plainly that the estate "like many others, was almost entirely swept away by the results of the late war."[118] Without the slave property that had once accounted for the bulk of the estate's wealth, the beleaguered family did not have the assets necessary to pay their debts to the insistent and formidable Floride. Simply put, the estate was underwater, and there was no way for Andrew Calhoun's immediate family to mitigate the financial disaster.[119] Fort Hill itself was "the only property remaining for the payment of the bond."[120] Consequently, foreclosure remained the only option Floride and Thomas Clemson were willing to consider.[121]

Margaret Calhoun fought back against her mother-in-law.[122] In an attempt to salvage her financial position, the widow of the late Andrew P. challenged the legality of the foreclosure on the Fort Hill plantation. While she conceded that she could not recover her lost slave property, she nevertheless thought she might have a chance to save her home. She employed three tactics. First, she claimed she had dower rights to the property – a standard argument. Second, and of critical importance for our purposes, she claimed "that the largest portion of the mortgage debt was incurred by the purchase of the fifty negro slaves, who have since been emancipated, and that the consideration of the bond, to that extent, has wholly failed."[123] In other words, Margaret argued that the mortgage contract had become null and void with the end of slavery, which had not happened as a result of her family's actions. Therefore, she was not required to pay the debt. If she were freed of this obligation, her estate could be salvaged.

Margaret Calhoun's argument was not unreasonable. The US Supreme Court had not yet ruled in *Texas v. White*, so the condition of the former Confederate states remained an open legal

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[116] Ernest McPherson Lander, *Calhoun Family and Thomas Green Clemson* (Columbia, SC: University of South Carolina Press, 1989), 223-224.

[117] Margaret is sometimes called "Marguerite" in court documents.

[118] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 4.

[119] The widow and children of Andrew P. Calhoun did rent out the land of the plantation in an attempt to raise the funds necessary to pay Floride Calhoun and Thomas Clemson. However, given the financial circumstances Southerners experienced in the immediate aftermath of the Civil War, they could not command enough money to pay their debts.

[120] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 4.

[121] Though it seems heartless of Floride to evict her own grandchildren, scholars of the family have documented that Floride did not have a particularly good relationship with her son Andrew, and thus cared less for his children than he did for her daughter Anna Clemson and her children.

[122] Floride died in July of 1866, just after initiating the foreclosure of her former home. However, this did not stop the legal action.

[123] *Calhoun v. Calhoun*, 2 S.C. 283 (1870), 5-6.

question; it was not yet clear whether or not the state courts had the authority to rule on matters related to slavery. Moreover, South Carolina, like Louisiana adopted a provision in its state constitution that nullified slave contracts. Article XIV, Section 4 of the state's Constitution of 1868 read, "any claim for the loss or emancipation of any slave…shall be held illegal and void."[124] But at the time of the initial trial, this Constitution had not yet been adopted. The family found itself in the legal no-man's-land that existed immediately following the end of the Civil War. Questions over *ab initio* (or, state suicide) and the meaning of emancipation had not yet been settled. Consequently, like many other debtors, the Calhouns could not fathom nor would they accept that they would be legally bound to honor mortgages for chattel property they no longer possessed. The mortgage on the fifty slaves, Margaret reasoned, must be forgiven.

In case the court did not accept this argument, Margaret Calhoun made a third argument. This claim was especially audacious. She maintained that because the slaves had been mortgaged, the creditor owned them. In this case, that meant her mother-in-law, Floride, who had since died in July of 1866. If there should be any financial loss caused by emancipation (a big if, according to her other arguments), it ought to be borne by the owner of the slaves and lender of the money to her late husband, not by the remaining members of Andrew Calhoun's immediate family. "If the property in the possession of the mortgagor is destroyed, without any fault of his, he cannot be held to account for it."[125] No matter how you understood the mortgage, the executors of Andrew Calhoun's estate and the family still living at Fort Hill refused to accept the liability. Instead, they argued that if anyone must, Floride Calhoun's estate should absorb the loss entirely.

The Circuit Court, which heard *Calhoun v. Calhoun* in July of 1866, did not agree with any of the arguments put forth by Margaret Calhoun and her children. Anticipating other debates over the meaning of emancipation, Judge Johnson ruled that emancipation had always been a foreseeable possibility, just as we have seen from judges in other states. "At the time, property in slaves, as in everything else, was subject to be destroyed by revolution; and it has been so destroyed."[126] Thus Andrew P. Calhoun, and all other slave buyers by extension, "took the chances of emancipation into consideration, and paid such a price as he supposed the intrinsic value of the slaves, lessened by such chances, would justify him in doing."[127] The risk was, and had always been, inherent in the property itself. Moreover, like courts in other Southern states, the judge proclaimed, "I can find nothing in the law which will justify me in disregarding the decisions in analogous cases, arising from the death or destruction of property, after it is sold, and before it is paid for," that would relieve the purchaser of the debt.[128] The family of Andrew P. Calhoun remained obligated to the debt incurred by the slave mortgage, just as would have been the ruling if the case involved the literal death of a slave during the antebellum years. The two scenarios were analogous, and the Circuit Court believed it was bound by precedent and legal interpretation to rule against the debtors. Margaret Calhoun appealed her case to the Supreme Court of South Carolina, hoping for a more favorable outcome.

By the time the case reached the Supreme Court of South Carolina in 1870, the political circumstances of the Palmetto State had changed. The state's constitution of 1868 was in effect, and it barred completely the enforcement of slave contracts. Under these new circumstances, life was breathed back into Margaret Calhoun's case against her mother-in-law's estate. Furthermore,

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[124] Constitution of South Carolina 1868. Article XIV, Section 4.
[125] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 10.
[126] *Calhoun v. Calhoun,* 2 S.C. 283 (1870)*,* 6.
[127] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 6.
[128] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 6-7.

as the justices of the South Carolina court recognized, the case had serious implications for similar suits regarding financial losses resulting from emancipation or the enforcement of slave contracts. The Calhoun case "is of interest to the community, from the large amount of debt which will be affected by its decision. We are impressed with its consequence, not only because our judgment will act upon pecuniary obligations of a great magnitude, but because important constitutional issues are necessarily involved in it."[129] Nonetheless, Margaret Calhoun's hopes – along with those of her potential peers – were quickly dashed. The justices of the court wasted little time condemning the provision in the new state constitution that barred the enforcement of slave contracts. During the interregnum between the initial suit and the appeal, *Texas v. White* had been decided, which resolved the *ab initio* question and made it clear that the Palmetto State had remained a constant and perpetual member of the Union, despite her rebellion from it. Thus, the US Constitution remained legally binding, and with it, the prohibition of impairing the obligation of contract. According to the South Carolina court, "the Constitution of the State, or an Act of the Legislature, plainly contravenes the Constitution of the United States, a Court would be false to every sentiment of duty and of principle, if it failed so to pronounce."[130] The provision violated the Constitution of the United States, and was thus necessarily null and void. Federal supremacy prevented any chance of Margaret Calhoun's victory in this case.

When it came to adjudicating the contract between Andrew P. Calhoun and his mother, the court had little difficulty. This court merely followed the lead of many other states that had once comprised the Confederacy. "Slaves, in South Carolina, when this contract was made, were the legitimate subjects of sale and purchase. To impeach such a transaction now as illegal, or against public policy, is not only to ignore the history of the State in regard to the institution, but to view the events of the past by the reflected light of the present day."[131] Margaret Calhoun could not now, when she found herself facing financial ruin, claim legal sanctuary from her husband's obligations. The Court similarly rejected Margaret Calhoun's argument that the holder of the mortgage must bear the loss of the property. In this, the justices argued, she misunderstood the meaning of the mortgage itself. The court declared, "the mortgage, in fact, is but a security for the debt."[132] Since the contract remained sound, the mortgage must be paid. The ruling of the lower court was affirmed without dissent.

The post-bellum story of the Calhoun family is especially noteworthy precisely because it conveys the financial losses of emancipation in sensational terms; this was a famous and seemingly wealthy family that was ruined by Confederate defeat and the destruction of slavery. However, countless other Southerners shared the same fate, even if it was on a much smaller scale. Many, like the Calhouns, also turned to their state courts in an attempt to recoup some of their losses. For some, finding a way to rehabilitate their finances was the difference between solvency and ruin. However, for Margaret Calhoun and her children, the court offered no relief. Fort Hill was auctioned off in Walhalla, South Carolina on January 21, 1872.[133]

Somehow, this was not the end of the Calhoun story or the family's ties to Fort Hill. Incredibly, in her will, written before the original order of foreclosure had been drawn, Floride bequeathed Andrew's bond and mortgage to her favorite daughter, Anna Clemson and granddaughter, Floride Clemson. In her diary, the younger Floride stated that "Fort Hill, all the

[129] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 291.
[130] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 292.
[131] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 307.
[132] *Calhoun v. Calhoun,* 2 S.C. 283 (1870), 308.
[133] Lander, *Calhoun Family and Thomas Green Clemson*, 239.

rest of her personal property & furniture, silver & jewels, to mother first, then to me, then to Calhoun [her brother], in case I die without either will or issue. A fourth part of the Ft. Hill bond & mortgage is mine now…. Grandma has done a noble part by me."[134] The remaining three quarters of the Fort Hill bond passed to Anna Clemson. Thus, when the property went up for auction, Thomas Green Clemson, Anna's husband, who had been one of the original parties to the initial foreclosure, bought Fort Hill on behalf of his wife's family using Andrew's original bond as security plus seven thousand dollars of his own funds for legal fees. The property would remain in the Calhoun family. After the deaths of Floride Clemson in 1871, Calhoun Clemson later that same year, and Anna Clemson in 1875, Thomas Green Clemson alone inherited Fort Hill. After yet another extraordinary and protracted legal battle (*Lee v. Simpson*) that contested this inheritance and ultimately ended up in the US Supreme Court, the ownership of the old Calhoun plantation remained Clemson's. The property became Clemson College in 1889, according to the last will and testament of Thomas Green Clemson.[135] Remarkably, the old Fort Hill plantation house still sits at the center of what is now Clemson University, and is open to the public for (highly recommended) public tours. Periodically, distant relatives of Floride and John C. Calhoun have challenged Clemson's right to the property and the subsequent establishment of Clemson College by an interloper on their family's land.

Cases like *Calhoun v. Calhoun* represent the demise of the traditional social hierarchy of the South, and demonstrate in extraordinary terms how this affected individual white families in the years following the Civil War. The most basic unit of social organization strained under the weight of military defeat, political failure, financial catastrophe, and the end of slavery. The ruptures within white households that came as a result of these events only added to the overall instability of the South. It was easy to blame the fraying of familial relationships on emancipation and the Union forces who occasioned it, which only compounded and further fueled the animosity many whites felt about the end of slavery and the financial losses they bore as a result of it. They believed the plights they suffered were caused by emancipation, and in that, they were at least partially, if not entirely, correct. Had their slaves remained property, or if their debts related to slaves had been forgiven, personal finances might have remained intact, and by extension, white families would have remained financially secure. During Redemption and after, the bitterness this loss evoked would itself be codified by those who sought the restoration of the old Southern order. This backlash, however, offered no relief for the Calhouns or families like them.

Conclusion

For the white Southerners who participated in the suits detailed in this chapter, emancipation had, quite literally, come at their expense. As we have seen, this may have happened in direct or indirect ways. For some, like the Calhouns, the financial losses were as swift as they were dramatic; emancipation meant immediate insolvency. For others, like the farmers in Virginia seeking the protection of the state's new homestead exemption, emancipation played a more ancillary role in their circumstances, but the loss of the region's financial stability certainly affected them profoundly. Whatever their economic circumstances might have been prior to the Civil War, almost all white Southerners suffered some kind of financial loss that was

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[134] Floride Clemson. *A Rebel Came Home*. (Columbia: University of South Carolina Press, 1961), 109. Calhoun is Floride Clemson's brother; Floride Calhoun's grandson.
[135] Clemson, *A Rebel Came Home*, 119-120.

related to the end of the peculiar institution. This reaffirms the already well-established claims about slavery's central role in the Southern, and even national, economy.

Yet, it also adds critical complexity to the narrative. The cases explored here demonstrate clearly the centrality of the courtroom for sorting out messy post-bellum financial matters. As historians have made clear for the antebellum decades, slaveholders regularly relied on legal systems for resolving financial disputes and more specifically, negotiating the business of bondage.[136] After the war, Southerners continued to expect their needs to be met in these same courtrooms, despite the end of slavery and the revolutionary change in law that destroyed the institution. Indeed, the very idea that slave ownership included an inherent risk of abolition was revolutionary in itself; it was an unthinkable concept prior to the Civil War. It was only by going to court after the fact that Southerners learned the extent of the risk to which they were exposed, and what that would mean for their personal finances and for the economy of the South. It would be judges who articulated to litigants – and Southerners more broadly – what emancipation actually meant and what it would cost. It meant, among other things, that the financial rug had been pulled out from under the entire slave South, and that judges and juries could put a dollar amount on the price each litigant would pay. Yet, is it possible that Southerners failed to grasp this meaning without receiving a legal lesson in court? Was there no sense of what Confederate defeat would mean? It is difficult to discern whether the actions of the white litigants discussed in this chapter came as a result of willful ignorance or true incomprehension. Most likely, it was some of both. However, one thing is clear: the uncertainty and instability of Reconstruction made litigation worth undertaking. Litigants approached the bench looking for relief well after the Thirteenth Amendment had been adopted and it had become evident that no compensation for lost slave property would be forthcoming from the state or federal governments. Therefore, going to court in an attempt to wring a bit more wealth out of slave property ended up being a measure of last resort. Many hoped that by appealing to the old social order in venues that had traditionally supported the slave owner's privilege, they would find sympathetic judges willing to continue honoring it.

