

December 1994

Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910 - Freedom: Personal Liberty and Private Law

Aremona G. Bennett

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910 - Freedom: Personal Liberty and Private Law*, 70 Chi.-Kent L. Rev. 439 (1994).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss2/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

PHANTOM FREEDOM: OFFICIAL ACCEPTANCE OF
VIOLENCE TO PERSONAL SECURITY AND
SUBVERSION OF PROPRIETARY RIGHTS
AND AMBITIONS FOLLOWING
EMANCIPATION, 1865-1910*

AREMONA G. BENNETT**

INTRODUCTION

In the wake of the Civil War, local law enforcement measures, legislative enactments, and judicial decisions in the slaveholding states of the South frustrated the Emancipation Proclamation of 1863 and the Thirteenth Amendment adopted two years later. At the federal judicial level, a policy of nonintervention against randomized lawlessness and its consequences devitalized the Fourteenth Amendment until well into the next century. Indeed, for the last third of the nineteenth century and beyond, *de jure* freedom for those newly emancipated availed them little in many areas. This Article will examine two: their personal security and their nontestamentary right or reasonable expectation to own, acquire, or possess property of whatever kind without fear of loss.

Included in this examination are the eleven southern states, which formed the Confederacy, as well as Kentucky, which remained nominally loyal to the Union.¹ Equal in significance to military rebellion, however, is the consistency of behavior by *all* southern states in the force that they exerted over persons of color following the Civil

* This article is dedicated to the memory of my grandmother, Elizabeth G. Jones.

** Associate Professor of Law, Widener University School of Law; B.A., University of Pennsylvania; J.D., New York University School of Law; M.A., Fordham University. I would like to thank Paul Finkelman for his valuable comments and suggestions. My thanks also to Hope Farrell for her able research assistance. Research for this article was supported by a grant from the Widener University School of Law.

1. In the nineteenth century, status as a slaveholding state was a major factor in defining the South. Accordingly, this region comprised the fifteen states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. Rev. 77, 86 & n.57 (1985). Although Delaware, Kentucky, Maryland, and Missouri remained loyal to the Union, Kentucky courts were openly hostile to war measures imposed by the federal government and chafed bitterly under the privations that the war and its aftermath occasioned. See *infra* notes 61-69, 99-101 and accompanying text.

War.² Deplorable practices or events occurring in one state might just as easily exist elsewhere in the South. On multiple levels, these states formed a regional bloc that did not begin to release its hold on the activities of black lives until the late twentieth century.

While appreciable numbers of white Republicans faced the same cruelties inflicted on persons of color after the war, the determining factor in abuse against whites was virtually always political affiliation. Blacks could, and did, become targets of violence merely because of their color. In addition, four million freed slaves would force a restructuring of a region that staggered the minds of the mainly anti-republican white South. Countless former slaveowners, their families, and sympathizers did their mightiest to frustrate the changes brought by the war and the three constitutional amendments adopted between 1865 and 1868. This Article examines the official devices used and actions taken to delay the exercise of liberty by persons of African descent during the years 1865 to 1910.

Elemental in meaning, personal security reflects an unmaimed, unassaulted, intact human being. In a more universal vein its equivalent is *life*, first among the inalienable rights declared by this nation's founders to be divinely conferred. After the Civil War, at least one member of Congress advanced the concept of personal security as an "absolute right" along with "the right of . . . personal liberty, and the right to acquire and enjoy property."³

Blanket authority to chastise the millions confined in slavery presumably ended with its abolition. Only a change in the belief in racial supremacy by the advocates of slavery, however, could have tempered the habits of lifetimes. This change did not occur; and the physical punishment imposed as a right under the old authority underwent an adaptation in the form of organized abuse meted out by often protected vigilante groups.

Tied to the unpredictability of one's security were the obstacles to black social and economic progress that southern white society created at the war's end. For the years 1865 and 1866, Black Codes offi-

2. The author understands that the term "person of color" sometimes had particular, not generic, meaning in the mid-nineteenth century and beyond. For example, in certain southern states, notably but not exclusively Louisiana, persons of color referred only to persons of mixed ancestry with European or Caucasian strains as part of the mixture. Other states used it all-inclusively as long as bloodlines contained some fraction of African ancestry. Throughout this Article the term will be used interchangeably with person of African descent, black, and, where quoted, Negro.

3. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence).

cially curtailed aspirations by persons of color.⁴ Thereafter, often customary barriers weakened efforts to get, keep, or use tangible resources (land, crops, belongings, and trades) included in the concept of proprietary rights.⁵ Despite Reconstruction, the continued inequality of the races compromised advancement of southern blacks as a whole. The abolition of slavery notwithstanding, white southerners forced persons of color to submit to externally-imposed constraints for nearly a century. Conversely, black opposition to unwanted controls after the war often necessitated flight, if lives were spared at all.

Against these precarious conditions and eclipsing the largely transitory gains of Reconstruction was the refusal or equivocation of southern state legislatures and state and federal courts to actualize measures that would benefit persons of African descent in the South.

