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The Contract Controversy

In *Wainwright v. Bridges*, the judges of the Louisiana Supreme Court evaluated a complicated agreement made in 1860 for the purchase of enslaved people. In 1867, the court, led by Justice James Taliaferro, refused to enforce the outstanding debts, holding that the end of slavery not only freed enslaved people from bondage but also destroyed the legal support required to enforce any agreement related to slavery. Taliaferro proclaimed in his opinion, "the unavoidable result [of emancipation] was, that the laws which had therefore sustained the institution of slavery and given their sanction to and enforced contracts … ceased to exist." The U.S. Constitution's contract clause, which otherwise prohibited the impairment of such agreements, did not apply because the "declaration of emancipation" had superseded it when it "inevitably demolished [slavery], and with it all its surroundings." Emancipation, enacted by the "sovereign power, the paramount law" prohibited "the traffic in slaves," and "necessarily involves the entire contract, and annuls it throughout."[1] The ruling set an important standard that abolitionist judges followed throughout Reconstruction.

Contracts – the legal device that scaffolded the slave economy – factor into a plurality of post-emancipation litigation related to slavery. At least 41 percent involved a contract for the sale or hire of

[1] *Wainwright v. Bridges* 19 La. Ann. 234 (1867), 239.

at least one enslaved person.[2] People who owed money claimed that emancipation had nullified their agreements, and refused to pay their creditors. Plaintiffs, on the other hand, insisted on enforcement. Strict performance (enforcing the precise terms of the contract as written) was out of the question because the Constitution now prohibited slave ownership, but plaintiffs sought to recover the debts owed to them. As Texas court reporter George W. Paschal wrote in his headnotes to one such contract case, "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." A steady stream of litigants prompted a discussion about the judiciary's role in eradicating slavery, maintaining legal traditions, and defining the Thirteenth Amendment.[3]

A deeply contentious judicial debate over the enforcement of contracts for the sale or hire of enslaved people erupted as one of legal Reconstruction's central battles. This chapter explains the doctrinal approaches favored by judges, analyzes their underlying legal rationales, and explores the consequences of choosing one rationale over the others. It argues that a fundamental disagreement about the meaning of the Thirteenth Amendment caused the judicial discord.

In retrospect, this debate among judges amounts to an early scene in a much longer story. Lawmakers, scholars, and activists have argued over the original meaning and intent of the Thirteenth Amendment since its inception.[4] In part, this stems from the imprecision of the amendment itself, which has allowed for a range of interpretations and was even designed with that intention. As historian Michael Vorenberg writes, even in 1865, those in favor of the amendment's

[2] This figure is based on the author's database of cases.

[3] Forty-one percent is a conservative estimate. It does not necessarily include the suits in which a contract may have formed one part of a much larger, more complex, legal proceeding. *Williams v. Arnis* 30 Tex. 37 (1867); George W. Paschal, *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas*, vol. XXX (Washington DC: W. H. & O. H. Morrison, 1870), 45.

[4] Antebellum abolitionists also disagreed about the Constitution's position on slavery. Some, including Lysander Spooner and Salmon P. Chase, saw slavery as a perversion of constitutional guarantees, while followers of William Lloyd Garrison viewed the document as a proslavery "covenant with death."

ratification "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" many "had begun to reevaluate the measure in new social, political, and legal contexts."[5]

For some, including modern activists, the amendment's clause banning slavery "except as a punishment of crime whereof the party shall have been duly convicted," has undercut its promise of abolition. Instead, it reinscribed "slavery by another name" within a carceral system controlled by the state.[6] Some believe the punishment clause was intentionally included to ensure precisely this outcome, although legal historians note the text of the clause derived

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

[6] In the postbellum South, this re-enslavement emerged in the form of chain gangs, convict leasing, and extra-legal lynching – which often included the performance of a mock trial to grant legitimacy to vigilantism and murder. In 1997, Critical Resistance identified the "prison industrial complex" as slavery's modern iteration. Thirteenth Amendment § 1. 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). See also David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996); Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso, 1996); Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866–1928* (Columbia: University of South Carolina Press, 1996); Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, MA: Harvard University Press, 2003); Dennis Childs, *Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary* (Minneapolis: University of Minnesota Press, 2015); Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (Chapel Hill: University of North Carolina Press, 2016); Talitha LeFlouria, *Chained in Silence: Black Women and Convict Labor in the New South* (Chapel Hill: University of North Carolina Press, 2016); Jeff Forret, *Williams' Gang: A Notorious Slave Trader and His Cargo of Black Convicts* (New York: Cambridge University Press, 2020); Kidada E. Williams, *They Left Great Marks on Me: African American Testimonies of Racial Violence from Emancipation to World War I* (New York: New York University Press, 2012); Ida B. Wells-Barnett, *The Red Record: Tabulated Statistics and Alleged Causes of Lynching in the United States*, 1895, www.gutenberg.org/files/14977/14977-h/14977-h.htm. Slavery has also been imagined as a carceral institution and experience, marked by subjugation, violence, and inequality. See, e.g., Stanley Elkins, *Slavery: A Problem in American Institutional and Intellectual Life* (Chicago: University of Chicago Press, 1959); Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Cambridge: Belknap Press, 2013), chap. 8 especially.

from the Northwest Ordinance in 1789.[7] Other scholars have emphasized the abolitionist origins of the Thirteenth Amendment, and stress its capacious – if unrealized – authority to demolish every facet of slavery. Legal scholar Alexander Tsesis argues that "the framers of the Thirteenth Amendment adopted abolitionist ideas on the universality of fundamental rights and made them constitutionally viable."[8] Civil rights, according to this reading, need not depend on the Fourteenth Amendment or federal statutes (e.g., the Civil Rights Act of 1866) because the Thirteenth Amendment had that potential all along (and perhaps more powerfully than the Fourteenth Amendment because it has no constricting state action requirement).[9] For scholars like Tsesis, recovering the abolitionist roots of the Thirteenth Amendment reinforces what Dorothy Roberts calls "abolition constitutionalism" – a reconsideration of the Reconstruction Amendments for use in present-day legal campaigns against inequality and subjugation.[10]

[7] Dorothy E. Roberts, "Abolition Constitutionalism," *Harvard Law Review* 133, no. 1 (2019): 67, 67n396. On the punishment clause and the Northwest Ordinance, see especially, George Rutherglen, "State Action, Private Action, and the Thirteenth Amendment," *Virginia Law Review* 94, no. 6 (2008): 1371–74. The Missouri Compromise also contained the same language.

[8] Alexander Tsesis, "A Civil Rights Approach: Achieving Revolutionary Abolitionism through the Thirteenth Amendment," *University of California-Davis Law Review* 39 (2006): 1800.

[9] Ibid., 1776; Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *The American Historical Review* 92, no. 1 (1987): 48.