Some litigants received (usually partial) assistance, but as many others did not. This begs the question: if Southern whites were often the "losers" in this scenario, then who won? While we might wish to proclaim those freed from the shackles of slavery as the real "winners," such a pronouncement would overlook the legal pattern that emerged from cases related to the finances of white Southerners. The obvious victors – the creditors to whom money was still owed for the purchase or hire of slaves – often did leave the courtroom with some compensation. For them, slavery still provided some financial benefit even after the institution had crumbled. Though the awards may have been meager, they still confirmed that slavery still had some remaining worth. Perhaps the most troubling aspect of the cases reviewed in this chapter is that one could still find value in human bodies, regardless of their new status as free persons. This prospect seems to fly in the face of jubilee celebrations, Constitutional Amendments, new public policy, and the simple belief that slavery had finally ended after generations of bloodshed and four years of Civil War. It forces the conclusion that there is far more to these cases than stories of individual loss. There is also a clear sense that slavery's past would haunt the post-war present, challenging the belief in slavery's total demise. In the process of figuring out what abolition actually meant (and would mean going forward), the answer derived in Southern courtrooms was something short of

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[136] See especially Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*, and Morris, *Southern Slavery and the Law, 1619-1860*.

the total eradication of the peculiar institution. As long as some white Southerners could continue to capitalize on their slave contracts in a world supposedly free of slavery, abolition remained incomplete.

Still, these victories were partial at best, and they can only be understood in the short-term. Most did not receive the full value they sought if they received anything at all, and their cases proved to be the end of slavery's productive life. The profitable property interest in slaves would not be restored, and whatever might be eked out of a slave contract during Reconstruction would be the last sum slavery provided. When it came to issues of contracts, warranties, currency, and personal finances, most judges adjusted, but nonetheless adhered to standards with which they were familiar instead of accepting the possibility that abolition might have shattered them entirely. Courts in most states required contractual obligations be met; they did not accept a warranty or the use of Confederate currency as a way out, nor would the traditional rules of lending be altered to accommodate fallen families. Specific facts of a case might allow a judge to lessen the debtor's burden, but by and large, they did not absolve one from payment. Debts incurred as a result of the investment in slaves would not be forgiven simply because emancipation had come as a result of military defeat. Southerners were served a bitter pill; emancipation, according to many jurists, had been an inherent risk in slave ownership, and the legal system could not be employed to defray the costs of gambling on it. Overwhelmingly, the effects of these losses far outlasted any creditor's legal victory.

Historians have long appreciated that former slaves bore the brunt of post-bellum resentment, and that this animosity would ultimately be lastingly codified in Redemption-era policies, Jim Crow laws, and extra-legal violence and "mob justice." However, noticing that so many cases asked courts to consider the price of defeat, and that many courts played a role in determining that price, may help us better and more fully understand why and from where white resentment originated. Simply put, it was personal, and struck at the heart of the traditional Southern household. Law, constitutional and state, had failed to protect white Southern interest in slaves. War had not saved them either. Neither, it seemed for many, would post-emancipation courts. Instead of protecting and insulating whites from financial disaster, slavery had proved to be their downfall. This was the price that had to be paid for generations of forced servitude and mistreatment. From the perspective of the freed slave, and indeed to modern scholars, it was a small one. But it seemed monumental to many at the time.

In the postwar years, white Southerners went to court and attempted to limit the costs of emancipation, but their battles proved (as if more finality were needed) that they would not and could not fully restore the financial benefits that the peculiar institution had once bestowed upon them. Thus, the end of slavery came to represent military defeat, legal defeat, and of financial loss (even if it was not total), and it is in all of these capacities that freedpeople bore the brunt of post-emancipation white resentment. Former slave owners watched their former property enjoy a newfound freedom, which had come, all too plainly, at their expense.

Chapter Five
The Problem of Emancipation in the Age of Slavery: The United States Supreme Court and the End of Legal Reconstruction

To this point, this dissertation has considered post-emancipation slave cases that were decided in state courts. We have explored several ways in which jurists grappled with the unanticipated legal consequences of emancipation: Southern state courts considered the date of emancipation, negotiated the social consequences of black freedom, and confronted the economic costs associated with the end of slavery. Critically, we have found that there was little judicial consensus on these matters; courts across the former slaveholding republic considered a variety of options, and ruled in as many ways, producing "many legalities" of Reconstruction-era Southern law. Not only was there little legal consistency from state to state, in some instances there was no legal uniformity even within a state. Texas, for example, revisited the date of emancipation several times before finally settling on Juneteenth. Louisiana, on the other hand, charted a more Radical course by refusing to enforce most legal matters related to slavery. Proponents of this view argued that the trappings of law that had once supported the peculiar institution had crumbled with emancipation. However, most Southern courts developed a far more moderate jurisprudence that permitted the continued litigation of slavery. Under this approach, justices made their determinations on the slave cases that lingered after emancipation case by case, and issue by issue.

Ultimately, the existence of several strategies to handle post-emancipation slave litigation proved untenable. The confusion it bred exacerbated the disorder – legal and otherwise – that followed the Civil War. Litigants, both black and white, were left unsure of their rights, financial circumstances, and social obligations. If black freedom were to have universal meaning across the reunited nation, and if, as Eric Foner has argued, a "national state possessing vastly expanded authority and a new set of purposes" were truly to emerge, then the "many legalities" of Southern law that had been a feature of antebellum Southern jurisprudence and of post-emancipation litigation, had to give way to a national standard.[1] By standardizing the approach to post-emancipation slave cases, the Supreme Court capitalized on the moment, and the justices connected national reunion with legal formalism. These were the stakes of the rulings made by the United States Supreme Court in a series of key cases. In the end, the nation's high court ensured national legal uniformity when it came to the lingering matters related to slavery, but for freedpeople, they did so in the least favorable fashion.

When examining the role that the US Supreme Court played in dismantling Reconstruction and the transitioning to Jim Crow, scholars traditionally analyze cases such as *The Slaughterhouse Cases (1873), United States v. Cruikshank (1876)*, *The Civil Rights Cases (1883)*, and, most notably, *Plessy v. Ferguson (1896)*.[2] However, though these cases may collectively represent the ultimate abandonment of Reconstruction's promise and the death knell

[1] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, xxiv.

[2] Brandwein, *Rethinking the Judicial Settlement of Reconstruction*. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876*, New York University School of Law Linden Studies in Legal History (New York: Oceana Publications, Inc., 1985). Ronald Labbe and Johnathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Lawrence, KS: University Press of Kansas, 2003). Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (New York: Henry Holt and Company, 2008). Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003).

for the legal protection of black civil rights, the Supreme Court's interventions began much earlier. Taken together, the cases reviewed in this chapter, *Thorington v. Smith (1868)*, *Texas v. White (1868)*, *White v. Hart (1871)*, *Osborn v. Nicholson (1871)*, and *Boyce v. Tabb (1873)* illustrate the ways in which the Supreme Court conceived of slavery and emancipation, understood the Civil War and the Confederacy, and envisioned American law in the post-bellum era.

This chapter demonstrates that the Supreme Court of the United States rendered the final verdict on legal Reconstruction within a decade after the end of the Civil War. By compelling all states in the Union to abide by the same legal rules, and by defining emancipation in the least expansive way possible, the justices closed off the Radical path charted by Louisiana and other states, and applied a much more moderate standard to the entire nation. Whatever exceptionalism slavery had created in Southern law, and whatever legal variety continued to exist in post-bellum law, was summarily squashed, opening the door for a unified and universal application of American law. This vision, as we shall see, reflected the belief that "law [w]as an ever-developing set of rules [that] assumed continuity over the course of Anglo-American legal history rather than a discontinuity created by the Civil War."[3] In a series of federal post-emancipation slave cases, the nation's highest court determined the post-bellum vision of a singularly American law that remained deeply and unequivocally connected to the antebellum past.

***Texas v. White* and the Legality of Secession**

In the years following the Civil War, Southern courts repeatedly wrestled with questions about the legality of secession. In several cases already reviewed, this was the first issue tackled by state courts. Had the states that made up the former Confederacy actually seceded and broken fully from the Union and the Constitutional rule of law? If so, what was the status of all the legal arrangements made by individuals during that period? More specifically, "were four years' worth of birth certificates, deeds, promissory notes, insurance, and business contracts…void as the statutes of the Confederacy?"[4] Answering this question was of the utmost importance. As legal scholar Harold Hyman makes abundantly clear, if the legal arrangements made under Confederate rule were nullified, social economic havoc would be soon to follow. Conversely, if the war were understood as a conflict between two independent nations, the issue could be sidestepped altogether.[5] Thus, at the very core of settling the open questions about secession was the stability and order of the South, and, by extension, the ultimate success of reunion.

The United States Supreme Court addressed the legality of secession in 1869 in *Texas v. White.* The case came to the Court directly from the state of Texas. The state, under the control of post-bellum Unionist governor A.J. Hamilton, sought to recover bonds originally obtained in

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[3] Michael Vorenberg, "Imagining a Different Reconstruction Constitution," *Civil War History* 51, no. 4 (December 2005): 416–26. Vorenberg shows that initially, in their 1866 ruling in *U.S. v. Rhodes*, the Supreme Court was more open to the notion that a "break from the past" had occurred. However, within a few years, the Supreme Court retreated from this position. "In 1866, for example, Justice Noah Swayne issued a decision on circuit, in U.S. v. Rhodes, that described the rights revolution launched by the Civil War as 'an act of national grace,' a break from the past signaling a future in which the Constitution would give 'protection over everyone.' But by the early 1870s, if not earlier, federal judges more frequently embraced the common-law style, looking to legal precedent, rather than the contingent political circumstances of the Civil War, as the basis of their rulings."

[4] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White*, 141.

[5] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White*, 141.

1851 that had been sold during the Civil War under the authority of the Confederate government as a way to raise funds. According to the new Texas government, the sale of the bonds amounted to theft by Confederate traitors, and as such, they ought to be returned to the legitimate government of the state. However, the Supreme Court of the United States had jurisdiction over the suit only if Texas had remained a state in the Union. If membership in the Confederacy had severed that tie, there would be no chance for Texas to recover the bonds; there would have been no existing court that could claim jurisdiction over the case. The bonds themselves were worth $5 million, a significant sum for a state in the throes of Reconstruction.

In order to claim jurisdiction, the Court was forced to decide whether or not a state could legally secede, and a great deal of the reported opinion was allocated to address definitions and theories of statehood. Ultimately, Chief Justice Chase declared for the majority, "When…Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State." This would have been enough to settle the matter, but Chase saw fit to make the point more emphatically. "The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States."[6] All states would have had to agree to the dissolution of the Union, or a revolution would have had to be successful in order for a state to leave the Union. The decision could not be made unilaterally by a single state or by a consortium of states. The Union was, and had always been, one "political body," and it was older than the Constitution.[7] Because the Confederacy's revolution had failed, and no unanimous consent had been given, Texas, and the other states of the former Confederacy had not legally seceded. They remained continual members of the United States.

There were several important consequences of this decision. First, it defined the legal relationship among the states of the Union. It was not a collection of states; it was, and would be henceforth unequivocally defined as a single unified nation. Second, and more immediately, the verdict settled an important issue for the reintegration of the South. There would be no need for Southern states to reapply for statehood (beyond completing Reconstruction and returning to a state in good standing) or for the scuttling of existing state institutions. Critically, American rule of law had never been obliterated in the states that had attempted to secede, and the Confederacy had never existed as a legally separate nation. It would therefore be impossible for Congress to treat the South as a conquered territory, as Radicals like Charles Sumner and Thaddeus Stevens had advocated. Critically, this became the premise upon which the Radical option for handling post-emancipation slave cases would be denied. When Chief Justice Chase proclaimed, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States," he ensured that *ab initio* could not be applied, and control of rebuilding the South could not be directed solely by Congress.[8] The people of the South would be able to play a formative role in reconstructing their own states.[9]

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[6] *Texas v. White,* 74 U.S. 700 (1868).

[7] Michael Les Benedict, "Salmon P. Chase and Constitutional Politics," *Law and Social Inquiry* 22 (Spring 1997): 459–500, 482.

[8] *Texas v. White,* 74 U.S. 700 (1868), 725.

[9] In addition, the *Texas* ruling provided the basis for two other cases, *Thomas v. Richmond,* 79 U.S. 349 (1871) and *Horn v. Lockhart,* 84 U.S. 939 (1873), which respectively preserved the legality of Confederate laws made "for the preservation of public order, and for the regulation of business transactions between man and man," and validated

Nonetheless, the decision served as a legal blow to the very notion of the Confederacy. The court declared that its existence had been *de facto*, and American courts would proceed as if secession had never happened. The Southern cause may have existed, and armies may have been mustered in support of it, but a legally recognized, independent nation had not been created. This position vindicated the belief long held by Abraham Lincoln and other Unionists, while simultaneously reinforcing the military defeat just suffered by Southerners. Despite this, while Unionists had maintained this position throughout the war, it did not serve their interests in the years that followed. Many Radical Republicans had hoped for the opposite verdict from the Court so that Congress could seize total control of what they considered to be the conquered territory that had once been known as the Confederacy.[10] Southerners, on the other hand, who had supported states' rights and believed their secession had been legitimate, were nonetheless pleased with the outcome. Southern states would remain intact political entities. Indeed, for individual white Southerners, the ruling was a relief. It eased some of the postwar disorder and calmed the fears of many who worried what Congressionally-controlled occupation would mean for the future of their states and families. Their legal institutions remained intact, and their legal expectations might still be met.