I. HISTORICAL REFERENCE: SLAVE AND FREE PERSONS OF COLOR IN THE ERA OF SLAVERY

A. *Justification for Slavery*

Constraints on persons of African descent in the United States began well before the country's formation. The preservation and perpetuation of slavery after 1787, however, required an explanation that could coexist with the ends for which the Revolutionary War had been fought. Slaveholding states found that explanation in the claim of racial inferiority of Africans and persons of African descent.⁶ It was foreseeable, then, that the ideology of inferiority devised to justify slavery would not permit a later renunciation of a collective self-image—the superior white race—perfected over preceding generations. And for the last decade of the eighteenth century, until the Civil War, survival demanded that “the most efficient coercive mechanism avail-

4. See *infra* notes 75-88 and accompanying text.

5. Writers have referred to such rights in the abstract, that is, not linked to an era or a culture. See, e.g., SIR JOHN SALMOND, *JURISPRUDENCE* 264 (1924) (“The aggregate of a man's proprietary rights constitutes his *estate*, his *assets*, or his *property* in one of the many senses of that most equivocal of legal terms.”). A more particular, although narrower, construction and one that is perceptible in the context of slavery parallels certain abolitionists' arguments in favor of “personal freedom” meaning the “right to testify in courts of law, the right to own, buy, and sell real estate, the right to sue and be sued.” AUGUST MEIER & ELLIOTT RUDWICK, *FROM PLANTATION TO GHETTO* 148 (rev. ed. 1970).

6. The original justification in African paganism proved irrational with the increase in slave conversions to Christianity and problematic with the freedom those conversions necessitated. Colonies in the late seventeenth century solved the dilemma by passing laws that denied freedom despite conversion. Subordinacy of the race evolved as the principle on which the South upheld slavery. See generally Wilbert E. Moore, *Slave Law and the Social Structure*, in *THE LAW OF AMERICAN SLAVERY* 325 (Kermit L. Hall ed., 1987).

able,"⁷ namely, slavery, overcome any doubts about the ideology's logic or morality. Judicial decisionmakers confirmed the authority of legislative enactments in cases like *Sterrett's Executor v. Kaster* in which the Alabama Supreme Court repeated a longstanding rule forbidding a slave to own property.⁸

Such decisions and the slave codes on which they were based did not conflict with the federal Constitution since that document recognized slavery.⁹ Nonetheless, some abolitionists condemned slavery for its denial of innate rights, if not constitutional precepts. The issue of citizenship, for example, although not at the forefront of contention between abolitionists and defenders of slavery, emerged at the fringe.

The conception of national citizenship and of certain privileges and immunities attaching to it, though vague, rudimentary, and ill defined, was yet basically present in abolitionist constitutional theory as early as 1834-1835. Appearing as a part of the undifferentiated mass of the total religious, ethical, natural rights argument, the expression 'American citizen'—sometimes 'citizens of the United States'—was roughly interchanged with 'human beings' or 'persons having inalienable rights' [One such abolitionist,] Elizur Wright . . . casually spoke of slaves as citizens.¹⁰

But recognition of natural rights for slaves in the 1830s was contrary to the institution and its rationalization. The adaptability of slaves to their lot would be the norm for many more years.

1. The Human Dynamic of Slave and Owner

It would have been impossible to oversee every encounter between slave and nonslave given the prevalence of persons of color, most of whom were enslaved, in the South.¹¹ For this reason customs and practices evolved to circumvent legal prohibitions, which resulted in the accumulation of assets that the slave often concealed. What fostered such habits were the sheer numbers of blacks and, in some

7. JAY R. MANDLE, *THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR* 15 (1978).

8. 37 Ala. 366, 370 (1861) ("A slave cannot be the owner of property: all his acquisitions, whether by gift, or by the earnings of his labor, belong to his master."); see also A. Leon Higgenbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511 (1989).

9. See *infra* note 29 and accompanying text.

10. JACOBUS TENBROEK, *EQUAL UNDER LAW* 95 (1965).

11. Looking at the census records for a fifty-year span covering 1865 to 1914, one writer found that "[i]n 1910 the blacks lived, by and large, in the same areas they had inhabited in 1860. . . . In 1910, 45 percent of all Southern blacks lived in counties where blacks were a majority of the total population; the corresponding figure had been 57 percent in 1880." ROBERT HIGGS, *COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865-1914*, at 28, 30 (1977).

cases, the benefits accruing to slaveowners who profited by allowing their slaves to transact business.¹² While advantages to slaveowners whose slaves generated income were the automatic result of a slave's incapacity to own property and its consequent vesting in the slaveowner, this outcome turned on the forthrightness of slave toward owner. And that most compelling of reasons for slaves to acquire money—buying their freedom or that of their families—inhibited their already strained relations with whites. Illustrative of that human dynamic is an 1845 narrative recounting the tale of Lunsford Lane, a North Carolina slave, who hired his time from his owner and paid her a portion of his earnings from the sale of pipes and tobacco.¹³ Over eight years he accumulated a thousand dollars surreptitiously.

During this time I had found it politic to go shabbily dressed and to appear to be very poor, but to pay my mistress for my services promptly. I kept my money hid, never venturing to put out a penny The thousand dollars was what I supposed my mistress would ask for me, and so I determined now what I would do.¹⁴

What he did was to ask his owner what price she would accept for him, then used a white man as intermediary in the purchase.

Hiring oneself out was a risk to both slave and owner in states that prohibited the practice. Slaveowners were not immune from punishment if they failed to exercise discretion in giving a certain independence to their slaves in jurisdictions that did not permit such privileges.¹⁵ Violation could result in the temporary confiscation of the slave as the owner's property as well as a fine.¹⁶ Grounds for imposing such penalties were neither uncommon nor unknown to authorities. In a footnote to his narrative, Lane commented:

It is contrary to the laws of the state [of North Carolina] for a slave to have command of his own time . . . but in Raleigh it is sometimes winked at. I knew one slave-man, who was *doing well for himself*, taken up by the public authorities and hired out for the public good, three times in succession for this offense. The time of hiring in such a case is one year. The master is subject to a fine. But generally . . . if the slave is *orderly* and appears to be *making nothing*, neither he nor the master is interfered with.¹⁷

12. See, e.g., WILLIAM HAYDEN, NARRATIVE OF WILLIAM HAYDEN: CONTAINING A FAITHFUL ACCOUNT OF HIS TRAVELS FOR A NUMBER OF YEARS, WHILST A SLAVE, IN THE SOUTH (1846).