[10] Roberts, "Abolition Constitutionalism"; Alexander Tsesis, *The Thirteenth Amendment and American Freedom* (New York: New York University Press, 2004); Michael Vorenberg, "Imagining a Different Reconstruction Constitution," *Civil War History* 51, no. 4 (December 2005): 416–26; William M. Wiecek, *The Sources of Anti-Slavery Constitutionalism in America, 1760–1848* (Ithaca, NY: Cornell University Press, 1977); James Gray Pope, "Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account," *New York University Law Review* 94, no. 6 (2019): 1465–554; Jacobus TenBroek, *Equal under Law (Originally Published as The Antislavery Origins of the Fourteenth Amendment (1951))* (London: Collier Books, 1965); Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138, no. 2 (December 1989): 437–504; George Rutherglen, "The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment," in *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment*, ed. Alexander Tsesis (New York: Columbia University Press, 2010).

But nowhere in these discussions have scholars or activists recognized that almost immediately after its ratification, debates over the enforcement of contracts tied to slavery began to restrict any abolitionist potential in the Thirteenth Amendment. Similarly, they have overlooked how judicial deliberations in such cases echo the exact terms of ongoing debates today about the amendment's utility: Some contend that the amendment lacks the power to fully abolish slavery or disrupt racial ideologies while others herald its expansive, if unrealized, capability to deliver transformational racial justice. Judges serving on postbellum tribunals fully appreciated the stakes of each position and understood that their rulings would help determine how significantly the Thirteenth Amendment would transform the American legal order.

Those who favored contract enforcement saw these cases as matters of established commercial law doctrine (law related to business and trade, including contracts) and they treated them like any other contract. They did not view the agreements' connection to slavery as disqualifying. As long as the contract accorded with the laws in effect when it was executed, it remained valid. Ruling otherwise, many reasoned, would violate the contract clause (Article 1, section 10) of the U.S. Constitution, which prohibited "impairing the obligation of contracts," and violated the longstanding jurisprudence on the sanctity of contracts that had developed during the antebellum decades.[11]

Detractors insisted the agreements' ties to slavery rendered them unenforceable by the new Thirteenth Amendment. Abolitionist judges, including Taliaferro, agreed with Radical politicians and Black delegates to state constitutional conventions that the issue was never about contract doctrine at all. Instead, it was about the abolition of property rights in people and the restoration of the natural right of liberty. (Though not mentioned in U.S. litigation, Article 2 of the Haitian Constitution of 1816 invalidated all debts for persons held as slaves based on the same premise.[12]) Abolition required the

[11] Andrew Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," *Chicago-Kent Law Review* 70, no. 2 (1994): 493; Justin Simard, "Citing Slavery," *Stanford Law Review* 72, no. 1 (January 2020): 93. U.S. Const. Art. I, §10.

[12] Ada Ferrer, *Freedom's Mirror: Cuba and Haiti in the Age of Revolution* (New York: Cambridge University Press, 2014), 330.

total destruction of slavery. Enforcement of these contracts reified slavery by affirming the privilege of ownership of human chattel and the value assigned to their bodies as originally inscribed in the contracts. In other words, they reasoned that these contracts were the practical instrument of slavery, and as such had become as invalid as the system of enslavement itself.

The abolitionist vision failed to gain sufficient judicial traction by the slimmest of margins. Many courts were deeply divided on the matter, and single votes, not unanimous benches, determined the result. Most postbellum courts narrowly deferred to settled legal principles and viewed contracts for slaves as divorced from slavery itself. That legal settlement had serious consequences for Reconstruction, and it gave otherwise unremarkable contract disputes, the likes of which would never be heard again, a significant role in post-emancipation life and law: It began a process of restricting the application of the Thirteenth Amendment to a limited subset of slavery's incidents (the legal limitations or disabilities that stemmed from enslavement). This all but eliminated the possibilities for using the Amendment as a powerful tool to achieve comprehensive abolition.[13]

Even before the end of the Civil War, politicians foresaw the impending contract problem. As early as 1864, in the Maryland Constitutional Convention, delegate Daniel Clarke of Prince George's County argued that emancipation without compensation constituted the illegal taking of property. More important, "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." The "general creditors, who looked

[13] The "incidents of slavery" came to be defined as the "various disabilities imposed upon slaves" by abolitionist George M. Stroud in his 1856 treatise, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America*. In 1864, Harvard law professor Theophilius Parson also wrote of slavery's incidents in *The Law of Contracts*. Rutherglen, "The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment," 164. A modern lawyer defines an "incident" of slavery as "an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery – a legal restriction that applied to slaves qua slaves or a legal right that inhered in slaveowners qua slaveowners." Jennifer Mason McAward, "Defining the Badges and Incidents of Slavery," *Journal of Constitutional Law* 14, no. 3 (February 2012): 571.

to the personal property – the negro property" of debtors "for payment of their claims," would "find that it has all been destroyed." He argued that failure to uphold these contract rights would violate the Constitution's contract clause and lead to socioeconomic chaos.[14]

Joseph B. Pugh of Cecil County, in contrast, espoused an abolitionist position. He argued that as foundational and well protected as the rights to slave ownership or contract were, they necessarily had to defer to the universal right to liberty. Pugh reminded the delegation that "the system of negro slavery … is the prime cause of the civil war now raging" and that "a disturbance of commercial and financial relations" commonly accompanied such "upheavals." Of Clarke, Pugh asked rhetorically, "did it occur to the gentlemen who traced this right" to private property "to the period of the origin of what are known as *natural* rights, that there are one or more other natural rights, such as freedom and the right to maintain it to the death?" Pugh urged his fellow delegates to consider "whether, in view of the troubles that surround us, the institution shall not be uprooted and every vestige of it buried, enshrouded in constitutional parchment, and sunken fathoms deep in the free soil of Maryland forever." Abolition, he claimed, superseded enslavers' property and contract rights. In the end, Maryland's new constitution prohibited slavery, but it did not provide compensation or nullify contracts for enslaved people.[15]

During the first years of Reconstruction (1865–1867), similar disagreements continued to rage. But with the onset of Congressional Reconstruction in 1867, states considered the issue once again – this time at conventions convened at the behest of newly installed military governors, following the dictates of the Reconstruction Acts. Delegates who drafted these constitutions looked very different from their predecessors. They came from classes not previously welcomed in high politics, including African Americans and members of the yeomanry. Many construed nullifying contracts for enslaved people as part of a multifaceted program for debt relief, which included homestead exemptions that shielded land from seizure, stay laws that

[14] W. M. Blair Lord and Henry M. Parkhurst, *The Debates of the Constitutional Convention of the State of Maryland*, vol. 1 (Annapolis: Richard P. Bayly, 1864), 650–51, 654.
[15] Ibid., 1:666.

gave debtors additional time to pay their loans, and the scaling of Confederate currency so the useless scrip could be exchanged into currency of value. Those who favored such provisions sought ways to transfer economic power out of the hands of the old planter class in order to create a more egalitarian society.[16]