For Chase, who chose to write the opinion for the difficult and polarizing case rather than assign it to another justice, *Texas v. White* presented an opportunity for the Court to comment on the nature of the Union and on Reconstruction as a federal project. Chase's opinion made clear that all states were indestructible members of a perpetual union. At the same time, he affirmed that Congress had the authority to carry out Military Reconstruction on the South as a penalty for rebelling, even though the Court made no explicit comment on the legality of the legislation.[11] The opinion provided the Chief Justice the chance to draw a crucial distinction between the actions of Texas' treasonous government and the individual legal arrangements assumed by the people of the state.[12] Critically, to Chase and the justices who joined in the majority opinion, it was the people who constituted the state, *not* their government. And, in the post-bellum South, this necessarily included newly emancipated slaves.[13] According to the Supreme Court, the Civil War had not changed the status of any state in the Union, but it had greatly expanded and altered the makeup of their citizenries.

Chief Justice Chase was encouraged to reach his decision by none other than Texas court reporter and "scalawag jurisprudent" George Washington Paschal, who had been sent to Washington by the Lone Star State to recover the lost bonds.[14] Paschal wrote a brief for the case, specifically designed to entice Chase.[15] It was Paschal who suggested the Court view *Texas v.*

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state court decisions made while states existed under Confederate authority. Surrency, "The Legal Effects of the Civil War," 155.

[10] Here is where Radicals deviated from the plans Lincoln originally envisioned with the Ten Percent Plan.

[11] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White,* 143. Harold Hyman, *A More Perfect Union*. (Boston: Houghton Mifflin Company, 1975), 518.

[12] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White,* 148.

[13] *Texas v. White,* 74 U.S. 700 (1868), 728. "The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty." Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White,* 148.

[14] Harold Hyman, *A More Perfect Union*, 517.

[15] As Harold Hyman shows, Chase and Paschal had similar professional trajectories. Both studied law as apprentices and clerked for prominent judges. Chase clerked for Judge William Wirt; Paschal served Georgia's infamous Joseph

White as an opportunity to transform the issue from the legal status of the state to one about the rights of the people.[16] To find in favor of Texas was to find in favor of the Union and, most importantly all the people who lived within its borders. Paschal's position gave Chase exactly what he wanted. First, it allowed the High Court to restore legal order to the South. Second, it provided a rationale that would force the new Texas government, if it wanted to be recognized and accepted by Congress, to accept and include black citizens as part of the state's body politic. The condition of readmission to the Union was the acceptance of emancipated slaves as rights-bearing legal persons. The war had indeed become one about black freedom, and not just one about the security of the Union; the ruling in *Texas v. White* declared it so as a matter of law.

Justices Noah Haynes Swayne, Samuel Freeman Miller, and Robert Cooper Grier dissented in *Texas v. White*. They raised significant questions about privileging judicial power over political authority, and emphasized the overwhelming evidence of secession.[17] This perspective is worth considering. Justice Grier wrote,

> Is Texas one of these United States? Or was she such at the time this bill was filed, or since? This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation. If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States.[18]

Though the majority ultimately opted against it, Justice Grier believed that the *de facto* status of the former Confederate states was of greater importance than any "legal fiction" concocted to prove that the Union was and had always been perpetual. To him, one had to forget "the truth of history for the last eight years" and ignore the horror and destruction of the war itself in order to think otherwise. The Confederate States of America had been a separate nation because its people had declared it so; Confederate leaders had raised an army, founded a separate government to support independence, and conducted international diplomacy. In the mind of Grier, and in the mind of many Southerners, that lived reality could not and should not be undone by any legal maneuvering.[19]

Chief Justice Chase, on the other hand, was acutely aware of what was at stake with this decision: the final pronouncement of federal supremacy, the ultimate success of Southern recovery, the chance to accumulate and centralize power and authority in the Judicial branch of the federal government, and, crucially for the old antislavery lawyer, a chance to incorporate freedpeople into civil society. For Chase and the others in the majority, the moment was not to be squandered.[20]

Lumpkin. Both men published digests of their respective states' laws; Chase published for Ohio, while Paschal wrote for Texas. Hyman, 144.

[16] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White,* 146.

[17] Grier wrote the most robust dissent about the existence of the Confederacy. Swayne wrote a concurring dissent, which Miller joined, that agreed with Grier, and raised procedural issues that he thought ought to have been addressed.

[18] *Texas v. White,* 74 U.S. 700 (1868), Dissent.

[19] For a discussion of the post-bellum Southern mentality on the nature of the Confederacy, see Nicoletti, "The American Civil War as a Trial by Battle." See also, Chapter Four, note 3.

[20] Interestingly, as noted by Norman Spaulding, the ruling created a particular paradox for Reconstruction. If the former Confederate states had never been out of the Union, how could their representatives be denied their seats in Congress? How could Northern legislators compel the adoption of new Constitutional amendments? Norman W. Spaulding, "Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective

This was a ruling of the victors; secession had failed on the battlefield and as a consequence, it could not have taken place as a matter of law. The Constitution had applied continuously even to those states that had attempted to leave the union, which allowed state courts to review all legal matters from the Confederate period. In addition, the ruling all but eliminated the possibility of future debates over the nature and legal extent of state sovereignty. Secession crises had plagued the nation several times during the antebellum period, and this ruling (and the several others reviewed in this chapter that reinforced it) declared that the possibility of secession was no longer open for debate. That position endured; the ruling has never been overturned.[21] Yet, *Texas v. White* settled only one issue faced by post-bellum state courts, and it failed to prevent them from charting their own paths throughout the period, suggesting both that states' rights was far from a dead or settled concept by 1869, and that the full meaning of the Supreme Court's ruling had yet to be fully realized.[22]

Nonetheless, the case did much to shape legal Reconstruction. It made clear that the United States Supreme Court did not view secession or the Civil War as a legal breach; the Constitution had weathered the storm intact. This was a significant pronouncement, especially with the addition of the Thirteenth and Fourteenth Amendments, and it illustrates that the Supreme Court, along with Congress, would exert considerable federal power in the aftermath of Civil War. This happened, in part, by design. As legal historian William M. Wiecek demonstrates, Congress consolidated its own power during Reconstruction, and also expanded the role of the federal judiciary. This was done in order to solidify the power of the national government more generally, and to create a unified partnership between Congress and the courts to better implement – and legitimate – federal authority and policy.[23] Chief Justice Salmon P. Chase took this partnership seriously, which is reflected in the *Texas v. White* opinion. The ruling would help determine and direct the way in which lower courts would handle the legal issues that arose in post-bellum Southern courts: they would work within the preexisting legal framework of the United States because no great rupture – secession – had taken place. There could be an adjustment to accommodate new federal law and the demise of slavery, but critically, wholesale

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Memory," *Columbia Law Review* 103, no. 8 (December 2003): 2042-2043. "If the southern rebel states were still in the Union, on what ground could the 39th Congress refuse to seat congress-men and senators elected by President Johnson's provisional governments? On what ground could Congresses composed exclusively of northern representatives not only propose the Reconstruction Amendments for ratification, but condition federal recognition of southern states on ratification of the same? And, given that the rebel-dominated provisional governments of ten southern states (enough for a veto under Article V) rejected the Fourteenth Amendment until they were replaced by federal military rule under the Reconstruction Act of 1867, on what ground could the Fourteenth Amendment be considered "ratified" within the meaning of Article V?" Laura Edwards suggests that some Congressional Republicans invoked the guarantee clause to justify their actions: until the states of the former Confederacy instituted a republican government that met the party's standards, their representatives need not be seated. See footnote 85.

[21] As Michael Les Benedict notes, *Texas v. White* "is the Supreme Court's most definitive statement of the relationship between the states and the Union. It has never been overruled, and is fundamental to our constitutional system." Michael Les Benedict, "Salmon P. Chase and Constitutional Politics," 471.

[22] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 78.

[23] Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1867," 334. "It is Congress in the first instance that gives new powers to the courts or takes them away. When Congress expanded the jurisdiction of the federal courts during Reconstruction, it did so sometimes deliberately, sometimes absentmindedly; its intention was clear in one statute, ambiguous and vague in another. But the result by 1876 was clear: Congress had determined to expand the power of the federal courts,' sometimes at its own expense, more often at the states', to make them partners in implementing national policy." The article attempts to correct one of the misrepresentations of Dunning, and others.

rejection of legal arrangements tainted by it was unnecessary.[24] The antebellum legal order would remain essentially intact, because, according to the Court, the Union itself had remained intact. The ruling helped maintain a continuity of American legal rules, a firm legitimation of legal agreements made during the Confederate period, and promoted the immediate resumption of state business. Most importantly, it became the cornerstone for the assertion that Constitutional obligations had been uninterrupted by secession or war.

***Thorington v. Smith* and the Currency Complication**

As we have seen, many post-emancipation slave cases were complicated by the use of Confederate currency. So too were plenty of other cases that had no connection to slavery, increasing the need for the Supreme Court to intervene. As many litigants argued, any contract that called for payment in Confederate dollars became instantly void once the Civil War ended. This was the currency of an illegitimate and treasonous government, they reasoned, and its value fluctuated dramatically according to the fortunes of war, since the notes themselves were only payable "after the Ratification of a Treaty of Peace between The Confederate States & The United States of America."[25] Opponents stipulated that the contracts remained valid, and payments ought to be converted to specie or equivalent American dollars. These basic positions were at the heart of *Thorington v. Smith*, decided just five months after *Texas v. White*.[26]

On November 28, 1864, Jack Thorington sold his land near Montgomery, Alabama to William B. Smith and John H. Hartley. The parties agreed to a price of $45,000, $35,000 of which was paid at the time of sale in Confederate currency. The parties agreed, "to pay Jack Thorington, or bearer, ten thousand dollars, for value received in real estate…. [T]his note, part of the same transaction, is hereby declared as a lien or mortgage on said real estate situate and adjoining the city of Montgomery."[27] In 1867, Thorington sued Smith and Hartley, who were still in possession of the land, and demanded they pay him "the $10,000 in the only money now current, to wit, lawful money of the United States."[28] The defendants contended that the land itself was only worth $3000 in the "lawful money" circulating in 1867; the original purchase price reflected the inflation of Confederate currency in 1864, and both the initial payment and the final payment were to be made in Confederate notes.[29] Since such notes had become worthless and illegal, there was no way for Smith or Hartley to abide by the specific terms of the contract. When the court in Alabama agreed with the defendants, Thorington appealed to the Supreme Court of the United States.

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[24] Vorenberg, "Imagining a Different Reconstruction Constitution," 419-421. "[J]udges cared less about the precise wording or original legislative meaning of constitutional provisions than they did about how the constitutional provision fit into traditions of law. Tradition, and its handmaiden, precedent, was everything to common-law jurisprudence."

[25] This inscription was printed on some Confederate notes.

[26] Surrency, "The Legal Effects of the Civil War," 160-61. Arthur Nussbaum, "Basic Monetary Conceptions in Law," *Michigan Law Review* 35, no. 6 (April 1937): 888-9. Morris G. Shanker, "The Law of Belligerent Occupation in the American Courts," *The Michigan Law Review* 50, no. 7 (May 1952): 1068-71.

[27] *Thorington v. Smith,* 75 U.S. 1 (1869), 3.

[28] *Thorington v. Smith,* 75 U.S. 1 (1869), 3.

[29] For example, in North Carolina during 1861 and 1862, Confederate dollars and US dollars were on par. After the fall of Atlanta in September 1864, the value of the notes was 100:1. Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 67. For a basic review of the inflation of Confederate currency, see Marc Weidenmier, "Money and Finance in the Confederate States of America," ed. Robert Whaples, *EH.net Encyclopedia*, September 22, 2002, http://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america/.

In his opinion to the case, Chief Justice Chase identified the central question raised in *Thorington*: “Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?” Or, were all such agreements “in aid of the rebellion?”[30] The answer to these questions had the potential to invalidate thousands of contracts that had been made in good faith during the Civil War, leaving open the possibility of compounding the economic calamity occasioned by wartime destruction and emancipation, as both sides – buyer and seller – would have had to bear a financial loss. However, at the heart of the matter was not currency; rather, it was the very nature of the Confederacy itself. How the Court construed the Confederacy would determine how it would interpret the use of its currency and the implications this had on post-bellum law and society.