13. THE NARRATIVE OF LUNSFORD LANE, BLACK MEN IN CHAINS 102 (Charles H. Nichols ed., 1972) [hereinafter LUNSFORD LANE].

14. *Id.* at 103.

15. See *State v. Woodman*, 10 N.C. (3 Hawks) 213 (1824) (upholding North Carolina's statute barring an owner from allowing a slave to act on his or her own.).

16. *Id.* at 213-14.

17. LUNSFORD LANE, *supra* note 13, at 102.

What emerged was an unequal collusion between slave and owner in the matter of the slave's working for gain; a collusion that owners—when they knew of it—assumed to be for their benefit, and that slaves calculated to be for theirs.

B. *Free Persons of Color During Slavery*

The South's conduct toward free persons of color provides a comparison for its later behavior after military defeat and the loss of human property. Although some free persons gained their freedom for service during the Revolutionary War, others acquired their freedom under state laws permitting private manumissions by owners.¹⁸ Frequently, such acts were testamentary. For example, in *Fisher's Negroes v. Dabbs*¹⁹ the Tennessee Supreme Court recognized emancipation by will or deed, but only as an "imperfect right until the state . . . assents to the contract between the master and the slave."²⁰ The law governing such private manumissions gave the court a discretionary role in approving or denying what the court characterized as a "contract,"²¹ prohibited free persons of color from other states from entering Tennessee, and required that manumitted slaves be immediately transported beyond the borders of the United States.²² Interpreting legislative intent in this 1834 opinion, the court implicitly admitted that fear was the foundation of the deportation provision. "Degraded by their color and condition in life, the free negroes are a very dangerous and most objectionable population where slaves are numerous."²³

In contrast to the *Dabbs* opinion, even when Tennessee prohibited manumission, unless the slave left the state, its supreme court asserted that the "slave[']s humanity conferred certain legal rights to freedom."²⁴ For example, one analysis of *Ford v. Ford*²⁵ described the reasoning of Justice Nathan Green as "a singularly libertarian view of

18. See MEIER & RUDWICK, *supra* note 5, at 50.

19. 14 Tenn. (6 Yer.) 119, 126 (1834).

20. *Id.*

21. The idea of a contractual relationship between owner and slave, which could be legally binding, was inherently contrary to the laws governing slavery. *Id.* at 127.

22. *Id.* at 128-29.

23. *Id.* at 126.

24. Arthur F. Howington, "Not in the Condition of a Horse or an Ox:" *Ford v. Ford*, the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity, in THE LAW OF AMERICAN SLAVERY 310, 322 (Kermit L. Hall ed., 1987); see also Jacob I. Corré, *Thinking Property at Memphis: An Application of Watson*, 68 CHI.-KENT L. REV. 1373 (1993).

25. 26 Tenn. (7 Hum.) 91 (1846) (concerning a devise to certain slaves of freedom and land under their owner's will).

slavery which emphatically underscored the humanity of the slave."²⁶ The Tennessee high court's more lenient application of the law than the statutory language might warrant did not, however, resolve the issue of equality in a slave's favor. "This tension between the demands of the law and the demands of social control produced the erratic quality of Tennessee manumission legislation."²⁷ Insinuated throughout legislative enactment and judicial opinion was the need to "save the community from the evils of a free negro population."²⁸

The federal Constitution preserved the importation of slaves until 1808 and otherwise protected the institution directly and indirectly.²⁹ Judicial decisions in some southern states after 1808 reflect the region's absolute independence in its administration of laws regulating slavery. An 1838 Alabama decision, for example, invalidated a testamentary provision freeing the decedent's slaves on the ground that a "legacy" of freedom was incompatible with a slave's lack of "capacity to take property, either by purchase or descent."³⁰ Alabama had a statute permitting manumission, but it gave the court unconditional discretion to grant or deny an owner's request.³¹ A margin for abuse inhered in the process since the judge ultimately decided whether meritorious service was sufficient to warrant approval.

Likewise, southern legislatures devised aggressive means for promoting the institution by such means as sentencing. Criminal acts could lead to sale into slavery. In a challenge to that penalty under the laws of Virginia, the state's supreme court rejected the argument

26. Howington, *supra* note 24, at 319. The Tennessee manumission law was only in force from 1842 until 1849. *Id.* at 321.

27. *Id.* at 322.

28. *Boon v. Lancaster*, 33 Tenn. (1 Sneed) 583, 583 (1854).

29. The United States Constitution provided, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ." U.S. CONST. art. I § 9. Besides Article I, Section 9, Clause 1, which "prohibited Congress from banning the African slave trade before 1808, but did not require Congress to end the trade after that date," other provisions "explicitly sanctioning" the institution included: the three-fifths clause by which slaves would have proportional representation, U.S. CONST. art. I, § 2, *amended* by U.S. CONST. amend. XIV; and the fugitive slave clause "requir[ing] that runaways be returned to their owners 'on demand.'" U.S. CONST. art. IV, § 2, cl. 3. See Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 190-92 (Richard Beeman et al. eds., 1987); cf. DONALD E. LIVELY, *THE CONSTITUTION AND RACE* 4 (1992) ("The original ordering of constitutional priorities resulted in a charter that neither directly endorsed nor prohibited but nonetheless accommodated slavery.").

30. *Trotter v. Blocker*, 6 Port. 269, 290 (Ala. 1838).