Other delegates, including Northern abolitionist "carpetbaggers" and Black Americans, saw contract nullification in moral terms, tied to the proper role of government in a post-emancipation nation. Reiterating arguments made in the eighteenth century, they claimed that ownership of human beings had always violated natural law. Emancipation corrected that injustice. As Black South Carolina delegate Robert B. Elliott noted, "A few years ago, the popular verdict of this country was passed upon the slave seller and the slave buyer, and both were found guilty of the enormous crime of slavery." That verdict had consequences. "The buyer of the slave received his sentence, which was the loss of the slave, and we are now to pass sentence upon the seller. We propose that he shall be punished by the loss of his money."[17]

Antislavery advocates had long condemned the buying and selling of people, especially the heart-rending separation of families, as proof of the institution's cruelty. Antebellum-era abolitionists, including Harriet Beecher Stowe with *Uncle Tom's Cabin*, publicized such sales to sway ever more readers to the cause. Ending the enforcement of contracts for bondspeople continued this tradition in a new venue. While no post-emancipation action could undo the fact that Americans had traded in human chattel for generations, proponents argued that contract nullification did the work of abolition. Removing slavery fully from the system of capitalism it once undergirded would bring the nation into alignment with the laws of nature and civilization and live up to the ideals on which it was founded.

[16] Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 496. On debt relief measures, see Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, 326–29. Debt relief measures will be explored further in the following chapters.

[17] J. Woodruff, ed., *Proceedings of the Constitutional Convention of South Carolina* (Charleston, SC: Denny & Perry, 1868), 227; Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 522; Ariela J. Gross, *Double Character* (Athens: University of Georgia Press, 2006), 154.

They rejected claims that contract nullification violated the U.S. Constitution. Elliott suggested the state's status allowed it to circumvent the problem. "If under the laws of the State these slave contracts were *bona fide* contracts, they are so no longer. Congress has declared that no legal government exists in this state." Without that lawful government, he reasoned, the constitutional provision did not apply. Delegate Robert C. DeLarge added that "the United States Courts can take the matter in hand, But we will record our votes on behalf of freedom, liberty and justice."[18]

Delegates from South Carolina articulated views on the more radical end of the political spectrum, but their debates were otherwise representative. The invalidation of contracts associated with slavery gained similar traction in constitutional conventions throughout the region. Mississippi, North Carolina, and Texas delegations entertained proposals that would have made the administration of such contracts illegal. More important, a majority of conventions – primarily from the deep South – agreed that the end of slavery had nullified agreements related to it. Arkansas, Florida, Georgia, Louisiana, and South Carolina included provisions in their constitutions that prohibited the enforcement of all such contracts, and Alabama's convention accomplished the same by adopting an ordinance.[19]

In accordance with the Reconstruction Acts, Congress reviewed states' new constitutions before they took effect. Some congressmen pointed to the constitutional problem of contract impairment, while others responded that contracts for enslaved people were unique – or at least had become so with the adoption of the Thirteenth Amendment. As Indiana senator Oliver Morton explained, "contracts of that kind are held … to stand upon a different obligation, a different footing morally, and perhaps legally from contracts of any other kind. Slave property was swept away; those owning slaves lost them; and it was

[18] Woodruff, *Proceedings of the Constitutional Convention of South Carolina*, 226–27.

[19] On Black political leadership in Reconstruction-era South Carolina, see Thomas Holt, *Black over White: Negro Political Leadership in South Carolina during Reconstruction* (Champaign: University of Illinois Press, 1979). Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 496, 496n5; Joseph A. Ranney, *In the Wake of Slavery* (Westport: Praeger Publishers, 2006).

perhaps just as proper that those owning choses in action [rights in property], debts, promissory notes, and bills of exchange given for slaves should lose them also." South Carolina delegate Robert Elliott had expressed the same sentiment, and it carried the day. In 1868, Congress approved the constitutions from South Carolina, Louisiana, Georgia, and Alabama, leaving all the nullification provisions entirely intact. Just a year later, Charles Sumner, the Radical senator from Massachusetts, introduced legislation that would have similarly denied federal courts jurisdiction over slavery-related contract disputes, making their enforcement impossible. Though the proposed statute died in committee, it confirms the existence of some congressional support for a comprehensive form of abolition that would have extinguished any remaining contractual obligations for bondspeople.[20]

Suits about slavery-related contracts began to appear on dockets immediately after the war. In Kentucky, the Court of Appeals began hearing cases just days before the Thirteenth Amendment took effect. Justices there required payment for enslaved people, despite emancipation. During Presidential Reconstruction (1865–1867), every state but Louisiana required their enforcement on the basis that contracts, if valid when executed, could not be abridged. The state constitutions produced after the Reconstruction Acts took effect, however, required judicial reconsideration. Many of the resulting governing documents introduced contract nullification provisions. This introduced the possibility that cases heard after these provisions went into effect might have been judged according to different standards than those decided before. More important, they opened the door to a significant doctrinal intervention that would have shaped what it meant for slavery to end.

Judges quickly shut that door. One by one, courts struck down contract nullification provisions in state constitutions. Only two states (Louisiana and Georgia) maintained them, and rulings there faced challenges in the U.S. Supreme Court. Just as opponents of nullification in conventions and Congress had warned, most judges

[20] Cong. Globe. 40th Cong., 2d Sess. 2999, 3005 (June 10, 1868); Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 501, 538.

agreed that the measures conflicted with the Constitution's contract clause. The retroactivity of the provisions only made them worse. As the Arkansas court ruled, "Wherein our State Constitution declares a valid contract null and void, we decide it to that extent contrary to the Constitution of the United States, and not binding upon the courts and people of the state." The contracts would be "judged by the laws existing when it was made." Whatever their methods, the majority of judges ruled that states lacked the ability to impair contracts.[21]

Courts in states without constitutional bans on the enforcement of contracts for enslaved people also considered the issue, since litigants raised the matter throughout Reconstruction. Petitioners reasonably hoped that courts would change their original position in states where military governors had installed new courts – new judges, perhaps more sympathetic to the federal cause, might rule differently. Nevertheless, judges continued to explain why they enforced agreements for enslaved people in nearly identical terms. In 1872, for instance, the Supreme Court of Virginia declared that "It would be monstrous … to say that the destruction of the institution can impair or affect contracts made during the period of its legal and constitutional existence." If contracts for slaves were lawful when made, then antebellum doctrine required that postbellum courts uphold them.[22]

Most American judges had for some time accepted a liberalized doctrine of contracts, believing "that the only basis of legal obligation" was the agreement of the parties who entered into it, rather than the "fairness of an exchange" or a sound price. The theory had become accepted doctrine by 1844, when William W. Story published *A Treatise on the Law of Contracts*. Judges applied the doctrine equally to commerce in enslaved people and the exchange of other goods, services, or property. Thus, when adjudicating post-emancipation claims, they deemed a contract's connection to

[21] The Arkansas and Florida courts were explicitly concerned with the "retrospective" nature of the provisions. *Jacoway v. Denton* 25 Ark. 625 (1869), 642, 647; *McNealy v. Gregory* 13 Fla. 440 (1869). See also *Calhoun v. Calhoun* 2 S.C. 283 (1870); *McElvain v. Mudd* 44 Ala. 48 (1870).