The decision in *Texas v. White*, issued just five months prior, had already established secession as a legal impossibility. The Court would not treat the Confederacy as a foreign nation conquered by the Union military. Yet, as the dissent in *Texas* asserted, such a claim was no more than a “legal fiction;” the Confederacy, and the states that comprised it, behaved as an independent country, and no judicial decree could alter that fact. This claim seems to have resonated to some degree with fellow justices during the short time between the two rulings. According to the Court in *Thorington*, the Confederacy was a “de facto government,” though “not in the highest sense of the term.”[31] Though the United States government never acknowledged its independence, Chase and his colleagues were willing to recognize that “the rights and obligations of a belligerent were conceded to it, in its military character… The whole territory controlled by it was thereafter held to be enemies’ territory, and the inhabitants of that territory were held, in most respects, for enemies.” That was enough for the Court to conclude, “the power of the insurgent government cannot be questioned.”[32] It was the effect of this power that concerned the justices most, because it had required that those living under Confederate control submit to its authority, which included the use of graybacks. Chase wrote,

> As a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, … this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States.[33]

[30] *Thorington v. Smith*, 75 U.S. 1 (1869), 6. The Court addressed two other questions, one about the use of evidence in determining the value of the currency stipulated in the contract, and the other about the payment on the remaining $10,000, but the primary issue for the purposes of this dissertation was whether or not contracts using Confederate currency could be upheld.

[31] “Supreme Court of the United States. Thorington v. Smith & Hartley,” *The American Law Register (1852-1891)* 17, no. 12 (December 1, 1869): 739. “The Confederate States, though not a *de facto* government in the highest sense of that term, were a government of paramount force having actual supremacy within certain territorial limits, and therefore a *de facto* government in such a sense as made civil obedience to their authority the duty of the inhabitants of the territory under their control.”

[32] *Thorington v. Smith,* 75 U.S. 1 (1869), 10-11.

[33] *Thorington v. Smith,* 75 U.S. 1 (1869), 11.

The Court believed that Confederate notes "were the only measure of value which the people had, and their use was a matter of almost absolute necessity."[34] Consequently, "the people" should not be penalized for having used them. The ruling was pragmatic and instructive; the essential purpose of the *Thorington* ruling was to ensure "that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States."[35] As long as the contracts in question were made "in the ordinary course of civil society," and not to directly aid the rebellion, the use of Confederate currency would not universally invalidate contracts made during the Civil War.

The ruling made certain that the people who lived in the Confederate states were not punished for the blunder of secession made by their political representatives. This distinction between the people and the government of a state had already been elucidated in the *Texas* decision. Furthermore, the justice envisioned by the Supreme Court demanded that contracts that included the use of Confederate currency be upheld, which served as yet a further indication of the Court's thinking: the American legal tradition and Constitutional order could absorb the shock of attempted secession and four years of Civil War. Thus, while the decision attended to two significant problems – the continued legal effects of the circulation of graybacks, and the dreaded social ramifications of further damage to the Southern economy – it also ensured that a remnant of the Confederacy (its currency) would not be fully repudiated. Coupled with the ruling in *Texas v. White,* this implies that when the United States Supreme Court faced its own Confederate reckoning, it found it possible to reconcile the calamity of the Civil War in ways that left legal arrangements, and by extension, legal tradition, intact.[36]

The Persistent Problem: Contracts and the Legacies of Slavery

Contracts, at the center of both *Texas v. White* and *Thorington v. Smith*, remained a persistent problem in state courts and for the Supreme Court of the United States throughout Reconstruction. Indeed, cases involving the sale or hire of slaves make up the bulk of post-emancipation slave cases; they account for nearly 41 percent of all litigation of this kind. There are three primary reasons for this. First, it merely reflects the prevalence of transactions involving slaves prior to emancipation. This type of case had always been litigated in state courts, and questions over the legality of slave contracts only forced more people into court. Second, in the wake of the war, state courts adopted different rules for judging such cases. Louisiana would not enforce slave contracts, while North Carolina, Kentucky, and other states would uphold them as long as they had been executed prior to emancipation. Third, even within a state, there may not have been a consensus on the matter, or even a continuous court. It made sense for a litigant to try his or her luck when state courts were in flux; Texas, for example, addressed the legality of slave contracts three times over the course of Reconstruction, with each new court that convened.

Some states, most notably Louisiana, adopted constitutional provisions that barred the enforcement of slave contracts. These enactments were subjected to review by the United States Supreme Court. At issue was whether such provisions violated the Article 1, Section 10 of the United States Constitution, which prohibited the impairment of contracts. The problem was clearly articulated in state constitutional conventions; for example, the Maryland delegate quoted in Chapter Two wondered what would happen to the security of slave contracts made in good

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[34] *Thorington v. Smith,* 75 U.S. 1 (1869), 13.
[35] *Thorington v. Smith,* 75 U.S. 1 (1869), 14.
[36] "Confederate reckoning" is borrowed from Stephanie McCurry's book of the same name.

faith if such agreements were rendered unenforceable. Though he suggested compensation for lost slave property as the appropriate remedy, neither the delegates of Maryland's constitutional convention of 1864 nor the federal government ultimately agreed.

The US Supreme Court tackled the troublesome issues of contract impairment in 1871 with its decisions in *White v. Hart* and *Osborn v. Nicholson*. *White v. Hart* decided whether or not a particular provision of Georgia's Constitution of 1868 was valid. It read: "No court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof." Such a measure had been inconceivable when William White and John R. Hart executed a contract for which "the consideration…was a slave."[37] The agreement was made on February 9, 1859; Hart would pay White $1230 on March 1, 1860. The specific details of the case share much in common with other contract cases previously reviewed, and the ultimate ruling in the case ensured that such cases would be decided similarly across the South.

Justice Noah Swayne articulated the central problem of the suit: Georgia's state constitution had eliminated all remedies for enforcing the contract: "not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract." This "annihilation," Swayne proclaimed, could not have taken place. Consequently, "The proviso which seeks to work this result, is, so far as all preexisting contracts are concerned, itself a nullity. It is to them as ineffectual as if it had no existence."[38] The United States Supreme Court ruled that no state could impair contract rights; the constitutional provision adopted by Georgia, and other Southern states, violated Article 1, Section 10 of the Constitution. All contracts, regardless of whether or not they involved a slave, were valid and enforceable as long as the contracts themselves had been made legally. State courts had to review these cases.

The rationale behind the decision in *White v. Hart* depended on the ruling in *Texas v. White*. Georgia posited that it should be viewed as a conquered territory to which Constitutional obligations did not apply. Its constitutional provision voiding slave contracts was therefore valid because it was implemented before the state had been formally readmitted to the Union. Adopting the fundamental premise behind *ab initio*, Georgia contended that during the interregnum between the end of the Civil War and readmission to the Union, Article 1, Section 10 did not apply to the state. In response to this claim, the Supreme Court invoked the decision from *Texas v. White*: secession had not made Georgia independent; it had remained a perpetual member of the Union. Despite his dissent in the *Texas* case, Justice Swayne reiterated its ruling and precisely defined the nature of the American Union. He wrote, "the National government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by State lines for the purpose of State government and local administration." Under this formulation, the Constitution had never ceased to apply to Georgia, or any other Southern state. Though the Civil War may have interrupted the peaceful relationship between the state and the federal government, "At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same."[39] Swayne, a Lincoln appointee, sang the Great Emancipator's familiar refrain: the Court would treat the former Confederacy as those states once in rebellion.

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[37] *White v. Hart*, 80 U.S. 646 (1872), 647.
[38] *White v. Hart,* 80 U.S. 646 (1872).
[39] *White v. Hart,* 80 U.S. 646 (1872).

This position resonated throughout the opinion. Swayne remarked that allowing a state to nullify slave contracts amounted to rewarding it with a right it had not possessed before it committed the crime of treason. By analogizing the relationship between states and the federal government with the relationship between a criminal and the government, he concluded, "His political rights may be put in abeyance or forfeited. The result depends upon the rule, as defined in the law, of the sovereign against whom he has offended. If he lose his rights he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime."[40] States would be held accountable for all the "disabilities and liabilities which before subsisted," just as a criminal would be, once released from custody.

In one sense, the ruling further emphasized the position of the victorious North. The Confederacy had never been a legally distinct nation; it was instead a band of rogue states guilty of treason that must now suffer the consequences of their defeat. For the individual, this meant that there would be no escaping financial obligation, even if the debt concerned a slave that had since been freed. Buyers and hirers, or, those who owed, would be held to the terms of the original contract and would (disproportionately) bear the loss of emancipation. Slave contracts would be enforced, as would slave mortgages, and other notes. The ruling reflected a classic formulation of *caveat emptor*, or buyer beware, which, as will be described further below, had become increasingly accepted over the course of the nineteenth century.

But the sword had another edge. With its ruling, the Supreme Court also insisted and ensured that slavery would still be litigated, and that debts for slaves would still be paid. In that sense, the sanctity of contract was of greater importance than the states' desire to eliminate one of the last vestiges of slavery from their statute books and their courtrooms.[41] More importantly, contract rights also trumped the Radical vision for abolition. Though African Americans could no longer be owned, the contracts that assigned monetary worth to their bodies still retained their value. Slavery would have a legal life after emancipation. In effect, Justice Swayne's opinion in *White v. Hart* affirmed what many moderate and conservative state courts, including Texas and North Carolina, and some state legislatures, including Maryland, had already concluded. "'[T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in the terms.'"[42] There would be an adjustment to accommodate the demise of slavery, but no wholesale rejection of the other elements of law that supported it, because the laws in force at the time each contract was executed became an unalterable part of it.

Despite the ruling in *White v. Hart*, the Louisiana courts, which had ruled against enforcing slave contracts in *Wainwright v. Bridges* and had subsequently adopted a constitutional provision similar to Georgia's, did not immediately reverse course. The intransigence of the Bayou State's legal community prompted yet another US Supreme Court case just two years after *White v. Hart*. The high court decided the Louisiana case *Boyce v. Tabb* in October of 1873.[43] The circumstances of the suit were nearly identical to those presented in *White* and the other slave contract cases argued in post-bellum state courts. The note in question had been executed in 1861, so there was no issue as to the legality of slavery. The defense asserted that the

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[40] *White v. Hart,* 80 U.S. 646 (1872).
[41] Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law*, 60-61. *White v. Hart,* 80 U.S. 646 (1872).
[42] *White v. Hart,* 80 U.S. 646 (1871), 653. Here, Justice Swayne was quoting the earlier case of *Van Hoffman v. The City of Quincy,* 4 Wallace 535 (1866).
[43] *Boyce v. Tabb,* 85 U.S. 546 (1873).

Thirteenth Amendment prevented state courts from enforcing slavery in any form and that the 1867 Louisiana case of *Wainwright v. Bridges* had ruled all slave contracts null and void. However, the arguments did not sway the Supreme Court, and they offered little in their opinion. The justices were "satisfied of the soundness of the views there presented" in *White*.[44] They added only a single clarification: "contracts relating to slaves, valid when made, were not impaired by the thirteenth amendment to the Constitution, and it would serve no useful purpose to restate the argument by which that decision was supported."[45] Louisiana, just like the rest of the South, would be held to the same standard put forth by the *White* ruling.

Osborn v. Nicholson presented a variant of the contract issue, and as a result, it was decided concurrently with *White v. Hart*. As discussed in Chapter Four, some litigants attempted to avoid payment for slaves after emancipation by contending that freedom amounted to a violation of the warranty. *Osborn*, a case from Arkansas, made this type of claim. A slave contract executed on March 20, 1861 conveyed a slave named Albert for $1300; there was an explicit warranty included in the agreement. The warranty was a standard one; it stated "I warrant said negro to be sound in body and mind, and a slave for life; and I also warrant the title to said boy clear and perfect."[46] However, federal forces emancipated the slave in 1862. There was no challenge to the soundness of the slave in question, but Albert did not remain a slave for the duration of his natural life. The buyer of the slave sued for breach of contract. As to the matter of the contract itself, the court let their ruling from *White v. Hart* do the talking. Slavery may have ended, but the contracts related to slavery remained valid and enforceable.

Yet, the thorny warranty issue required separate treatment. Justice Swayne, in writing the opinion of the court, equated the loss of slave property to eminent domain.[47] "A change of the ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment."[48] Justice Swayne encouraged the litigants to think of emancipation as the lawful taking of property by the government, and this action did not breach the warranty for it could never have been foreseen nor prevented by the seller. The warranty could have protected against this taking if it included "a guaranty against the event which has caused it," but this was not stipulated, as few suspected in March 1861 that the fiery trial of Civil War would destroy the peculiar institution.[49]

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[44] *Boyce v. Tabb,* 85 U.S. 546 (1873), 757.
[45] *Boyce v. Tabb,* 85 U.S. 546 (1873), 757.
[46] *Osborn v. Nicholson,* 80 U.S. 654 (1872), 655.
[47] Eminent domain had been declared a legitimate state power by the Supreme Court in *West River Bridge v. Dix (1848)*. However, in this case and others that dealt with the premise, just compensation for the expropriated property was necessary for the act to be deemed legal. In *Mills v. St. Clair County (1850)*, the High Court ruled that it was up to the state legislatures and courts to protect individuals from violations of the "public use" and "just compensation" requirements of eminent domain. However, in the cases under review in this dissertation, no compensation, be it just or unjust, for lost slave property would be forthcoming. See Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910," *The Journal of Economic History*, The Tasks of Economic History, 33, no. 1 (March 1973): 232–51. For more on the development of the use of eminent domain, see chapter 3 of Horwitz, *The Transformation of American Law 1780-1860*.
[48] *Osborn v. Nicholson,* 80 U.S. 654 (1872), 657. Opponents to this view invoked the takings clause of the Fifth Amendment; property could not be seized without "just compensation." Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138, no. 2 (December 1989): 444.
[49] *Osborn v. Nicholson,* 80 U.S. 654 (1872), 658. It should be noted that prior to emancipation, slaves could also have been insured as property. Insurance might have covered the loss in the event that a warranty would not. However, few Southerners insured their slaves, preferring instead to use their accumulated wealth to buy more slaves. See Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*, chapter 3, 96.