31. As a prerequisite to the court's determination, the law provided that the "owners shall make publication in some newspaper . . . where such slave or slaves reside . . . for at least sixty days previous to the making application" to the county court. *Id.* at 293.

that it violated the state's constitution.³² The court construed constitutional language as excluding all persons of African descent.

Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it The numerous restrictions imposed on [free blacks and mulattoes] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population.³³

Nor was conviction of a criminal offense the only prerequisite to the threat of enslavement. The United States Supreme Court agreed with the courts of Kentucky and Mississippi that persons of color in slaveholding states were presumed to be slaves.³⁴ As framed before the high court in *Hall v. United States*,³⁵ the issue arose from a petition to the court of claims in which Hall, "a man of color," sought the proceeds from the sale of cotton seized in 1863 by the federal army and "converted into money."³⁶ Hall claimed to have been born free despite disputed findings that he had lived as a slave. Against the opposing claims of Roach, his alleged owner who also sought the proceeds, Hall testified that in satisfaction of Roach's debt to Hall for the latter's raising of livestock on Roach's plantation, he received the cotton. The court accepted the finding that Hall had no title to the cotton and concluded that, as a slave, he could not have contracted with his master to receive it. Support for that conclusion lay in the absence of any evidence that Hall had sought freedom under the laws of Mississippi. Thus, "[h]is color was presumptive proof of bondage."³⁷ Although the case was submitted and decided in 1876, the Supreme Court would not make the Civil War amendments retroactive. Instead the Court reasoned, "This case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were

32. *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447 (1824).

33. *Id.* at 449.

34. *See Davis v. Curry*, 5 Ky. (2 Bibb) 238, 240 (1810) ("Color being one of the criteria by which the African race is distinguished from the rest of the population of the country, must consequently afford . . . a presumption of slavery upon which the master may rely until the contrary is proven."); *see also Hall v. United States*, 2 U.S. 27 (1875).

35. *Hall*, 2 U.S. 27.

36. *Id.* at 28.

37. *Id.* at 30.

still in force there."³⁸ Although it is conceivable that some persons of color made bogus claims of free status, going so far as to pursue them in court, personal accounts testify to the desperate circumstances awaiting a free person abducted and enslaved.³⁹ Some states placed such grave burdens on free persons wanting to remain free that the state offered a foolproof exit from the labyrinth: voluntary enslavement.⁴⁰

The ease with which persons of color could transgress a multitude of laws made them ever susceptible to dangers that fell short of enslavement. Legal changes denying access to skilled trades portended a future marked by the abuses of contract labor and debt peonage.⁴¹ And as in other instances, recourse to the courts revealed the lengths to which judges would accommodate the dominant group, laws on behalf of blacks notwithstanding. In an 1855 case, a free person of color was prosecuted before the mayor of Richmond for violating an ordinance prohibiting persons of color from operating cook-shops.⁴² The petitioner argued that his license under a state statute authorizing him to conduct such a business was superior to the city ordinance. Even strict attention to the belief systems of mid-nineteenth century Virginia cannot make the court's reasoning appear other than pretextual. The court went farther than a mere decision "that the ordinance was not in conflict with the act of assembly."⁴³ It manufactured a compatibility consistent with the treatment accorded free blacks. Approving the hierarchy that regulated relations between the races forced a suspension of logic.

It was not the object, nor the effect of the act, to give to every person who paid the tax and obtained a license to keep a cook-shop, the right to do so If the ordinance would have been lawful, had there been no such act, it is lawful notwithstanding the act; for there is nothing in the act to render it unlawful.⁴⁴

This explanation depicts a wily legislature and a complicit court: create a revenue-producing measure—taxed licenses, allow all free persons to become licensees, then prosecute free persons of color

38. *Id.* at 30-31.

39. See generally MICHAEL KNIGHT, IN CHAINS TO LOUISIANA: SOLOMON NORTHUP'S STORY (1971). First published in 1853, this account describes twelve years of enslavement culminating in unsuccessful charges against the narrator's kidnappers before the courts in his home state of New York. *Id.*

40. See THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 41 (1965) (describing the law of Virginia before slavery's abolition).

41. See generally MEIER & RUDWICK, *supra* note 5, at 98-100.

42. *Mayo v. James*, 53 Va. (12 Gratt.) 17 (1855).

43. *Id.* at 20.

44. *Id.*

pursuant to an ordinance which prohibits them from using their licenses.

Well-defined markers between free and slave dimmed with successive legislative actions and judicial interpretations. As reminders of what their racial counterparts did not have—freedom—free persons of African descent became an irritant from which most southern states sought relief by legal and ideological means. Those states pushed to the limit a racial classification that could place white persons at the greatest remove from the others and, in the process, ignore the very existence of common qualities. Instead, white persons would be consoled by the creed that “[f]ree negroes belong to a degraded caste of society; they are in no respect on an equality with a white man. According to their condition they ought by law to be compelled to demean themselves as inferiors”⁴⁵ The law complied and, supported by social conventions, was “ready to serve as precedent[] for the regulation and control of the vastly expanded free Negro class after emancipation.”⁴⁶

II. DEFIANCE: THE EMANCIPATION PROCLAMATION

A. *Military Necessity and Judicial Rejection*

Freedom for slaves, embodied by what many regard as the definitive turning point between slavery and freedom, began as “a *means* to victory [for the federal army], not yet an end in itself.”⁴⁷ The Emancipation Proclamation’s significance is a thread in the sometimes tangled debate over slavery’s role in the Civil War. If abolishing slavery was not the actual provocation for the war, then it became inextricable from it; an adjunct to it; and its leverage grew steadily with Confederate intransigence.