[22] *Henderlite v. Thurman* 63 Va. 466 (1872), 476–77. See also *The Emancipation Proclamation Cases* 31 Tex. 504 (1868); *Williams v. Johnson* 30 Md. 500 (1869).

slavery as irrelevant. Invoking a classic formulation of *caveat emptor*, or let the buyer beware, judges held that financial loss from a contract was a foreseeable consequence of investing in any asset. While there has been some scholarly debate about whether antebellum southern courts fully accepted this approach, post-emancipation litigation shows clear deference to it – even in states that had accepted commercial protections for slave buyers (e.g., implied or explicit warranties) during the antebellum decades. As one legal scholar puts it, judges determined that "The legal foundation of the enforcement of a debt … was not the law of slavery, but the law of contracts."[23]

The trend toward formalism also shaped legal decisions: During the nineteenth century, a "system of objective rules necessary to assure legal certainty and predictability" developed to help ensure market stability. A central part of this formalism was the antebellum iteration of the maxim *lex loci contractus* – contracts were governed by the law of the jurisdiction where they were made. By the same token, the laws in effect at the time of a contract's execution were an inherent part of that contract. For example, in *Bronson v. Kinzie*, the U.S. Supreme Court declared in 1843 that states could not enact legislation that "materially" and retroactively impaired the contract rights of creditors, since existing laws at the time a contract was made "entered into the contract, and formed a part of it."[24]

[23] Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1979), 185, 200. Scholars have emphasized that no separate commercial law of slavery existed. Rather, "the general rules of private law could be easily adapted to support slave commerce." Simard, "Citing Slavery," 90; Andrew Fede, "Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor," *The American Journal of Legal History* 31, no. 4 (1987): 322–58. More recently than Fede, scholars note more national agreement on commercial law principles. Justin Simard, "Slavery's Legalism: Lawyers and the Commercial Routine of Slavery," *Law and History Review* 37, no. 2 (2019): 571–603; Laura F. Edwards, *The People and Their Peace* (Chapel Hill: University of North Carolina Press, 2009); Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999). Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 541.

[24] Horwitz, *The Transformation of American Law, 1780–1860*, 201; James W. Ely Jr., *The Contract Clause: A Constitutional History* (Lawrence: University Press of Kansas, 2016), chap. 3. Determining what "materially" impaired contracts became a source of some controversy. On changing interpretations of contract in the late nineteenth century, see Roy Kreitner, *Calculating Promises: The Emergence of Modern*

The antebellum opinion also emphasized the presence and purpose of the Constitution's contract clause, on which postbellum judges would later rely. Chief Justice Roger Taney stressed that the framers intended "to maintain the integrity of contracts, and to secure their faithful execution throughout this Union." Taney hoped that *Bronson* would prevent states from tampering with contract rights. In this way, the right to contract became entwined with notions of the public good: Individuals would engage in commercial activity only if they were certain the law would enforce the agreements they made, according to the terms on which they made them.[25] As the national economy became ever more integrated, lawyers and judges developed legal rules that promoted market dynamism, ensured predictability, and minimized conflict.

This market-driven approach to doctrine straddled the Mason–Dixon Line throughout the antebellum decades. Northern and southern lawyers shared a commitment to commerce, and ultimately nurtured a legal tradition that emphasized it. In practice, this meant that southern judges applied nationally recognized legal principles to matters related to slavery, and as Justin Simard writes, "integrated their slave economy into a national legal and financial system."[26] By doing so they strengthened slavery's place within the nation by ensuring it was part of widely accepted legal structures. Because slave contracts were traditionally seen as *only contracts*, judges could (and did) elide the truth: Each transaction conveyed an enslaved human being, not just another piece of property.

American Contract Doctrine (Stanford, CA: Stanford University Press, 2007), 6. Kreitner writes, "Contract … is the private law of the parties to the contract: their obligations flow directly from the agreement, not merely in the sense that they have agreed to be bound, but also in that they have agreed on the specific terms that bind them. The parties, thus, are seen as making law for themselves." Post-emancipation judges regularly justified contract enforcement because the parties had agreed to the terms. They emphasize what Kreitner calls the "centrality and calculability of the individual."

[25] *Bronson v. Kinzie* 42 U.S. 311 (1843), 318–19. See also *McCracken v. Hayward* 43 U.S. 608 (1844); *Blair v. Williams* 14 Ky. 34 (1823); *Commercial Bank of Natchez v. Chambers* 16 Miss. 9 (1847). See also Harry N. Scheiber, "Economic Liberty and the Modern State," in *The State and Freedom of Contract* (Stanford, CA: Stanford University Press, 1998).

[26] Simard, "Slavery's Legalism: Lawyers and the Commercial Routine of Slavery," 573–74, 588, 593.

This unifying, national commercial culture informed judicial decisions in post-emancipation contract litigation. It helps explain why some northern justices installed on the benches of southern courts by military governors often agreed with their southern counterparts on the issue of contracts related to slavery. They believed that their nullification would undermine settled law that had proven merits at a time when the post-bellum economy desperately needed stability. Jurists agreed that there was nothing specific to slavery in the rules to which they ascribed, and it made sense to apply them just as they had always done. Put bluntly, most judges in post-emancipation contract cases could not see or would not recognize the connection between contract doctrine and slavery.

Courts in two states – Georgia and Louisiana – rejected the approach that invariably upheld contract doctrine, but for very different reasons. To sustain the state constitution's ban on the enforcement of contracts for enslaved people, Georgia Supreme Court chief justice (and former Confederate governor of the state) Joseph E. Brown invoked the conquered province theory – a version of what came to be known simply as *ab initio*. The principle, originally put forth by Radicals in Congress, accepted that the entire Confederacy had become conquered territory upon its defeat, and that the states that had comprised it therefore ceased to exist. Echoing South Carolina delegate Robert Elliott, Brown contended that upon defeat, Georgia "was in the Union, in a territorial sense" only. It lost the constitutional rights of states, and per the Constitution's directive on territories, fell under the governing control of Congress. Brown reasoned if the provision that banned the enforcement of contracts for enslaved people had in fact been contrary to law, then Congress would not have sanctioned the state's new constitution. Even so, the argument Brown made in 1869 did not directly challenge contract doctrine; instead, it rested on his belief that states could and did secede, and that the Constitution thus did not apply to them unless and until they were reincorporated into the Union.[27]

[27] "*Ab initio*" was the shorthand used for the different theories used to evaluate secession's legality – whether secession was null and void *ab initio* (from the beginning) or whether states had left the Union and the protection of the Constitution. *Shorter v. Cobb* 39 Ga. 286 (1869), 288, 293. Prior to Brown's ascension to the bench,