The court ruled that the original contract had not protected against the ever-present risk of emancipation, that was described in Chapter Four (though the statement implies such a guarantee might have been honored if it had been included in a slave contract). Thus, the majority concluded, "when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested." Even though the right to own Albert as a slave no longer existed, the "Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force."[50] The contract, as it was construed, would be enforced, regardless of the warranty included in it, because the laws in effect at the time the contract was executed remained an inherent part of the agreement. Thus the contract survived the revolutionary addition of the Thirteenth Amendment to the Constitution. As for the warranty itself, the Court agreed that it had not been breached because the slave remained in his condition of bondage for the *life of the institution*, and the warranty did not include any coverage for the possibility of emancipation.

The decisions in *Osborn v. Nicholson* and *White v. Hart* were issued simultaneously, and Chief Justice Salmon P. Chase wrote one dissent for both cases.[51] His remarks reveal both his beliefs on slavery and one of Reconstruction's roads not taken. For him, no part of the contract in question should have been enforced because it was contrary to natural law. Like Lord Mansfield before him in *Somerset*, Chase believed that the abolition of slavery corrected that which had existed solely because of immoral positive law. He claimed "That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law." Furthermore, as some state lawmakers and judges believed, the elements of law that protected slavery "were annulled by the thirteenth amendment of the Constitution which abolished slavery." In effect, Chase agreed with the path Louisiana, Georgia, and a few other states initially chose to tread; any further legal support of slavery was unconstitutional because the Thirteenth Amendment made it so.[52] This path ensured that "thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late Slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence."[53] Even though post-emancipation slave cases would die out on their own, to continue litigating matters of slavery at all permitted the injustice of slavery and the unnatural positive law that sustained it to continue influencing law and society. For Chase, this violated the Thirteenth Amendment and the very meaning of abolition, and he believed those who participated in the economy of slavery ought to pay the full price for their immoral deeds.

Chief Justice Chase's dissents in *White v. Hart* and *Osborn v. Nicholson* seem to contradict his opinion in *Texas v. White.* That is, if, as Chase's 1869 ruling asserted, the states of the former Confederacy had never been legally separate from the Union or out from under the

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[50] *Osborn v. Nicholson,* 80 U.S. 654 (1872), 662.

[51] Chase was near death in 1872, and the short dissent reflected the ailing Chief Justice's condition. He had suffered a stroke in 1870. Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White*, 151.

[52] Louisiana Supreme Court Justice James Taliaferro used similar language in his opinion for *Wainwright v. Bridges*. He too believed that slavery had only been sanctioned by positive law, and as such always had the potential to be abolished.

[53] *Osborn v. Nicholson,* 80 U.S. 654 (1872), 663-664. Interestingly, Chase did not remark on the other contract cases entertained by the Supreme Court during his tenure. Only those related to slavery occasioned such impassioned remarks. Benedict, "Salmon P. Chase and Constitutional Politics," 486-487.

rule of the Constitution, why would Article 1, Section 10 not apply to slave contracts? The answer lies as much in Chase's personal history as a staunch abolitionist as with his legal reasoning. While Chase believed firmly that all other contracts, regardless of their date or stipulated currency, ought to be enforced, he could not tolerate those agreements involving slavery. Because he believed firmly that the peculiar institution was immoral and contrary to natural law, it "was the only exception to the truism that society's stability required sound property rights defined by contracts."[54] To Salmon P. Chase, the rule of American law was continuous, and the protection of private contracts was sacrosanct, *except* when it came to matters of slavery.

Ultimately, Chase's seemingly contradictory assertions in *Texas v. White* and the contract cases reflected his long and consistently held beliefs about slavery and its place in American law. As Eric Foner notes about the Chief Justice's antebellum beliefs, contrary to radical abolitionists, "Chase developed an interpretation of American history which convinced thousands of northerners that anti-slavery was the intended policy of the founders of the nation, and was fully compatible with the Constitution."[55] To Chase, the founders never intended slavery to last indefinitely; they believed freedom to be the natural state of all men.[56] Legally, he used his interpretation of the Fifth Amendment to support his claim. By restricting Congress from depriving any person of life, liberty, or property without due process, the founders made clear that the national government could not support slavery.[57] Critically, as his long-standing ideology helps clarify, Chase did not view Reconstruction, or the cases that he heard during the period, as a Constitutional rupture. There was no need for Chase to envision the Reconstruction Amendments as a Constitutional revision because they merely supported what Chase believed to be the original intentions and values of the founders. If anything, the post-emancipation slave cases he heard as Chief Justice offered him and the Court the opportunity to ensure a Constitutional *restoration*. As his friend Ohio Governor George Hoadly remarked, "[b]y disposition and education [Chase] was a conservative. His function was not that of a destroyer, but a restorer."[58] The description is apt.

To be sure, when evaluating the legality of slave contracts, the Reconstruction-era Supreme Court was left with a difficult task. Reviewing post-emancipation slave cases demanded a careful balance of public interest with a significantly altered Constitution. On the one hand, the courts were presented with new state constitutions that barred the enforcement of such contracts, which supposedly reflected the sovereign will of the people.[59] On the other hand, states were struggling to revive lethargic economies and ease disorder within their states and

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[54] Hyman, *The Reconstruction Justice of Salmon P. Chase: In re Turner & Texas v. White,* 158.
[55] Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, (New York: Oxford University Press, 1970), 73. Chase was a chief architect and proponent of the "Slave Power" theory that contended that slaveholders "were conspiring to dominate the national government, reverse the policy of the founding fathers, and make slavery the ruling interest of the republic. See also, Hoang Gia Phan, *Bonds of Citizenship: Law and the Labors of Emancipation*, (New York: New York University Press, 2013), 120-121.
[56] Foner, *Free Soil, Free Labor, Free Men*, 75.
[57] Foner, *Free Soil, Free Labor, Free Men,* 76. This belief became the basis for part of the Liberty Party's platform.
[58] George Hoadly quoted in Benedict, "Salmon P. Chase and Constitutional Politics," 472. This conservatism was lauded by Chase's contemporaries, who were impressed by the Chief Justice's ability to leave politics behind and assume a proper degree of "caution and restraint" when faced with cases that could have Radicalized American the Constitutional order.
[59] See especially, Roman J. Hoyos, "A Province of Jurisprudence?: Invention of a Law of Constitutional Conventions," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus D. Dubber (Portland, OR: Hart Publishing, 2012).

institutions. Yet, by preserving slave contracts, the Supreme Court ensured continuity with the antebellum past. This was the Court's solution for promoting post-bellum stability. It is implicitly clear in *White* and *Osborn* that the majority of the justices were not only firmly committed to a conception of contract that had emerged during the Jacksonian Era, they were willing to strengthen and expand it.[60]

Like most state court judges, the majority of the Supreme Court justices had accepted the so-called "will theory of contracts," which Morton Horwitz famously describes as "the view that all value was subjective and that the only basis of legal obligation was an arbitrary convergence of individual wills or 'meeting of the minds.'"[61] Accordingly, it is not surprising that during the 1870s, Supreme Court justices invoked a classic formulation of *caveat emptor*, or buyer beware, in post-emancipation slave cases. The rule, integral to the will theory, stipulated that as long as both parties understood the risks they were taking and accepted the terms of a contract when they signed it, it would be valid under the law. Put in context, financial loss from a slave contract was the consequence of relying on human assets in the age of *caveat emptor* and increasing legal formalism, both of which had developed as part of a "system of objective rules necessary to assure legal certainty and predictability."[62]

The overwhelming commitment to these legal "rules" by most state court judges and ultimately by the Supreme Court emphasizes the problematic interrelationship between slavery and the law. There was no discrete definition of slavery or separate slave law – no American analog to the *Code Noir* – that could be summarily repealed in the aftermath of emancipation; the evolution of existing laws to accommodate slavery in the United States defied attempts at an abolition of this kind. Nor was there a legislative plan to end the peculiar institution that addressed in advance the legal issues associated with abolition.[63] Thus the central problem for

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[60] Morton Horwitz contends that the will theory of contracts was well accepted and fully functional by 1844, when William W. Story published *Treatise on the Law of Contracts*. Horwitz, *The Transformation of American Law 1780-1860*,158. This contention – that the primacy of contracts had been well established by the mid-nineteenth century corroborates the findings of Howard Gillman. Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1995). See especially, Chapter 1.

[61] Horwitz, *The Transformation of American Law 1780-1860*, 200. Many criticisms have been leveled against Horwitz. For example, A.W.B. Simpson believes the origins of modern contract are really in the 16th and 17th centuries, which Horwitz neglects to his detriment. See A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts," *Chicago Law Review* 46 no.3 (1979) 533-601. James Gordley argues that the will theory of contract arose from "jurists [who] were borrowing from the fashionable philosophical, political, and economic theories in which the individual will played a major role." This was made possible, Gordley argues, by "the fall of the Aristotelian philosophical tradition, an event that caught up with the lawyers a bit later than with everyone else." See James Gordley, "Contract, Property, and the Will – The Civil Law and Common Law Tradition," in *The State and Freedom of Contract*, ed. Harry N. Scheiber. (Stanford: Stanford University Press, 1998), 79, 82. These criticisms to not detract from the usefulness of Horwitz' arguments on this chapter. Reconstruction era judges, at least, are fully aware of their role in the shaping of the economy. For my purposes, the most useful critique of Horwitz comes from Harry Scheiber, who suggests that there may have been an alternative, coexisting theory behind judicial action, "'the rights of the public.'" This is also evident in judicial action of the post-bellum period. See Harry N. Scheiber, "Regulation, Property Rights, and Definition of 'The Market': Law and the American Economy." *The Journal of Economic History* 41: no. 1 (1981): 103-109.

[62] Horwitz, *The Transformation of American Law 1780-1860,* 201. See also, Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford, CA: Stanford University Press, 2007).

[63] Britain, for example, paid reparations to slave owners when it abolished slavery, sidestepping claims of illegal government taking without compensation. For the most recent scholarly treatment of this topic see, Catherine Hall et al., *Legacies of British Slave-Ownership: Colonial Slavery and the Formation of Victorian Britain* (Cambridge: Cambridge University Press, 2014). To examine the flow of the reparations paid, visit University College London, "Legacies of British Slave-Ownership," accessed April 16, 2015, https://www.ucl.ac.uk/lbs/. In South America (in

the United States remained: How could courts avoid throwing the baby out with the bathwater? How could the court preserve a judicial commitment to contract rights while simultaneously accommodating the end of slavery? Many jurists believed their primary duty was to existing legal principles and laws, *not*, critically, to the litigants seeking redress in their courts.[64] Here was the problem of emancipation in an age of slavery. The Thirteenth Amendment, with its intentional imprecision, provided no answer, and the Court was unwilling to seek guidance from the Congressional debates held prior to its passage.[65] Instead, rather than explore the possibility that the law of contract had become irrevocably intertwined with laws of slavery rendering these particular agreements unenforceable, the nation's high court drew a distinction between the two. It required courts deal with post-emancipation slave contracts as they would any other contract, not as agreements about slaves in a post-slavery legal world. There are several reasons for adopting this approach. First, as already noted, this reinforced and prioritized accepted notions about contract, and allowed them to remain dominant. Second, it supported the belief articulated in *Texas v. White* that the Civil War had not in fact caused a legal breach; American law and Constitutional order had been continuous, despite an attempted secession.

It became clear to jurists that a limited view of emancipation would preserve accepted tenets of American law. As a consequence, slave status, defined as the property interest that had been vested in millions of African American bodies, was all that courts could safely invalidate without disrupting a multitude of other legal arrangements previously touched by slavery. Instead of judging slave contracts, the Supreme Court set the standard for evaluating contracts for slaves. The distinction cannot be overstated; its universal application prevented the total eradication of slavery from American law. By adopting a limited interpretation of the end slavery and leaving intact the legal arrangements with which it remained associated, the United States Supreme Court effectively limited Radical Reconstruction's chance for success by making clear that the meanings of the era's amendments – especially the Thirteenth Amendment – were indeed less capacious than Radical Republicans claimed. Not all facets of the peculiar institution would be toppled.

Yet, the Court's ultimate rulings on the cases related to slavery achieved something that had been impossible prior to emancipation: they effectively ended the "many legalities" of American law that had been produced by the irregular development of state law related to slavery and the subsequent disagreements about the legal meaning of emancipation. National reunion provided the occasion for legal standardization. No longer would slavery, the laws of slavery that varied state by state, or the multiple means of addressing slavery's demise frustrate a uniform conception and application of American law. In other words, whatever exceptionality slavery added – and continued to add – to American law would be eliminated by national legal

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what is now Argentina, Bolivia, and Uruguay), the Assembly of the United Provinces of the Río de la Plata addressed the gradual emancipation as a means to end slavery. A law freeing the wombs of slaves, called *Libertad de vientres*, was adopted in 1812. Children born to slave mothers would not themselves be slaves, leading to the eventual death of the institution itself. The French *Code Noir* remained in effect until the abolition of slavery in 1848.