By July of 1862, President Lincoln, although greatly aggravated by the secessionists, had not yet resolved to deprive the rebel South entirely of its assets. But his willingness to allow some remnant of past privilege was quickly fading. To the argument of Union General George B. McClellan and others that slavery should not be forcibly abolished, he replied, “This government cannot much longer play a game in which it stakes all, and its enemies stake nothing. Those enemies must understand that they cannot experiment for ten years trying to destroy the government, and if they fail still come back into the

45. WILSON, *supra* note 40, at 27.

46. *Id.* at 41.

47. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 502 (1988).

Union unhurt.”⁴⁸ When the majority of border state congressmen refused his request to support a “plan for compensated emancipation,” their response pushed the President “toward . . . [a] radical position,” culminating in the initial Emancipation Proclamation two months later.⁴⁹

While those who have studied the era recognize that “[n]orthern objectives originally consisted of saving the union but by war’s end had broadened to include the elimination of slavery,”⁵⁰ others emphasized slavery’s role as the “direct cause” of the war.⁵¹ Whatever the vantage, slavery and secession were symbiotic when viewed through a white southern lens: “[W]ithout slavery there would have been no Black Republicans to threaten the South’s way of life, no special southern civilization to defend against Yankee invasion.”⁵²

In September of 1862, President Lincoln issued a “preliminary” proclamation stating that slaves in rebel states would be free as of January 1, 1863.⁵³ It was an ineffectual warning that subsequently demanded vigorous implementation. Speaking of the war’s progression, a noted sociologist theorized that “[t]he cause of liberating the Negroes . . . became . . . a much-needed strengthening moral justification to the North.”⁵⁴ The preliminary proclamation’s aim to make the rebellious South lay down its arms rather than risk wholesale emancipation did not mean that capitulation would restore its slaves. Expressly excepted, slaves and property to which legitimate claims could be made by third persons no longer figured in the victor-vanquished equation.⁵⁵ It was predictable on that point alone that the states in rebellion would find the executive offer worthless because it would not adequately benefit them.

Even after the Civil War state courts routinely declared the Proclamation to be of no effect. Acknowledging it would have meant, among other things, that slaves could not be distributed as part of an

48. *Id.* at 502-03.

49. *Id.* at 503-04.

50. LIVELY, *supra* note 29, at 39.

51. RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO* 16 (1969).

52. MCPHERSON, *supra* note 47, at 311.

53. Act of Sept. 22, 1862, 12 Stat. 1267 (1862); *see also* MEIER & RUDWICK, *supra* note 5, at 142.

54. 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 431 (1972).

55. *See generally* JONATHAN T. DORRIS, *PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON* 34 (1953).

estate. The South Carolina Court of Errors in *Pickett v. Wilkins*⁵⁶ asserted:

[Emancipation] was, in fact, accomplished by the conquest of the country. Until that took place, slavery continued after the proclamation, just as it had existed before, and it ceased to exist in the different parts of the State as they fell into the hands of the conqueror. The proclamation was, in effect, simply an advertisement of what would be a certain consequence of conquest.⁵⁷

Mississippi resorted to a more universal code of conduct between conqueror and conquered to support its position.⁵⁸

It is a doctrine unknown to the laws of nations, that one belligerent can, by a mere proclamation or military order, change the civil *status* of the persons residing in the interior of an enemy's country, or their rights of property, over which the belligerent has no present power to enforce *any* order.⁵⁹

By this reasoning the court held enforceable a contract involving payment for slaves hired out.

B. Nullification of Congressional Support

A corollary to the Emancipation Proclamation was the Act of Congress freeing the wives and children of slaves who volunteered as soldiers in the federal army.⁶⁰ If rebellious states found ample justification for ignoring a presidential proclamation, they would hardly dignify a congressional directive with greater compliance. Their nominally loyal neighbors, exempt from the Proclamation and congressional provisions, commended their opposition. In an elaborate opinion, written several months after the Civil War, Kentucky's highest court served as apologist for southern disobedience by fashioning an argument based on the federal Constitution.⁶¹ The plaintiff in *Corbin* had sued to recover his slave, a woman who had left his premises and had been hired by the defendant who believed that the Act of

56. 42 S.C.L. (13 Rich.) 366 (1867).

57. *Id.* at 368. The case arose from a claim by distributees, to whom only slaves were given in an 1864 partition of the disputed estate. Plaintiffs requested either contributions from the other heirs or a new partition "exclusive of the negroes . . . [who] were not property when the partition took place." *Id.* at 367. In the decree dismissing plaintiffs' claim, an act upheld on appeal, the court interpreted the Emancipation Proclamation as having no effect on the "fact" of slaves who continued to be treated as such "long after the 1st of January, 1863." *Id.* at 371.

58. *Vicksburg & Meridian R.R. v. Green*, 42 Miss. 436 (1869).

59. *Id.* at 438. Lending weight to the court's argument was its finding that the President had never "asserted or assumed" the power under the Constitution to abolish slavery and that his exceptions to the application of the Proclamation "show[ed] that it was purely a military order." *Id.*

60. Act of July 17, 1862, ch. 201, §§ 12-13, 12 Stat. 597, 599 (1862).

61. *Corbin v. Marsh*, 63 Ky. (2 Duv.) 193 (1865).

Congress duly authorized the freeing of all female slaves whose husbands volunteered for service in the federal army.⁶² In reviewing the trial court's decision for the plaintiff, the court considered two questions: whether "Congress [had] power to emancipate [the soldier slave's] wife and children," and, "if [such] power existed, [whether it was] exercised so as constitutionally to divest the owner of that wife of his legal title to her."⁶³ Deciding against congressional authority on both counts, the majority upheld the lower court. The court's unassailable point of departure was that the Constitution of the United States "is as supreme in war as in peace."⁶⁴ It rejected Congress' action, initially denouncing the failure to provide for compensation.