Louisiana's court, in contrast, embraced an abolitionist approach to contract enforcement. Taliaferro ruled in *Wainwright* that the "sovereign power" had destroyed slavery, which rescinded "the sanction of law and its authority to enforce" agreements related to it. When the "essential requisites to a perfect obligation ceased to exist, the contract ceased also."[28] Taliaferro's opinion rested on the premise that slavery violated natural law. Typically, scholars point to Lord Mansfield's 1772 ruling in the *Somerset* case as the legal precedent for this idea in the Anglo-American context.[29] Because slavery contradicted the laws of nature, only the laws of man – positive law – could have sanctioned it. Many learned American jurists, including Joseph Story and Lemuel Shaw, upheld pro-slavery laws because they believed the Constitution sanctioned them, even though they personally abhorred the institution. Likewise, Taliaferro conceded that slavery had been "tolerated" in Louisiana "by the constitution of the United States," but otherwise existed "accidental[ly]." The Thirteenth Amendment rescinded that support, destroying the entire institution.[30]

judges in Georgia had repeatedly affirmed the validity of contracts for the sale or hire of enslaved people. In one 1866 suit, Chief Justice Joseph Henry Lumpkin compelled payment on a contract for the sale of an enslaved man named Jack. Registering both his proslavery convictions and his evangelical leanings, Lumpkin held that emancipation was "a two-edged sword … like the flaming sword placed at the East of the garden of Eden, at Adam's expulsion, turning every way towards the community." Freedom for enslaved people may have spelled doom for the South, but deference to accepted doctrine demanded that agreements for their sale had to be enforced nonetheless. On Lumpkin's belief in slavery as a God-ordained institution, see Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890*, 87–88. *Riley v. Martin* 35 Ga. 136 (1866), 139. Ranney, *In the Wake of Slavery*, 22–23. Brown started his political career as a states' rights Democrat who eventually argued for secession. He became a "scalawag" Republican during Reconstruction, but returned to his Democratic roots as the era ended. He was elected to the Senate in 1877 as a Democrat.

[28] *Wainwright v. Bridges* 19 La. Ann. 234 (1867), 239.

[29] Recently, Holly Brewer has argued that slavery did exist in England despite *Somerset*'s claim to the contrary. The case "attempted to overturn the common law of slavery in England itself" that had developed to include slavery over the course of the seventeenth and eighteenth centuries. Holly Brewer, "Creating a Common Law of Slavery for England and Its New World Empire," *Law and History Review* 39, no. 4 (November 2021): 765–834.

[30] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1975). *Wainwright v. Bridges*, 19 La. Ann. 234 (1867), 237.

Taliaferro and other abolitionists might have read *Somerset* differently, since the opinion distinguished between a contract for an enslaved person and the practice of slavery. Mansfield invoked *lex loci contractus* explicitly when he stated that a sale of a bondsperson remained "good here," even where slavery had no positive legal support. (One could not hold a man in bondage in England, but one could enforce a contract for his sale in an English court.) Most American jurists had accepted Mansfield's premise that any "sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement."[31]

Southern judiciaries and legal theorists had gone to great lengths to demonstrate that slavery did indeed derive from natural law.[32] But Louisiana had a long history of declaring slavery's violation of natural law, even as its antebellum legislature and court supported the institution's legal existence. This view underlay the conclusion that upon freedom, formerly enslaved people acquired retroactive rights. The Louisiana court's abolitionist decision not to enforce slave contracts, then, actually aligned with a much longer legal tradition unique to the state. It was not, as some scholars would have us believe, a view that retrospectively "denied the legality of slavery, even where slavery was recognized by positive law." Rather, the ruling followed an established line in state law and jurisprudence.[33]

[31] *Somerset v. Stewart* 98 ER 499 (1772), 509. Still, as Robert Cover notes, the *Somerset* ruling remained a "constant reminder to the judge who read it, of the disparity between slave law and the moral principles underlying a decent legal order." As a consequence, the Confederate Constitution specifically repudiated the decision. Ibid., 87–88. Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 515.

[32] Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery* (Philadelphia: T. & J.W. Johnson & Co., 1858); Alfred L. Brophy, *University, Court, and Slave: Pro-Slavery Thought in Southern Colleges & Courts & the Coming of the Civil War* (New York: Oxford University Press, 2016). In the 1830s, theorists focused on the constitutional right to property enshrined in both the federal and state constitutions as trends in jurisprudence shifted away from natural law in favor of positive law. By the late 1850s, Cobb had taken a different tack. See especially, Simon J. Gilhooley, *The Antebellum Origins of the Modern Constitution: Slavery and the Spirit of the American Founding* (New York: Cambridge University Press, 2020), chap. 4.

[33] Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994), chap. 1; Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 517.

Wainwright played an outsized role in shaping Louisiana's postbellum legal order. It became the basis for the state's constitutional ban on the enforcement of contracts that conveyed enslaved people. Less than a year after the decision, delegates incorporated the main tenets of the opinion into Louisiana's new constitution. Article 128 stated: "Contracts for the sale of persons are null and void; and shall not be enforced by the courts of this state."[34] Justice Taliaferro served as the president of Louisiana's constitutional convention and presided over the delegation's debate about the continued enforcement of the contracts. The constitutional provision was later struck down by the U.S. Supreme Court, but *Wainwright* survived. In *Palmer v. Marston*, Associate Justice Noah Swayne wrote the opinion that preserved Taliaferro's abolitionist result. The court had "no power of review" because the suit did not involve a state constitutional ban on contract enforcement (the decision had predated the state's constitutional ban) and it "was governed by the settled principles of the jurisprudence of the State."[35]

Abolitionist state court judges were joined by some federal justices. Arkansas Federal District Court judge Henry Clay Caldwell "saw the law as an instrument of substantive justice" and firmly believed in freedom as a natural right. Like some abolitionists of the antebellum era, including Salmon P. Chase and Lysander Spooner, he renounced the idea that the U.S. Constitution had ever supported the institution, let alone "[given] any sanction to slave contracts." In *Osborn v. Nicholson* (later appealed to the U.S. Supreme Court) he determined

[34] "Constitution Adopted by the State Constitutional Convention of the State of Louisiana, March 7, 1868" (New Orleans Republican Office, March 7, 1868), University of Pittsburgh Internet Archive, http://archive.org/details/constitutionadop1868loui. Related, 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."