[64] Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*, 124, 126. As Laura Edwards notes, Congressional Republicans did not necessarily intend the Reconstruction Amendments to produce sweeping change. She writes that the amendments "were structured around the presumption that slavery could be removed from the legal order without changing much of anything else." But, as I argue here, it was all but impossible to leave the existing legal framework intact *and* fully abolish slavery.

[65] For a detailed account of these debates, see Vorenburg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* and Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment."

standards set by the United States Supreme Court. This was especially true when it came to matters of contract.

Former Slaves and the Reconstruction-era Supreme Court

Tellingly, the Supreme Court never mentioned the slaves who were the subjects of the contracts contested in the primary cases that settled the direction of legal Reconstruction. The nature of slavery and the effects of the Civil War on the peculiar institution received considerable explication from the justices, but the effect of these decisions on former slaves, and the meaning of their liberation, was only implied. If the Court considered slavery to be a simple property relationship, and emancipation divested the property interest from the slave so that only free persons remained, then freedom could be defined simply as self-ownership. Many scholars have explored the connections between Reconstruction and the free labor ideology that accompanied the concept self-ownership, but for the purposes of this dissertation, what matters most is not the specific contours of that connection, but rather, that the United States Supreme Court chose to define slavery's demise in these terms alone.[66] According to this logic, the Thirteenth Amendment only guaranteed formal freedom, and nothing more.[67] It was to this limited conception of slavery – as a mere property relationship – that Salmon P. Chase and other Radical court observers objected most vehemently. The position developed by the Court's majority ignored both the immorality of slavery as a legally sanctioned practice, and the multifaceted nature of the institution. In short, the Supreme Court adopted the position advocated by moderate state courts.

The Supreme Court ruled more directly on the rights of African Americans in two notable cases, though neither came close to the standard Chase advocated. The *Slaughterhouse Cases* (1873) and *United States v. Cruikshank* (1876) do not fall into the category of post-emancipation slave case, as I have defined it; both arose as questions over specific legislation. Moreover, they have been studied extensively by scholars precisely because of their importance to Fourteenth

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[66] See especially: Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*. Brandwein argues that the Reconstruction court essentially accepted the Northern Democratic view of emancipation: the end of formal slave law was the victory guaranteed by the Civil War. Matters beyond that, such as the rights of freedmen, were to be determined at the state level. In other words, for Brandwein, the Reconstruction court institutionalized free labor ideology: abolition equaled self-ownership. The Court recognized the federal government's ability to end slavery, but it "presented individual ownership of self as the definition of slavery's destruction…." Brandwein, 2. For more on Free Labor and Reconstruction, see: David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862-1872* (Chicago: University of Illinois Press, 1981). Montgomery argues that the demands of free labor ideologues threatened the success of the Radical Republican vision for the post-bellum nation. He explores the local histories "found in the industrial towns of America" in order to show that "beyond [black] equality lay demands of wage earners to which the equalitarian formula provided no meaningful answer, but which rebounded to confound the efforts of equality's ardent advocates." Montgomery, x. VanderVelde, "The Labor Vision of the Thirteenth Amendment." VanderVelde argues that a "strong pro-labor theme…runs consistently through the [Congressional] debates" over the passage of Thirteenth Amendment and, and that this discussion continued, and was further refined, in the months and years following its adoption. Further, "the Reconstruction debates reflect a desire to improve all workers' status by recognizing the dignity of labor…and raising the floor of legal rights accorded all working men. …If the fourteenth amendment spoke in terms of equality of rights and the fifteenth in terms of universal suffrage, the thirteenth amendment spoke in terms of a set of minimum standards that laboring men could expect in their employment relations." VanderVelde, 440-1, 448. On contract, law, and labor more broadly, see Harry N. Scheiber, ed., *The State and Freedom of Contract* (Stanford, CA: Stanford University Press, 1998).

[67] This was inferred in the *Slaughterhouse Cases*. Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York: Harper & Row, Publishers, 1982), 436.

Amendment jurisprudence, and have long been primary targets for legal studies of Reconstruction.[68] Still, these cases further demonstrate the Supreme Court's reluctance to embrace a more revolutionary vision of Reconstruction's possibilities, and when put in context as end points in a series of important cases decided during Reconstruction, they corroborate the claim that the Court's conservatism had been years in the making.

The *Slaughterhouse Cases* concerned the Louisiana legislature's decision to give a monopoly on butchering to the Crescent City Live-Stock Landing and Slaughter-House Company. Though at first it does not appear to be a case at all related to slaves, its outcome determined a great deal about the rights former slaves would ultimately enjoy. The Court ruled that the monopoly – established for public health reasons – was in fact legal. Justice Miller, who wrote the opinion of the court, rejected the use of the Fourteenth Amendment as grounds for the suit; the amendment had been adopted to establish citizenship and civil rights for African Americans.[69] However, in so doing, the decision reestablished the distinction between state and national citizenship that had been pronounced so infamously by Justice Taney in the *Dred Scott* ruling.[70] The Fourteenth Amendment, Miller wrote, only restricted states from "abridg[ing] the privileges and immunities of citizens of the United States;" it did not protect against impairment of rights granted by one's state.[71] It was to this point that Justices Field, Bradley, Swayne, and Chase dissented.[72] Nonetheless, by viewing the rights of national citizenship in such narrow terms, the Court limited the Fourteenth Amendment's ultimate scope as the guarantor of a broad range of civil rights. More importantly for this project, Justice Miller used his decision to "warn

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[68] See footnote 2 above.

[69] The plaintiffs, butchers who sued in federal court, made three Fourteenth Amendment claims: the state had abridged their "privileges and immunities," violated the Due Process Clause that "protected their 'property' right to engage in their occupation without hindrance," and because the law gave preference to some butchers over others, violated the equal protection clause. Peter Irons, *A People's History of the Supreme Court* (New York: Penguin Books, 2006), 199.

[70] Though critically, Justice Miller did not reinstate Taney's claim that African Americans lacked citizenship or rights. The comparison is only to the notion that state and national citizenship were distinct.

[71] *Slaughterhouse Cases,* 83 U.S. 36 (1873), 77-78. "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? [I]f the proposition of the plaintiffs in error be sound...[T]he effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character....We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." Peter Irons and Harold Hyman both write that Miller's reasoning ignores entirely the Congressional debates of the proposed amendment in 1866. Irons, *A People's History of the Supreme Court*, 200. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*, 460. Hyman writes, "All the judges ignored congressional debates, that, arguably assumed in the Amendment's first section national protection against state infringement of a very broad body of ordinary rights."

[72] All four justices signed Justice Stephen Field's dissent, however both Swayne and Bradley also wrote separate dissents of their own. Chase, who was quite ill by the time the case was decided, offered no separate remarks. Field's dissent has become famous for its early articulation of the free labor laissez faire principles that would become the hallmark of the *Lochner* era. Field saw the monopoly granted by Louisiana as class legislation, and believed the court should oppose it. Swayne and Bradley placed more emphasis on the expanded notion of national citizenship. They noted that the Civil War and the end of slavery produced "an expansion of the meaning of liberty to include the liberty of individuals against popular majorities," and the Fourteenth Amendment had been "designed to remedy" any violation of this right. Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*, 68-69.

Congress" against invoking the Section V of the Fourteenth Amendment to enforce African American civil rights.[73] Miller wrote,

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other.[74]

Though not immediately obvious, legal scholar Peter Irons asserts that the passage "reveals its limitation to acts 'of a state' that are 'directed' against blacks," by carefully omitting any mention of private acts.[75] According to Miller's interpretation of the Fourteenth Amendment, acts of discrimination or racial violence committed by private individuals did not run afoul Constitution. The implications of this part of the ruling hardly require comment; the Fourteenth Amendment would not necessarily protect African Americans from abuse at the hands of private individuals.[76] In the damning words of Harold Hyman and William Wiecek, "The 5-4 decision in *Slaughterhouse* gave a permanently narrow reading to the new privileges and immunities clause; it began blighting the constitutional hopes of the freedmen, leading to the nadir of legally enforced segregation and discrimination."[77]

The notion that the Fourteenth Amendment offered no protection against private action was cemented three years later with the Supreme Court's ruling in *United States v. Cruikshank*. In Colfax, Louisiana, an election dispute between black Republicans and Democrats turned into a violent siege in which "white racists had turned the Colfax courthouse into a human slaughterhouse."[78] The Colfax Massacre, as it has become known, quite literally determined who would control the law and the seat of justice in Grant Parish, Louisiana. Despite the brutal deaths of many African Americans and a call by the national press for legal action against the perpetrators, local officials declined to prosecute those responsible for the massacre.[79] Federal officials stepped in when it became clear that no charges would be forthcoming. Ninety-six men were indicted for violating the Ku Klux Klan Act of 1870, and, though only three were convicted, the United States government still used the law to affirm that it had and would use the authority to prosecute those who engaged in racial terror. William Cruikshank was one of the three men convicted (and the only one still living) of violating the rights of two African Americans – Levi Nelson and Alexander Tillman – by depriving them of the rights to exercise their Constitutional right to "peaceably assemble" and of "life liberty and due process of law." Cruikshank appealed the verdict.

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[73] Irons, *A People's History of the Supreme Court*, 201.

[74] *Slaughterhouse Cases,* 83 U.S. 36 (1873), 82.

[75] Irons, *A People's History of the Supreme Court*, 201.

[76] Unsurprisingly, Salmon P. Chase resisted the Court's direction to the end; though *Slaughterhouse* was decided weeks before his death, he joined the dissent, maintaining his long-held position that the end of slavery amounted to a Constitutional restoration. Continuing to support slavery in any way only extended the sin of slavery; it prevented the true intentions of the framers from being realized.

[77] Hyman and Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875*, 475.

[78] Irons, *A People's History of the Supreme Court*, 202. The number of those killed in the Colfax Massacre remains disputed. Eric Foner cites fifty killed, while a Louisiana legislator speaking after the horrific event stated more than 280 had died.

[79] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 437-438.

In a unanimous decision, penned by Chief Justice Morrison Waite, the Supreme Court overturned Cruikshank's conviction. The ruling relied on the distinction between state and national citizenship articulated in both *Slaughterhouse* and *Dred Scott*, and further solidified that "the Reconstruction Amendments protected only a finite roster of federal rights against states only."[80] In other words, the Bill of Rights would not be applied to the states, and it was becoming the common opinion of American jurists that citizens of the United States had few rights that the federal government – including the courts – could be bound to protect. Waite's opinion declared that the murdered African Americans were only entitled to enjoy the right to assemble if they had congregated "for the consultation in respect to public affairs and to petition for a redress of grievances."[81] Perhaps more important than this deeply flawed reading of the First Amendment was the Court's insistence that Fourteenth Amendment provided no basis for protecting individuals from private action. Waite asserted, "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."[82] Mob violence and "murderous conspiracies," which were quickly becoming hallmarks of Southern society, were, by this logic, outside federal jurisdiction.[83] "Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."[84] Thus, the Ku Klux Klan Act was rendered unconstitutional; the federal government had no authority to support such legislation that targeted civilians because the Fourteenth Amendment applied only to state actions.[85] In an instant, the federal government's ability to protect the safety of African Americans was all but eviscerated. Southern whites rejoiced in the victory, while African Americans faced a grisly future.[86]

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[80] Hyman and Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875*, 488. The opinion stated, "The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States." *United States v. Cruikshank,* 92 U.S. 542 (1875), 551.

[81] *United States v. Cruikshank,* 92 U.S. 542 (1875), 552.

[82] *United States v. Cruikshank*, 92 U.S. 542 (1875), 554.

[83] Irons, *A People's History of the Supreme Court,* 204.

[84] *United States v. Cruikshank,* 92 U.S. 542 (1875), 553-4.

[85] Some Republicans in Congress believed that the Constitution's guarantee clause gave the federal government all the authority it needed to intervene in states that did not establish a republican government that met their standards. The Thirteenth Amendment, according to this view, "gave constitutional substance to the guarantee clause." Lyman Trumbull argued that the amendment gave Congress the ability to eliminate any of slavery's remaining vestiges. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*, 99.

[86] Pamela Brandwein argues that *Cruikshank* has been over simplified; she argues that federal civil rights enforcement remained a possibility. She focuses specifically on the rulings attention to voting rights under the Fifteenth Amendment, a portion of the case I have chosen to omit because it falls outside the scope of this project. (The Fifteenth Amendment, according to Waite, was not an affirmation of suffrage as a right of citizenship. But, the Amendment did allow the federal government to protect voters against racial discrimination.) However, Brandwein suggests, "Acting on their understanding of the Court opinion, the Grant Administration deployed federal marshals in the 1876 election, and the Hayes, Garfield, and Arthur administrations brought cases that resulted in rights victories, putting election officials and Klansmen in jail. …The complex legacy of *Cruikshank* thus includes both the release of savage murderers and the communication of rules for federal rights enforcement – in a shorthand made possible with the wide circulation and authority of Justice Bradley's circuit opinion – that Republican

Rather than using *Slaughterhouse* and *Cruikshank* to begin a story about judicial abandonment of black rights and the promises of Reconstruction, the cases should be seen instead as reflective of a judicial pattern that had begun in the late 1860s with the ruling in *Texas v. White*. The war may have forced the end of human bondage, but the Court deemed that it had not forced a rupture in the existing Constitutional order. Nor had the addition of the Thirteenth and Fourteenth Amendments; the rulings in *Slaughterhouse* and *Cruikshank* prove the point. The majority of Supreme Court justices paid no mind to the intent of the framers of those Amendments, and instead chose – as did many of their counterparts in state courts – to render decisions that comported with the antebellum past, rather than craft rulings that honored the post-bellum moment. Justice Miller invoked the same distinction between state and national citizenship that his predecessor had made in the infamous *Dred Scott* ruling in 1857. Justice Waite insisted that the federal government had no more authority to protect the bodies of freedpeople as it had had to protect those same bodies when they were slaves. Without accepting the Radical vision for Reconstruction, the Supreme Court justices helped make sure that Radical promise would go unfulfilled.