It would be inexplicably strange and inconsistent to admit, as all do, that Congress cannot, in time of peace, take private property for public use without just compensation, and, nevertheless, to claim, as some seem to do, the power to take it without any compensation in time of war, when all such property is in most danger of spoliation, and in most need of the protection of this boasted *palladium*.⁶⁵

As the dissent in *Corbin* remarked, a supplemental Act did provide for compensation to loyal masters of up to three hundred dollars for slaves who volunteered to serve in the military.⁶⁶ The dissent also justified the distinction between compensation for soldier slaves but not their immediate families on the ground of financial expediency. Considering the disputed Act's possible relevance to Kentucky, it urged temporary sacrifice to the greater cause of supporting the government.⁶⁷

62. *Id.* at 196.

63. *Id.* at 196-97. The court did not address the apparent inapplicability of the Act to Kentucky as a state that was not in rebellion. Section 13 of the Act stated:

That when any man or boy of African descent, who by the laws of any State shall owe service or labor to any person who, during the present rebellion, has levied war or has borne arms against the United States, or adhered to their enemies by giving them aid and comfort, shall render any such service as is provided for in this act, he, his mother and his wife and children, shall forever thereafter be free, any law, usage, or custom whatsoever to the contrary notwithstanding: *Provided*, That the mother, wife and children of such man or boy of African descent shall not be made free by the operation of this act except where such mother, wife or children owe service or labor to some person who, during the present rebellion, has borne arms against the United States or adhered to their enemies by giving them aid and comfort.

§ 13, 12 Stat. at 599.

64. *Corbin*, 63 Ky. (2 Duv.) at 194.

65. *Id.* at 196.

66. *Id.* at 204-05 (Williams, J., dissenting).

67. *Id.* at 228-29. As the dissent observed,

The slave soldiers from Kentucky, even at the price of \$300 each, will amount to over seven millions of dollars, the payment and fund being already provided for by law. The other slaves set free by the last enactment may be safely set down at 75,000, and, at the price of \$300 each, would amount to over twenty-two millions of dollars. Now, if these slaves have been emancipated by the direct, immediate, legal action of the government,

Of some moment in the majority's reasoning was the difference between governmental acts directed at rebelling states, and the gratitude expected by faithful states like Kentucky. It is exposed as a false dichotomy as soon as the court makes a plea for federal restraint toward its errant neighbors.

Insurgent citizens of Tennessee were still, *de jure*, citizens of the United States—they were not *national* belligerents—they were not absolved from their original obligations to the Federal Constitution as their supreme law, nor deprived of their title to its protection; and the suppression of the insurrection neither needed nor authorized the abolition of *all* the slaves in their State by the Federal government.⁶⁸

This implicit charge of greed by the government recurs in the context of emancipating soldier slaves when securing their use for the rebellion's duration would suffice.⁶⁹ Rather than an objection to undercompensation, the court's disapproval in reality lay with the *freedom* that accompanied a soldier slave's service. The South was more likely to physically lose slaves to Union lines as soldiers than to lose women encumbered with children. Female slaves could expect little to no support from most white persons, and ultimately had nowhere to go.

Prudent but unheeded in its plea for compliance, the dissent regarded patience as the more beneficial course.

Should all these acts of Congress be pronounced unconstitutional, then these slaves have not been made free by law, but are still slaves, and will so remain until, by the adoption of the constitutional amendment, now pending, they shall be declared free; and being so declared by constitutional amendment, no compensation will ever be granted by Congress.⁷⁰

Eventual "public justice" was too weak an incentive for the majority. It considered enticement into service by declaring a slave's wife or child free an unpalatable means to an intolerable end—permanent deprivation of property.

the loyal slaveholder has the great claim of justice on his Government, that whilst he suffers in common with all others, contributes of his earnings and substance equally with all others, that it would be unjust, and contrary to the great policy of public justice declared by the Constitution, that his slave property should also be taken for the public benefit and compensation therefor withheld. If these slaves of Kentucky, so freed, should perchance belong to loyal owners, their claims would amount to near thirty millions of dollars, and will be the only savings possible out of the great wreck of his property incident to the rebellion.

Id.

68. *Id.* at 197.

69. *Id.* at 198.

70. *Id.* at 229 (Williams, J., dissenting).

III. CONSTITUTIONAL MANDATE: THE THIRTEENTH AND FOURTEENTH AMENDMENTS

A. *Abolition of Slavery by Constitutional Amendment*

On December 6, 1865 the states ratified the Thirteenth Amendment, which provided that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁷¹

Although it clearly abolished slavery, and as a constitutional edict was mandatory, it left unanswered: what status were the newly freed then to assume? Did it in fact “establish[] civil rights as an incident of freedom”?⁷² Antagonism to it was swift, fueled in part by the President. As one scholar has written, “[President Johnson] maintained that the amendment only abolished the institution of slavery and did not alter the preexisting relationship between nation and states.”⁷³

This implication of intact sectional autonomy, with its predictable reluctance to change old ways, was at odds with a society of self-determining, if not classless, individuals—the former slaves. As has been observed:

[T]he case of those who resisted the passage of the Thirteenth Amendment was built almost entirely on opposition to the expansion and consolidation of the national power. With slavery already dead, that expansion and consolidation would be neither great nor of continuing importance if the amendment effected only a ‘simple exemption from personal servitude.’⁷⁴

1. Legislative Opposition in the South

Most repugnant of all responses to the amendment was the enactment of Black Codes by southern states in 1865 and 1866.⁷⁵ These stratagems were conceived at the behest of constitutional conventions—themselves perfunctory affairs designed to make the minimum revisions acceptable to the federal government⁷⁶—and preceded Re-

71. U.S. CONST. amend. XIII, § 1.

72. LIVELY, *supra* note 29, at 41.

73. *Id.* at 44.