[35] *Palmer v. Marston* 81 U.S. 10 (1872), 12. The court upheld *Wainwright* six times during Reconstruction. 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). Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 302. See also *Winter v. Tournoir* 25 La. Ann. 611 (1873); *Succession of Herbert* 27 La. Ann. 300 (1874); *Brusle v. Hamilton* 26 La. Ann 144 (1875).

that the "statute giving the remedy" for the enforcement of slave contracts had "been repealed by article 13 of the amendments, of the constitution of the United States." He considered the amendment "the work of the sovereign people of the United States," and rejected the idea that after its passage, states could be compelled "to open their courts to the slave-dealer, and let him recover … the fruits of his barbarous traffic." The abolition of slavery had likewise abolished legal mechanisms once used to support it.[36]

Unlike jurists elsewhere, Caldwell invoked the Fourteenth Amendment to expand his attack on slave contracts. To him, section 4 of the amendment further substantiated nonenforcement. It pronounced that "neither the United States, nor any state, shall assume or pay any debt of obligation incurred in aid of insurrection or rebellion against the United States, *or any claim for the loss or emancipation of any slave*; but all such debts, obligations, and claims, shall be held illegal and void." While the section was meant to prevent compensation for slave property paid by state or federal governments, Caldwell ruled that it "conclusive[ly]" prohibited the enforcement of *any debt* for an enslaved person, even those made between individuals. By this reasoning, any further exchange of monies for a formerly enslaved person constituted illegal compensation for slave property.[37]

Historians and legal scholars have paid scant attention to section 4 of the Fourteenth Amendment. Those who believe in the Lost Cause explain it as an attempt by Republicans to punish the South, while others see it as a way to secure political support from northern legislatures, or, more generously, as a tool for Republicans to finish what the Thirteenth Amendment had started. More recently, however, historian Amanda Kleintop has argued persuasively that section 4 responded to southerners' ongoing insistence that they be compensated for enslaved people taken from them, and represented congressional Republicans' belief that abolition required "the denial of white southerners' claims to own human property." While they may not

[36] Arnold and Freeman III, "Judge Henry Clay Caldwell," 317, 320, 324. *Osborn v. Nicholson* 18 F. Cas. 846 (1870), 849–50, 853–54. American Council of Learned Societies, *Dictionary of American Biography*, 2:408. Caldwell quoted in Arnold and Freeman III, "Judge Henry Clay Caldwell."

[37] U.S. Const. Amend. XIV, §4, emphasis added; *Osborn v. Nicholson* 18 F. Cas. 846 (1870), 856.

have been thinking specifically about contracts for enslaved people when they debated section 4, many of those Republicans must surely have agreed with Caldwell's interpretation of it. Some had already voiced their support for the state constitutional provisions that nullified slavery-related contracts on similar grounds during congressional debates over states' new constitutions.[38]

Some delegates made comparable arguments at state constitutional conventions. Jonathan Jasper Wright, Black lawyer and delegate to the South Carolina Convention, contended that preventing the enforcement of slave contracts would "not establish a new precedent" because it comported with section 4 of the Fourteenth Amendment. Delegates in Virginia and Mississippi considered the same argument, although unlike South Carolina, neither state included a contract nullification provision in its new constitution.[39]

Even in states that upheld contracts for enslaved people, abolitionists left a lasting mark, but majority rulings have obscured their contributions. The courts in Alabama, Arkansas, and Texas, for example, were split on the matter. Dissenting judges opposed enforcing contracts for enslaved people for a variety of reasons. Some articulated concern for "fairness toward the contracting parties," while others deferred to state constitutional provisions. Others agreed with Joseph Brown: The states of the former Confederacy had left the union and thrown off the authority (and accompanying protections) of the Constitution. For example, Arkansas judge John E. McClure, a proponent of *ab initio*, understood contract enforcement as "a matter

[38] Amanda Laury Kleintop, "Life, Liberty, and Property in Slaves: White Mississippians Seek 'Just Compensation' for Their Freed Slaves in 1865," *Slavery & Abolition* 39, no. 2 (2018): 383–404; Amanda Laury Kleintop, "The Balance of Freedom: Abolishing Property Rights in Slaves during and after the US Civil War" (Dissertation, Evanston, IL, Northwestern University, 2018), 150–52. Unsurprisingly, congressmen from loyal border states strongly resisted the inclusion of the provision. They believed that their loyalty had earned them protection from the same fate as Confederate rebels.

[39] Woodruff, *Proceedings of the Constitutional Convention of South Carolina*, 218. Wright later served on the bench of the South Carolina Supreme Court, but he could not save the slave contract provision from nullification. R. H. Woody, "Jonathan Jasper Wright, Associate Justice of the Supreme Court of South Carolina, 1870–77," *The Journal of Negro History* 18, no. 2 (April 1933): 114–31. Kleintop, "The Balance of Freedom: Abolishing Property Rights in Slaves during and after the US Civil War," 209n282.

wholly within the control of the sovereignty of the State." Thomas Peters in Alabama and Andrew Jackson Hamilton in Texas believed that contracts made after the Emancipation Proclamation took effect violated public policy and therefore should not be honored.[40]

By and large, however, the theory first articulated by James Taliaferro in *Wainwright* reflected post-emancipation abolitionist thought among judges. The Thirteenth Amendment emancipated slaves *and* abolished slavery by "annulling the laws" that had regulated both the economy of slavery and the contracts used to facilitate it. McClure exposed the sleight of hand required to uphold contracts in the first place. The purpose of the nullification clauses in state constitutions, he contended, was to "destroy the *right of property* in all slave contracts." Noting the logical fallacy of his colleagues' ruling, he continued, "I am not advised that property in a slave *note* is any more sacred or entitled to a higher or holier protection than the property in *slaves*." Alabama's Judge Peters emphasized the wording of the Thirteenth Amendment, noting that it called for the destruction of the entire institution. "The slave was not declared to be emancipated, but *slavery* was forever forbidden. The power that upheld it was withdrawn" and, as a consequence, "the obligation of the contract is gone."[41] By emphasizing the agreement, traditionalist judges – whether intentionally or not – had privileged contract doctrine over property law, in order to maintain exchanges of enslaved people.

Dissenting abolitionist judges further criticized that their colleagues' longstanding commitments to slavery prevented them from appreciating the fundamental change in American law that the Reconstruction Amendments enacted. Federal District Court judge Henry Caldwell insisted that "no one can escape from [the Reconstruction Amendments'] operation by 'the cry of the 'constitution as it was.'" The judicial inclination to enforce contracts linked

[40] John C. Williams, "Slave Contracts and the Thirteenth Amendment," *Seattle University Law Review* 39, no. 3 (2016): 1015; Ranney, *In the Wake of Slavery*, 73. *Jacoway v. Denton* 25 Ark. 625 (1869), 654. McClure substantiated his position by invoking the U.S. Supreme Court's ruling in *Ogden v. Saunders* 25 U.S. 213 (1827), 282.

[41] *McElvain v. Mudd* 44 Ala. 48 (1870), 74–75, emphasis added; *Jacoway v. Denton* 25 Ark. 625 (1869), 648, 661, emphasis in original.

to slavery, Peters noted, "shows how reluctantly the human mind is disposed to … do right, though the heavens may fall."[42]

At no time, however, did abolitionist judges propose the outright repudiation of contract or commercial law doctrine. The Thirteenth Amendment, they claimed, had rendered protections guaranteed by the contract clause inapplicable to agreements for enslaved people, and *only* them. As Caldwell interpreted it, section 4 of the Fourteenth Amendment prevented enforcement of debts only for enslaved people. By this reading, the Reconstruction Amendments held tremendous potential power. Together, they could abolish slavery by eliminating property in people and bringing freedpeople into civil society without any residue of their former status.