Conclusion

Cruikshank and *Slaughterhouse* both originated in Louisiana, and together, they illustrate critical moments in the state's Reconstruction history. By the time of the Colfax Massacre, Radical promise had fully given way to Redemption and unchecked racial violence. As such, they have overshadowed the fact that Louisiana had initially been a state that offered hope for Reconstruction's success, and that the state's supreme court had adopted the Radical position that any further legal support of slavery violated the Thirteenth Amendment. As this chapter has demonstrated, the United States Supreme Court rejected this position, and insisted that matters related to slavery continue to receive judicial attention from courts across the nation.[87]

The Supreme Court evaluated the many responses to the issues addressed in Southern state courts, and recognized that in some courtrooms, jurists remained steadfastly committed to a total eradication of slavery and the laws that had once supported it. Yet, when presented with the opportunity to adopt this more Radical approach to the end of slavery, the majority of Supreme Court justices balked, and settled instead on a more moderate path. When they did so, they granted slavery a troubling legal legacy, and missed the chance to fully protect the right of freed people. The justices, like so many of their counterparts in state courts, courts clung to assumptions about race, law, and Southern society that reflected the antebellum past, not a post-slavery present. As this dissertation has shown, the success of this more conservative route as a national standard challenged the notion that slavery was fully abolished, for it allowed continued litigation of slave contracts, permitted the stain of slavery to remain visible, and in some instances, facilitated the recovery of the last bit of profit from the ownership of slave bodies. With the approval of the High Court, elements of slavery survived emancipation.

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administrations perceived and later successfully acted upon." Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 88.

[87] Pamela Brandwein attributes this to the Court's support of the free labor ideology. Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*.

<u>Epilogue</u>
Slavery's Legal Afterlife

When Louisiana judge James G. Taliaferro wrote in the opinion to *Wainwright v. Bridges* that the Thirteenth Amendment had crushed any remaining legal support of slavery, he offered just one of many definitions of emancipation. When Sarah Lacy contested the apprenticeship of her son, Elkin Pope, to Mary Timmins, she asked the Texas court to clarify her rights as a parent, and by extension, the meaning of her freedom. When members of the Calhoun family assumed the roles of plaintiff and defendant in a suit over the future of their economic survival, they invited the South Carolina Supreme Court to determine what the end of the peculiar institution meant for the slave-owning class that had once been atop the South's social hierarchy. While the stakes of these three cases may have been easy to grasp, reaching conclusions about the issues presented in them was not. The purported abolition of slavery had produced a series of profound legal questions that had not been addressed by the Thirteenth Amendment or any other policy. As a consequence, litigants asked Southern courts to decide nearly 700 post-emancipation slave cases during the Reconstruction era. Collectively, the verdicts in these cases, and the process of reaching them, make up legal Reconstruction.

This dissertation has addressed several important legal issues heard in these courts. It was not initially clear when slaves became free persons. Nor was obvious how the personal, and often intimate, relationships between newly freed blacks and Southern whites ought to be understood. Litigants wanted to know whether slave contracts remained valid and precisely how much they stood to lose as a result of emancipation. As we have seen, there was a variety of different approaches to these problems. However, there was no consensus from either judges or litigants as to how legal matters related to slavery ought to be treated in the aftermath of emancipation. Some state courts adopted a Radical position; as Judge Taliaferro proclaimed in Louisiana, there would be no legal sanction or review of most post-emancipation slave cases. The more moderate position, accepted by Maryland, North Carolina, and Texas, addressed matters of slavery and judged them with both old and new law in mind. For instance, slave contracts remained valid if they were legal when signed, permitting some Southern whites to eke out a bit more profit from their former human property. On the other hand, the apprenticeship of a black child that too closely resembled enslavement would not be tolerated. The conservative states, represented by Kentucky in this study, resisted the end of slavery bitterly. There was little room for the meaningful consideration of black freedom for a judge like George Robertson; he continued to demand compensation for freed slaves well after it had become clear that neither he nor anyone else would receive any.

The United States Supreme Court finally ended this legal multiplicity. The justices decided a series of cases over the course of Reconstruction that determined the outcome of legal Reconstruction. The High Court insisted that all states adopt the moderate position that had been most common in Southern state courts. Matters of slavery would continue to be considered, regardless of attempts by states to prevent it. Undoubtedly, it was important to settle the questions that remained disputed at the state level in order to provide greater legal stability. In addition, since so many post-emancipation slave cases involved matters of personal finance, the standardization also helped provide stability to the Southern economy. Yet, when presented with the opportunity to squash the lingering vestiges of slavery, the Court did not take it. Abolition remained incomplete, which left the door open for the future legal support of Jim Crow laws,

lynch law and mob justice, and the adaptation of convict servitude in the years following Reconstruction.[1]

As modern scholarship insists, Reconstruction had the potential to be revolutionary; it could have provided and protected freedom, economic prosperity, and the legal and social equality of former slaves and their descendants.[2] After securing the end of slavery, the Radical vision of politicians such as Thaddeus Stevens and Charles Sumner propelled the passage of the Civil Rights Act of 1866 and the adoption of the Fourteenth Amendment. Similarly, many state legislatures, once under Radical control, adopted new state constitutions that affirmed the freedom of all African Americans, protected their rights, and in some instances, forbade any further recognition of slavery or the Confederacy. By the late 1860s, African Americans could be found serving in Congress, in state legislatures, in the army, and in local police forces, while others simply began the momentous, and sometimes monumental, task of building their lives as free persons. But, as this dissertation has shown, this tells only part of the story. During the same period, judges and litigants confronted the unexpected consequences of emancipation secured by the sword, and wrestled over the precise meaning of Confederate defeat and, more importantly, black freedom. Legal Reconstruction offered far less promise.

Though not inevitable, at moments when flickers of Radical Republican promise seemed brightest and the full enjoyment and security of civil rights seemed closest, the majority of Southern justices, with whom the United States Supreme Court ultimately agreed, extinguished them. They clung to the old ways, and, in some instances, mourned the destruction of slavery along with most of Southern white society. Most jurists remained steadfastly committed to antebellum legal rules – especially related to contract – and applied them to post-emancipation slave cases whenever possible, leaving remnants of slavery intact and untouched by emancipation. Slavery itself continued to be defined in limited ways: as a basic property relationship, devoid of its other aspects. Accordingly, emancipation entailed only the elimination of this relationship.[3] Such a practice undermined Radical attempts at Reconstruction, and ultimately fostered narrow interpretations of the Reconstruction Amendments, contradicting the published intentions of their framers. Without viewing the cumulative effects of secession, Civil War, emancipation, and the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments as amounting to an invalidation of all of slavery's legal residues, it became all but impossible for justices to accept or define legal Reconstruction in revolutionary or Radical terms. In short, the final resolution of legal Reconstruction offers a story of continuity, not of rupture.

This does not mean, however, that there was not meaningful legal change during Reconstruction. For example, significant secession crises became a thing of the past once the Civil War and Reconstruction established federal supremacy. There was, notes Laura Edwards, a related "transformation of the people's relationship to the federal government, and consequently,

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[1] On convict servitude, see especially, Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso, 1996). Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor Books, 2008). Convict servitude existed in the North since the 1820s. After being transplanted to the South, it became one of the tools used to circumscribe the rights and freedom of African Americans.

[2] See especially, Egerton, *The Wars of Reconstruction: The Brief, Violent History of America's Most Progressive Era*, and Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*.

[3] To many, the Thirteenth Amendment only "gave the federal government jurisdiction over that *one* aspect of individuals' legal status." Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*. See also, Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*.

to the nation's legal order."[4] Perhaps most crucial of all, the Constitution was remade by the addition of the Thirteenth Fourteenth and Fifteenth Amendments, which eventually did provide the means for protecting the civil rights of all Americans. Moreover, as we have seen, some courts were willing, at least for a time, to extend and protect the new rights of freedpeople when faced with legal problems for which there was little or no antebellum precedent. It is surely undeniable that, as Eric Foner writes in the epilogue to *Reconstruction*, "Without Reconstruction, …it is difficult to imagine the establishment of a framework of legal rights enshrined in the Constitution that, while flagrantly violated after 1877, created a vehicle for future federal intervention in Southern affairs."[5] Nonetheless, by examining Reconstruction from the vantage point of the Southern courtroom, we can more fully appreciate why these flagrant violations became standard practice for so many decades: The resistance to more Radical-leaning jurisprudence prevented the full eradication of slavery from American law and, ultimately, American society.[6]

Through this investigation, it has become clear that legal Reconstruction was distinct from the political Reconstruction commonly described by scholars. Emancipation, defined politically, is fixed, both in time and meaning. It denoted the precise moment when slavery ended. When defined by Southern jurists, emancipation was far more fluid; it happened many times over, and while slaves may no longer have been owned in the literal sense, freedom did not fully destroy slavery. This suggests that a full understanding of the period warrants a corrective to our standard narrative of Reconstruction. The meaning of freedom was contingent upon the venue in which it was defined, and when it was defined in court, it remained incomplete.

Long before *Plessy v. Ferguson* enshrined the infamous "separate but equal" doctrine, and the *Civil Rights Cases* struck down the unquestionably progressive Civil Rights Act of 1875, state court judges and individual litigants confronted the altered legal terrain of the post-Civil War South and negotiated the precise meanings of the Thirteenth Amendment, the end of slavery, the transformation of the former slave states, and ultimately, the reunification of the United

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[4] Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*, 10.

[5] Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 602-603.

[6] In *Rethinking the Judicial Settlement of Reconstruction*, Pamela Brandwein argues for a revised periodization of Reconstruction. For Brandwein, *Plessy* marks the beginning of the Court's abandonment of black rights, instead of its culmination. She contends that the state action doctrine "was not a definitive abandonment" of the promises of Reconstruction; rather, "an entire jurisprudence of rights and rights enforcement" was constructed from "a Fourteenth Amendment concept of 'state neglect' and a voting rights theory built from the Fifteenth Amendment and Article I, Section 4. Constructed from legal categories that have long since disappeared, this jurisprudence contained broad possibilities as well as constraints and ambiguities, and modern observers have perceived its contours in only partial and inchoate ways." She suggests that we think of "the Panic of 1874 and election of 1874 [as] mark[ing] the beginning of a transitional period during which national politics was uncertain, unstable, and fluctuating," where the commitment to the Republican vision of Reconstruction "was not what it had been, but was not yet what it would become." Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 2, 9. While I agree that a total abandonment of black rights was far from certain even during the Redemption years (what she calls a "transitional period"), I argue that by exploring state level jurisprudence, we can clearly perceive a trend in that direction that was affirmed, but not first articulated, by the United States Supreme Court. Moreover, this dissertation, along with the scholarship of Michael Vorenberg and Robert Cover, challenge Brandwein's direct linkage between the federal judiciary and national politics. Though certainly interrelated, Brandwein overstates the connection; instead, as I have shown here, the Court was driven in large part by its commitment to a legal ideology that had taken shape in the earlier in the nineteenth century. Maintaining the legal continuity between the antebellum past and the post-emancipation present – especially when it came to the law of contract – was far more influential than "fluctuating" political terrain. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1984). Vorenberg, "Imagining a Different Reconstruction Constitution."

States. The foregoing analysis of hundreds of post-emancipation slave cases, which have received only limited treatment by historians, establishes that Southern judges and litigants contested, and ultimately fixed the meaning of emancipation. In turn, their determinations influenced the meaning of freedom at the highest levels of federal law and policy-making. These findings raise a number of questions about the role of Southern litigants and judges in determining Reconstruction's revolutionary potential: suits between former slaves, cases concerning the role of military enlistment in disputes, and Reconstruction-era criminal prosecutions related to slavery demand a further detailed investigation. A more thorough exploration of the tenacity of American legal traditions is also warranted. In addition, the connection between legal Reconstruction and its subsequent eras – the Jim Crow and *Lochner* eras in particular – demand reconsideration. Nonetheless, it is already clear that slavery's legal afterlife was long and profound. By exploring one critical dimension of its afterlife, this dissertation has demonstrated that until we have traced the full extent of slavery's strange career in Reconstruction-era courts, we will not fully understand the tenacious and long-term effect that the peculiar institution has had on American law or society.

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Appendix A
Additional Cases Related to the Date of Emancipation

Texas

After the 1868 ruling in *The Emancipation Cases*, the Supreme Court of Texas revisited the date of emancipation twice more, in *Dowell v. Russell* in 1873, and in *Garrett v. Brooks* in 1874. Even though *Dowell* didn't explicitly overturn *The Emancipation Cases*, it rejected Juneteenth as the specific date for emancipation in Texas. This left open the possibility of continued litigation over the legality of slave contracts, which is exactly what the court had tried to prevent in 1868.[1] The issue was brought before the court in *Garrett* just a year later, confirming the concerns of the judges who decided *The Emancipation Cases*. *Garrett* offered the court the chance to address the matter for a final time.