74. TENBROEK, *supra* note 10, at 162.

75. On the evolution, implementation, and demise generally of these laws see WILSON, *supra* note 40.

76. Southern states’ maneuvers attest to this:

On the question of slavery several of the conventions sought to save face. Some persons in Mississippi did not wish to convey the idea that they were giving up slavery voluntarily . . . [although Mississippi] finally passed a resolution abolishing the institution. South Carolina chose to forbid the reestablishment of slavery after asserting that

construction. They subjected persons of African descent to many of the indicia of slavery in order to exploit their labor, divide families, extract their assets, and restrict their chances for acquiring assets.

In Mississippi, for example, probate courts had authority to apprentice children "to some competent and suitable person" on a finding of nonsupport by their parents.⁷⁷ Several provisions made clear the law's design in creating a facsimile of slavery to the extent possible. In the matter of designating a suitable person, "the former owner of said minors shall have the preference."⁷⁸ And although temporary in duration, the "apprentice shall be bound by indenture, in case of males until they are twenty-one years old, and in case of females until they are eighteen years old."⁷⁹ Flight from this arrangement authorized

[the] master or mistress . . . [to] pursue and recapture said apprentice, and bring him or her before any justice of the peace of the county . . . [I]n the event of a refusal on the part of said apprentice so to return, then said justice shall commit said apprentice to the jail of said county on failure to give bond, until the next term of the county court.⁸⁰

South Carolina forbade a person of color to work in a skilled trade unless the man or woman had been apprenticed in it or was already in it. Black merchants were required to pay hefty sums as license fees and in all instances of trade or commerce a court had to approve the person's "good moral character" as a prerequisite to continuing in business.⁸¹

slaves had been 'emancipated by action of the United States authorities.' Georgia inserted a clause in its new constitution acknowledging the abolition of slavery but added a proviso that the people of the state did not give up their right to ask compensation for slaves emancipated.

JOHN H. FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 41 (1961).

77. Act of Nov. 22, 1865, ch. 5, § 1, 1865 Miss. Laws 86, 87.

78. *Id.*

79. *Id.* § 2 at 87.

80. *Id.* § 4 at 87-88.

81. Act of Dec. 21, 1865, No. 4733, 1865 S.C. Acts 291. Section LXXII of the Act read, in pertinent part:

No person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shop keeper; or any other trade, employment or business (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person, until he shall have obtained a license therefor from the Judge of the District Court; which license shall be good for one year only. This license the Judge may grant upon petition of the applicant, and upon being satisfied of his skill and fitness, and of his good moral character, and upon payment, by the applicant, to the Clerk of the District Court of one hundred dollars, if a shop-keeper or peddler, to be paid annually, and ten dollars if a mechanic, artisan, or to engage in any other trade also to be paid annually

Id. § LXXII at 299.

The restrictions on persons of color from working at occupations outside of farming, in this crucial juncture between slavery's end and the point at which self-reliance would be made possible by Reconstruction measures, caused significant consequences. Trades had flourished during slavery. Large plantations had "substantial numbers of skilled slave artisans"⁸² whose value for hire corresponded to their expertise. "This select group of slave craftsmen included engineers, coopers, carpenters, blacksmiths, brickmakers, stone masons, mechanics, shoemakers, weavers, millers, and landscapers."⁸³ Household servants in well-ordered residences likewise demonstrated specialization of the highest quality.⁸⁴ For several decades to more than a century slave artisans dominated certain trades. "[I]n the eighteenth century, and perhaps down to 1830, the slave's dominance in the mechanical arts in the Old South was not challenged."⁸⁵

Well before the Civil War some southern cities had taken measures to end the competition from black skilled workers; Charleston, South Carolina and Savannah, Georgia are examples.⁸⁶ "[A]n 1831 Savannah ordinance . . . said blacks could not be apprenticed to the 'trade of Carpenter, Mason, Bricklayer, Barber, or any other Mechanical Art or Mystery.'"⁸⁷ Post-bellum restrictions like those in South Carolina's Black Code and their subsequent statutory transformations effectively removed many opportunities for blacks to learn trades and professions.

Also inhibited by the Codes were commercial dealings involving persons of color. North Carolina's 1866 Code, for example, required blacks to have a white person as a witness when they contracted "for the sale of certain animals or for any article of the value of ten dollars or more."⁸⁸

82. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 41 (1972).

83. *Id.* at 59.

84. *Id.*

85. LESLIE H. OWENS, *THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH* 177 (1976). This same author, citing an 1837 review, quoted, "[S]ome of the best tailors and mantuamakers in the southern states are slaves. In the cities, all of the hair-dressers and barbers, many of the butchers, and sundry of the tavern-keepers, are slaves or free negroes." *Id.* at 179; see also HERBERT G. GUTMAN, *SLAVERY AND THE NUMBERS GAME* 54 (1975) (Extrapolating from 1848 census figures for Charleston, South Carolina, the author concluded that "the absolute number of slave artisans would have increased by about 40 percent between 1848 and 1860 and that two out of five slaves . . . would have been artisans," despite a reduction of 25 percent in the adult male slave population "between 1850 and 1860.").