In part, because abolitionist judicial writing includes natural law rhetoric, some scholars have concluded that these opinions constituted a "retrospective" denial of slavery's legality that demanded "emancipation be made retroactive," or a political stance disguised as judicial reasoning, not a plausible legal argument for contract nullification. These "neoabolitionists," legal scholar Andrew Kull has contended, "would have involved the nation in a political revolution that Reconstruction did not envision. The Constitution of 1787 had allowed the states to maintain the institution of slavery. The Thirteenth Amendment altered that Constitution but did not seek to overthrow it."[43]

This characterization misinterprets the arguments of judges who opposed contract enforcement. Judges who agreed that slavery violated natural law did not argue that it had never been legal in the past. Caldwell's own language was clear on the point: "[T]here shall be no *further* recognition by the federal government or the states of

[42] *Osborn v. Nicholson* 18 F. Cas. 846 (1870), 854; *McElvain v. Mudd* 44 Ala. 48 (1870), 81.

[43] Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," 531–32. Since its publication, Andrew Kull's article on the enforcement of slave contracts has been the foundation for evaluating the topic. Simard, "Citing Slavery"; Gross, *Double Character*. Recently, some scholars have begun to reassess it. See, e.g., Williams, "Slave Contracts and the Thirteenth Amendment"; Diane J. Klein, "Paying Eliza: Comity, Contracts, and Critical Race Theory – 19th Century Choice of Law Doctrine and the Validation of the Antebellum Contracts for the Purchase and Sale of Human Beings," *National Black Law Journal* 20, no. 1 (2006): 1–41; Roberts, "Abolition Constitutionalism."

the idea that there could lawfully be property in man." Whether or not slavery *should* have been allowed in the United States was beside the point. Moreover, abolitionist judges did not seek to overthrow the Constitution. Instead, they used natural law claims only secondarily to bolster the argument that the Thirteenth Amendment should be understood capaciously: It both prohibited enslavement and destroyed all the incidents of slavery.[44] Taliaferro explained, "We do not consider the position maintainable, that the effect of emancipation was merely to produce a change in the status of the slave, and not to render void contracts relating to slaves. The status of the slave could only be changed by annulling the law that gave him that status. Emancipation, and the existence of laws upholding slavery, are incompatible. They cannot exist together."[45]

Ratification debates support the interpretation that jurists were not disavowing enslavement retrospectively but prospectively insisting on the abolitionist potential of the amendment. A number of congressmen envisioned the amendment as a powerful tool – certainly strong enough to annihilate slavery-related contract rights. Radicals Henry Wilson of Massachusetts and Thaddeus Stevens of Pennsylvania made impassioned appeals to natural law, and promised that the amendment would "obliterate the last lingering vestiges of the slave system." Delaware Republican Daniel Smithers argued that courts would lack the ability to enforce contracts, explaining that "The operation of the amendment is upon the law, not upon the subject; its effect is to" prohibit "the courts [from] tak[ing] cognizance of the claim of the master."[46]

Legal scholar George Rutherglen writes that congressmen who understood the Thirteenth Amendment expansively believed that "Slavery could no more be maintained through the private exercise of common law rights of property and contract … than through the efforts of the government itself." They recognized that it simultaneously abolished slavery's government-supported institutional structure and extinguished the common-law rights (those derived from

[44] *Osborn v. Nicholson* 18 F. Cas. 846 (1870), 856.
[45] *Wainwright v. Bridges* 19 La. Ann. 234 (1867), 240.
[46] Cong. Globe, 38th Cong., 1st Sess. 1324 (1864); Rutherglen, "State Action, Private Action, and the Thirteenth Amendment," 1378, 1384, emphasis added.

custom and precedent rather than written laws) individuals had traditionally claimed in order to practice it – both as incidents of the institution itself.[47]

The judges deciding post-emancipation suits had lived through the Thirteenth Amendment's ratification process, and they themselves participated as politicians in state constitutional conventions called to implement it. Unquestionably, they understood the politics behind the amendment and viewed themselves as attentive interpreters of it, responsible for implementing a new legal order.

The Thirteenth Amendment resolved what legal scholar Robert Cover describes as the "cognitive dissonance" produced when personal abolitionism collided with legal philosophy. It enshrined natural law principles – the natural right to freedom – into positive law in the Constitution. And by invoking the language of the Thirteenth Amendment, which prohibited *slavery*, not just enslavement, post-emancipation abolitionist judges could resolve the antebellum Gordian knot that beset them by limiting their aim to slavery, without running afoul of established commercial law principles. If anything, it was the traditionalists who retreated after emancipation to the safety of what Cover calls the "mechanistic formalism" of established law when they proposed to enforce agreements for human chattel in the same way that they always had, despite the new amendment.[48]

As the newly free Page family discovered, the failure to adopt the abolitionist interpretation of post-emancipation contract enforcement had dire consequences. In 1857, free man Henry Page had negotiated the purchase of his wife Dilly and two of his children, Britton (Britt) and William (Bill), from their enslaver, William Andrews. Page agreed to pay $3,200 in installments for his family members. He "became alarmed" in 1861 by "the great political excitement in the county" and feared that he and his family "would be reduced to slavery

[47] Ibid., 1376. Rutherglen argues that the Civil Rights Act of 1866 offers the "best evidence of what Congress thought the 'badges and incidents' of slavery were at the time." Admittedly, only a few Radicals, including Lysander Spooner and William Seward, supported the natural position prior to the Civil War. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890*, 57, 69.

[48] Cover, *Justice Accused: Antislavery and the Judicial Process*, 226–29, 232.

again." Page "left home [and] went to Cincinnati [and] remained there a while," hoping to find safety. (It is not clear whether any of his family members went with him.) That same year, Andrews sued Page for $1,550, the balance due on the note contracted in 1857. In so doing, he initiated litigation related to the sale of enslaved persons that would last until 1871, well after all of Page's family members had become free people.[49]

Henry Page did return to Tennessee and lived there with his family until he died prematurely in a Nashville sawmill accident in 1864. He left nearly 300 acres of land and $2,000 worth of personal property behind, but no will. His family members considered themselves his lawful heirs and as free persons they continued to live on the various properties Page had acquired before his death. In 1866, the Page family was shocked to learn that a court had ordered the sale of their property to cover the outstanding debt still owed to William Andrews. Representing their widowed mother Dilly, Page's other children, Wyatt, Swail, and Larkin, traveled to Carthage, Tennessee – a town nestled along a bend in the Cumberland River approximately fifty-five miles east of Nashville – to contest the sale in the Smith County Chancery Court. They believed the debt had already been satisfied. And even if it had not, the law had freed the people identified for sale in the contract, thus making the agreement invalid.[50]

By the time the Tennessee Supreme Court finally decided the case in 1871, however, the judges assumed the contract's enforceability, holding, "It is needless … to consider the 13th Amendment to the Constitution of the United States." They considered only whether Dilly was the legitimate wife of Henry Page and, if so, whether she had overriding dower rights to the land that might otherwise be sold off. The court ruled that while she was indeed a dowager, she would have to relinquish some of the property to Andrews to cover the outstanding obligation. As a consequence, she retained a mere one-third of the

[49] *Andrews v. Page* 50 Tenn. 653 (1871), Tennessee State Library and Archive, MT Box 474, page 36. Court records refer to Dilly as "Dilla" and "Dillah," and sometimes name Henry as "Harry."