In *Garrett v. Brooks*, the Texas Supreme Court reopened the issue over the moment of emancipation for the third time. The bizarre circumstances of the 1874 case are worth considering. Before *Garrett v. Brooks* was argued before a Texas court, the litigants engaged in an extra-legal affair to settle their disagreement. According to the contract presented in court, William Garrett agreed to sell his slave, Miles, to John H. Brooks for $400 in gold. However, the two men disagreed over the date the contract had originated. In this peculiar case, the litigants appear to have decided to date the slave sale contract April 1, 1865, even though the contract was actually executed on July 5, 1865. Garret contended that the "defendant [Brooks, the buyer] wrote the note and backdated it to 1 April 1865 because he feared that the government of the U.S. States and Soldiers would punish him for the transaction if dated 5 July 1865."[2] The two men had knowingly attempted to arrange a slave sale after they knew that slavery had been abolished. If that were not strange enough, Brooks argued that the $400 note was really payment that resulted from a violent dispute. The original "sale" was part of a ruse to get Miles to return to San Augustine, "so he [Garrett] could get him home," as Garrett still believed Miles was his slave.[3] The ruse worked, and Brooks notified Garrett that Miles was living on his property. Garrett arrived at the home of Brooks with "his gun and pistols to defendants house and asked for Miles."[4] In an effort to defuse the increasingly violent situation, Brooks agreed to pay $400 to Garrett. At that point, he had come to believe that Miles was in fact a free man and that he had wronged Miles "in telling Garrett where he was and because he knowing that Mr. Garrett treated negroes badly he would ill treat him…."[5]

This violence is worth considering precisely because it demonstrates the necessity for legal certainty on the issue of emancipation. Without a firm date, the risk for disorder among the people of the South became a very real problem. Instead of settling disputes over slave contracts in court, many could (and did) resort to extra-legal violence. Moreover, without committing firmly to earlier court rulings on the matter, the state courts themselves ran the risk of sparking

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[1] Campbell, Randolph B., Pugsley, and Duncan, *The Laws of Slavery in Texas*, 143.

[2] *Garrett v. Brooks,* 41 Tex. 479 (1874). Texas State Library and Archives, box 201-4324, file M-8485. Transcript, page 15.

[3] *Garrett v. Brooks,* 41 Tex. 479 (1874). Texas State Library and Archives, box 201-4324, file M-8485. Transcript, page 12.

[4] *Garrett v. Brooks,* 41 Tex. 479 (1874). Texas State Library and Archives, box 201-4324, file M-8485. Transcript, page 12.

[5] *Garrett v. Brooks,* 41 Tex. 479 (1874). Texas State Library and Archives, box 201-4324, file M-8485. Transcript, page 13.

the sort of uncertainty that promoted the kind of violence that had led to the litigation in *Garrett v. Brooks*.

Hoping to put an end to the matter of post-emancipation slave contracts, Judge Thomas J. Divine, reaffirmed Juneteenth as the date of emancipation in Texas. He wrote in the *Garrett* opinion, "The date of General Granger's order or declaration of Abraham Lincoln has been considered as the definite period from which the destruction of the right to hold slaves in Texas is to be dated."[6] Though the date of emancipation in Texas had been challenged three times over, the Court ultimately reaffirmed the original date, June 19, 1865 as the end of slavery in the state.

Virginia

The Virginia Supreme Court addressed the issue of emancipation almost exactly as did Texas, North Carolina, and other moderate states; in fact, it cites *The Emancipation Cases* and *Harrell v. Watson* in its own ruling. However, it did not render a verdict on a major case on the subject until 1872. Virginia dealt with the legal problems raised by emancipation later in the Reconstruction period than did other Southern states, but it had suffered an extreme amount of disruption and physical damage as a result of the Civil War, making a return to judicial normalcy a greater task than elsewhere.[7] Nevertheless, the Virginia court would follow the pattern set by many others and determine the legal date of emancipation.

Henderlite v. Thurman began in 1863, after the death of Smyth County resident Thomas Thurman. Unlike most of the cases that prompted courts to settle the date of emancipation, *Henderlite* involves a will, not a direct sale or hire contract. However, a slave sale contract ultimately became the element of controversy in the case. Thurman bequeathed his houses, land, and nine slaves to his three sons and two grandchildren. A court appointed commissioner sold all the property, real and chattel, to cover the debts of the late Thomas Thurman. The remaining money was to be split among the inheritors. However, the grandchildren were infants, and lived in Memphis, Tennessee. Wartime disruption made communication with Memphis impossible. The portion set aside for the children would be "retained under the power of the court till communications with Memphis were restored (i.e.) till the end of the war."[8] George Henderlite would act as security for the bonds set aside for the two infants.

Back and forth litigation continued throughout the war and early years of Reconstruction. In August of 1868, Henderlite, and Thomas H. Thurman, administrator of his late father's estate, moved to have the previous orders of the court reevaluated. They contended that the Emancipation Proclamation had freed the slaves before they had been sold in 1863, making the bonds received for them null and void. Moreover, the sales had been conducted in Confederate currency, making the sale illegal according to US law of 1862. Thus, the two men asked that the court reevaluate the value of Thomas Thurman's estate and resell the property. It appears that a family dispute led to the complication of the case. When the family members living in Virginia discovered an accounting error, they asked the Tennessee family and their court appointed

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[6] Campbell, Randolph B., Pugsley, and Duncan, *The Laws of Slavery in Texas*, 143. *Garrett v. Brooks 41 Tex. 479 (1874).*

[7] General Ulysses S. Grant captured Richmond, the Confederate capitol, in April of 1865. The US Army's siege of the city and the subsequent "Evacuation Fire" set by Confederate soldiers reduced the city almost entirely to rubble. The Library of Virginia reports that legal records from many counties were moved to Richmond for safe keeping. Most of these records were destroyed by the Evacuation Fire on April 3, 1865. "Research Notes Number 30, Lost Records Localities" Library of Virginia, May 2010. http://www.lva.virginia.gov/public/guides/rn30_lostrecords.pdf Accessed March 27, 2013.

[8] *Henderlite v. Thurman,* 63 Va. 466 (1872). Archived Records and Briefs, Virginia State Law Library. #89, 2.

adviser (Henderlite) to return some of the money they were given. They responded by claiming the sale of the slaves, in which the bulk of the wealth of the estate resided, had been fraudulent.[9] The question of the legality of slave sales in Virginia may have arisen out of a family dispute, but the significance of the central issue elevated the stakes. The Virginia Supreme Court would have to enter the debate over the legal date of emancipation.

When the Virginia Supreme Court ruled on *Henderlite*, the majority agreed, "The controlling question in the case is as to the effect of the proclamation issued by President Lincoln on the first day of January 1863, and known as the emancipation proclamation."[10] They focused in on the same question that all Southern courts had had to answer: whether the Emancipation Proclamation legally abolished slavery or not. But unlike other states, Virginia had the benefit of previously set precedent. The US Supreme Court had already ruled in *Texas v. White* (1868) *White v. Hart* (1871) that secession had not taken place and thus slave contracts could not be invalidated if they were executed legally. Consequently, the Louisiana model was off the table by the time the Virginia court ruled in 1872, and the Virginia opinion acknowledged the fact.

> It is worthy of notice, that in nearly all the States in which this question has been raised, the validity of this class of contracts has been fully sustained. Georgia, Arkansas and Louisiana are exceptions. But in these States the decisions were based avowedly upon the provisions in their State constitutions prohibiting the courts from rendering judgment of recovery in such cases. The Supreme Court of the United States reversed the decisions rendered by the Georgia and Arkansas courts, upon the ground that these provisions impaired the obligation of contracts.[11]

Having the benefit of knowing how other courts had ruled and what the Supreme Court had said on the matter provided the Virginia justices with a degree of confidence as they adopted the model used by others. It proved to be a safe and successful bet.

As had courts in other states, the Virginia court addressed the meaning of the Emancipation Proclamation, which the plaintiffs raised in their claim. The court concluded that even if one granted supreme and expansive Executive wartime powers,

> [T]his right of emancipation, and giving to the proclamation all the effect of a war measure between independent nations, it is clear it could not operate in regions beyond the control of the Federal authorities. … The authority of the invader extends no further than his possession. His title rests upon force, and is measured by it. … As a war measure then, the proclamation of President Lincoln could only have the effect of emancipating such slaves as came within the control of the Federal armies.[12]

The Virginia Court accepted the basic premise set forth by their counterpart in North Carolina: slaves had to be under Union control before they were considered free persons. Instead of being

[9] *Henderlite v. Thurman*, 63 Va. 466 (1872). Archived Records and Briefs, Virginia State Law Library. #89, 2-3.
[10] *Henderlite v. Thurman,* 63 Va. 466 (1872). 468.
[11] *Henderlite v. Thurman,* 63 Va. 466 (1872). 477.
[12] *Henderlite v. Thurman,* 63 Va. 466 (1872). 472.

about freedom, Justice Staples described emancipation as tantamount to the wartime seizure of any other property. To the victor go the spoils.

The court ruled that the slaves in question were sold legally because Union forces had not yet emancipated them. They remained behind Confederate lines, under Confederate jurisdiction. Justice Staples wrote, "Upon the whole, I think we may safely conclude, both upon reason and authority, that as the negroes sold under the decree in this case were, at the time of said sale, occupying a territory exclusively under the control and within the lines of the Confederate government," the contract was valid "by the law of the place where it was made."[13] The opinion did lament the fate of the purchaser. The justice recognized the apparent injustice to the buyer, who suffered exclusively as a result of the ruling. But, the court responded, "The slaves were purchased at a judicial sale, as to which the doctrine of caveat emptor applies in all its strictness. The appellants purchased with full knowledge of all the facts, and they assumed all the risks attending the acquisition of this species of property in the then existing condition of the country."[14] In other words, all the basic criteria necessary for a legal contract had been met; the hands of the court were tied.

Slavery was legal at the time of the sale, and both parties of the contract had equal access to the facts of the moment. To the mind of the justices on the Supreme Court of Virginia, "It would be monstrous to hold that a contract, perfectly fair and legal when made, can become illegal, or be held contrary to public policy, by reason of a subsequent alteration of the laws and constitution of the State."[15] With this, the court illustrated perfectly the notion of the right to contract to which many of the Southern states remained (and would continue to remain) committed, and which the United States Supreme Court demanded in 1871 that they uphold. The fact that many state courts and the US Supreme Court were unwilling to invalidate slave contracts suggests the centrality of contracts in American law during the middle of the nineteenth century. Indeed, the idea of impairing the obligation seemed "monstrous" to Justice Staple; justice and the rule of law as it was understood in this particular moment would be perverted if such contracts were not protected. Moreover, and more importantly for our purposes here, it reinforces the notion that justices felt compelled to find ways of ruling on post-emancipation slave cases that comported with antebellum law. Virginia, even at the later date, fit the mold.

Justice Staples did not restrain his comments to the facts of the case, and in so doing, he revealed the more conservative leaning of the Virginia court. He also took the opportunity to comment on the outcome of the war, which he clearly understood not as a Union victory, but rather, as a Confederate loss. While not as vitriolic in tone as we found in Kentucky, the Justice made clear the beliefs – personal and otherwise – of the majority of the Virginia court. "The gross injustice of the government, in requiring the citizen to pay for property wrested from him by the sovereign power, has been strongly pressed upon our consideration." The very idea that anyone would be forced to pay something for nothing seemed as counterintuitive to Justice Staples in 1872 as it is to modern readers. He believed that Virginia's slaves "were emancipated by force of arms by the conquest and subrogation of the South. All men knew the fact, and all acquiesced in the result. The State is, therefore, not in the predicament of compelling her citizens

[13] *Henderlite v. Thurman,* 63 Va. 466 (1872). 474, 476.
[14] *Henderlite v. Thurman,* 63 Va. 466 (1872). 482. This is a good example of the "will theory" of contracts in practice. See Horwitz, *The Transformation of American Law 1780-1860*.
[15] *Henderlite v. Thurman*, 63 Va. 466 (1872). 476.

to pay for property of which she has deprived them."[16] The state, in other words, should not have had to bear the responsibility of compelling payment for seized property.
The jurist spoke about the "conquest and subrogation" of the Slaveholder's Republic. The ratification of the Thirteenth Amendment did not prompt abolition, he reasoned, the slaves "were emancipated by force of arms." This opinion, more than many others, invoked the legacy of a bloody and destructive war as relevant legal evidence, and illustrated how that legacy shaped some Southerners. It foreshadows the "lost cause" rhetoric that exploded across the nation in the years following Reconstruction, and more immediately, the onset of Redemption. Certainly, the fact that the case was not decided until 1872 influenced the direction of the court, but it also reveals the smoldering sentiment to which many white Southerners – judges and laymen alike – would cling in the years after Union troops left the region. Kentucky's court wrote its most explosive rulings in the days immediately following the abolition of slavery, but it moderated its course over time. In Virginia, on the other hand, the resentment and anger over the loss of slavery and over the loss of the war had not abated. Rather, it festered.

[16] *Henderlite v. Thurman*, 63 Va. 466 (1872). 478.