[50] *Andrews v. Page* 50 Tenn. 653 (1871), 659, Tennessee State Library and Archive, MT Box 474, pages 28, 52, Petition of H. Page heirs, Deposition of G. G. Dillard.

estate her husband had set aside for their family. Worse still, unless the debt was repaid in full, the remainder of the land would "be subject to the right of redemption," and would be sold off after her death to repay Andrews instead of being passed down to the Page children.

In part, this was a positive outcome. Dilly and her children were recognized as Henry's legitimate family and heirs, so they would manage to keep some of the family's property if they paid Henry's financial debt.[51] But the justices of the court entirely sidestepped a fundamental problem: Enforcing this contract imposed an extraordinary liability. It required the Page family to continue paying for their freedom *after* the law had already emancipated them. This meant that William Andrews continued to profit from his ownership of Dilly and her children, and received legal sanction to seize land that would have been rightfully theirs had she and they been born free. Dilly, a freed woman, remained bound to her former enslaver through legal obligation. *Andrews v. Page* revealed not only that upholding contracts for the sale of enslaved people could cause financial harm for those like the Pages, but also that after emancipation, freedpeople retained what legal scholar John C. Williams considers "something of their character of property."[52]

The Page family, quite literally, had to pay for the freedom that the Constitution of the United States had already guaranteed. But resolutions in similar suits with less obvious connections to the lives of formerly enslaved people just as significantly diluted the meaning and abolitionist promise of the Thirteenth Amendment.

By privileging contract and commercial doctrine, the majority of judges ensured that those released from bondage retained some semblance of their identity as property. Legal historian Allison Mileo Gorsuch found that indenture contracts in the antebellum free state

[51] On the surface, the case presents as one about the legitimacy of Dilly and Henry's marriage in order to determine whether she had dower rights, and scholars typically cite it this way. See, e.g., Darlene C. Goring, "The History of Slave Marriage in the United States," *The John Marshall Law Review* 39, no. 2 (2006): 299–347. Only an investigation into the archival record reveals the sale at the heart of the litigation. The incisive work of lawyer John C. Williams tipped me off to the deeper meaning of the suit. Williams, "Slave Contracts and the Thirteenth Amendment," 1026–27, 1026n70. *Andrews v. Page* 50 Tenn. 653 (1871), 671.

[52] Williams, "Slave Contracts and the Thirteenth Amendment," 1027.

of Illinois allowed slaveholders "to exercise the powers of ownership while denying ownership itself." Similarly, judges' enforcement of contracts permitted southerners to do the same. While these rulings did not return people to bondage, their interpretations nevertheless stymied abolition by "disguising slavery" behind a veneer that blended contract and commercial law doctrine. Those decisions did not reject *slavery* or seek to destroy its economic foundations; they merely accepted that American law no longer sanctioned *enslavement*.[53]

Aligning with the majority of state court judges, the U.S. Supreme Court required the enforcement of contracts for bondspeople. On appeal in 1871, the Court reversed Caldwell's decision in *Osborn v. Nicholson*, holding that the contract clause still applied to contracts for the sale or hire of enslaved people, despite the Thirteenth Amendment. Affirming the *Bronson* rule, Justice Noah Swayne wrote, "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. This is a principle of universal jurisprudence." Contrary to the intent of many of its framers, the justices held that arguments that relied on the Thirteenth Amendment failed because "there is nothing in the language of the amendment which in the slightest degree warrants the inference … that such should be its effect."[54]

The Supreme Court decided *White v. Hart* at the same time as *Osborn*. That case considered Georgia's constitutional provision barring contract enforcement and, in particular, Joseph E. Brown's rationales to sustain it. Echoing *Osborne*, Swayne stressed that contracts made according to the laws in effect at the time they were executed remained valid and enforceable in perpetuity. He added that the ongoing validity of contracts rested on the illegality of secession: The states of the former Confederacy had remained a part of the Union throughout the war, Swayne declared; thus, they could not evade

[53] Allison Mileo Gorsuch, "To Indent Oneself: Ownership, Contracts, and Consent in Antebellum Illinois," in *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012), 137, 151.

[54] *Osborn v. Nicolson* 80 U.S. 654 (1871), 662.

constitutional dictates after the war had ended. Two years later, in *Boyce v. Tabb*, the Court ruled that federal courts in Louisiana could enforce contracts tied to slavery, but it never overruled *Wainwright*. With these decisions, the issue of slavery-related contracts was settled, with just one abolitionist decision surviving the onslaught.[55]

Still, abolitionist jurists offer a glimpse of the road not taken. They began the process of identifying and eradicating all the incidents, if not yet all the badges, that had constituted the laws of slavery. Because critics have dismissed the dissenting abolitionists' arguments as violating basic legal principles of contract doctrine, it has been difficult to appreciate their significance and, conversely, the harm caused by the majority rulings. The *Wainwright* decision in Louisiana, Caldwell's impassioned ruling in federal court, and the dissents written in a number of other states show that the practical outcome of a policy of nonenforcement would have been that money for bondspeople would not be exchanged. While one party to any contract was going to absorb the financial loss, the nullification of slave contracts would have ensured that the law no longer acknowledged property in persons, or the "claim of the master." This process might have laid a better foundation for the incorporation of freedpeople into civil society, but even if it did not, it would have removed one aspect of slavery from American law and commerce – itself a prerequisite for abolition.

Those who initially had high hopes for the amendment's power and promise recognized as much. The contract controversy, which began before the adoption of the Reconstruction Acts, and in a few instances, even before the Thirteenth Amendment took effect, illustrated to judges and Radicals alike that additional measures – including additional amendments and federal statutes – would be necessary to carry out their vision of Reconstruction and realize abolition. That work, which produced the Civil Rights Acts of 1866 and 1875, and the Fourteenth and Fifteenth Amendments, began in earnest even before the disagreement over contracts had been resolved.

[55] *White v. Hart* 80 U.S. 646 (1871); *Boyce v. Tabb* 85 U.S. 546 (1873). In *Boyce*, diversity of citizenship took the litigants to federal court.