86. GUTMAN, *supra* note 85, at 52.

87. *Id.*

88. WILSON, *supra* note 40, at 106.

The federal legislative and executive branches disagreed on the iniquity of the Codes. James Henry Lane, Republican Senator from Kansas stated: "This, then, is slavery, less the protection which the master formerly afforded his chattel. The slave now has a mob for his master."⁸⁹ However, according to one historian, "President Johnson had acquiesced in the Black Codes without a murmur. On December 18, 1865 . . . he made an oblique reference to them as 'measures . . . to confer upon freedmen the privileges which are essential to their comfort, protection, and security.'"⁹⁰

Although military orders invalidated some Black Codes, the climate of white dominion lingered. At least one state, Alabama, did not need a Black Code: it had delayed repealing its prewar slave code until 1867.⁹¹

Ironically, the North's military command may have encouraged the enactment of the Codes. Andrew Johnson's transition to president suspended the finalizing of amnesty provisions that his predecessor had begun. While Johnson's sentiments on this issue were regarded as more harsh than Lincoln's, General Sherman, at this ambiguous juncture, had made representations to Confederate General Joseph Johnston assuring a return to the status quo. They agreed that, once all Confederate armies were decommissioned, the rebellious states would resume their governance and, most importantly, "civil, political, personal, and property rights [would] be guaranteed to the inhabitants of the states lately in rebellion."⁹² Since Lincoln's Emancipation Proclamation had specifically excluded slaves as returnable property to surrendering states, theirs would be a limbo status. Johnson never agreed to the Sherman-Johnston accord and the specter of southern rebels exempt from all reprisals, save one, disappeared. Whatever inclination toward leniency the North manifested, however, emboldened the South if only temporarily. This was a propitious interlude that favored southern white designs. For nearly two years the South could use Black Codes to trivialize and avenge the North's triumph. Ultimately, Johnson's policies and the South's self-interest as states readmitted to the Union would demand a compliance that was more reflective of national cooperation. As later events would demonstrate, however, southern white compromise was not to be confused with meekness. Likewise, the consensus among those officials

89. CONG. GLOBE, *supra* note 3, at 589.

90. KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877*, at 81 (1965).

91. See WILSON, *supra* note 40, at 114.

92. DORRIS, *supra* note 55, at 98.

who passed Black Codes throughout the region and the indispensable support for vigilante organizations during Reconstruction belie claims of general ignorance of the violence existing during the Code years and immediately thereafter.⁹³

2. The Frailty of Enforcement Legislation

Section 2 of the Thirteenth Amendment provided, "Congress shall have power to enforce this article by appropriate legislation."⁹⁴ In response to the animosity the Black Codes typified, Congress, over presidential veto, passed the Civil Rights Act of 1866.⁹⁵ The first section stated in part:

That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁹⁶

Although it did not offer an exhaustive definition of civil rights beyond the limited enumeration quoted above, by targeting state laws and officials, it was destined to face southern condemnation.

Allowing persons of color to not only conduct themselves in ways designed to preserve their safety, but also to increase their wealth made freedom of economic gain a significant focus.⁹⁷ Consistent with this idea is the view that civil "rights traditionally had been defined by the state . . . and had been perceived largely in economic terms. Incipient federal interest in securing them . . . evinced no consensus for altering their linkage to material considerations."⁹⁸ This is not to minimize the Act's attention to judicial access and personal security. At the same time, however, granting to blacks contractual rights equal to

93. See WILSON, *supra* note 40, at 85 ("That some Negroes were abused or murdered everyone in the South knew, but it is likely that many southerners had no knowledge of the extent of such atrocities.").

94. U.S. CONST. amend. XIII, § 2.

95. Civil Rights Act of 1866, ch. 31, 14 Stat 27 (1866).

96. *Id.*

97. Contractual freedom was not, of course, superior to limitations on rights to acquire licenses. Even if a state did not *expressly* prohibit persons of color from obtaining trade or professional licenses, it accomplished this effect indirectly by placing in their paths impediments to the educational requirements on which some trades were conditioned.

98. LIVELY, *supra* note 29, at 45.

those of whites could potentially reverse decades of restrictions and impediments in an area that slavery had, as a matter of law, foreclosed altogether.

Although circumscribed in application and left to states to administer, the Act was an intrusion nevertheless. In 1867 the Kentucky Court of Appeals declared it unconstitutional.⁹⁹ In particular, the court challenged the superiority of the Act in allowing persons of color to give evidence against white persons.

Each State, so far as not prohibited by her own Constitution or that of the United States, has the unquestionable right to regulate her own domestic concerns, and prescribe remedies, *including rules of evidence*, in cases in our own courts; and we presume that congress would never assume authority to regulate the testimony of free white citizens in State courts. The 'civil rights bill' has attempted no such presumptuous absurdity.¹⁰⁰

Quoting both sections of the Thirteenth Amendment, the court went on to say, "The utmost legal effort of the emancipating section was to declare the colored *as free as the white race* in the United States. It certainly gave the colored race nothing more than freedom. It did not elevate them to social or political equality with the white race."¹⁰¹ Congress' drafting of the Civil Rights Act resembled a tottering edifice waiting for a high wind. The needs of a nation less than a century old and recovering from an internal war required clarity, if not boldness. But the Act's deficiencies were derivative of the Thirteenth Amendment itself, a conclusion made irrefutable by the later passage and application of the Fourteenth and Fifteenth Amendments.¹⁰² Whether through a combination of naivete and optimism¹⁰³ or ambi-

99. *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5, 10 (1867).

100. *Id.* at 7.

101. *Id.* at 8.

102. Contrasting the three amendments led to this assessment by two constitutional historians:

The Thirteenth Amendment, in imperial manner, forbade every American individual as well as every American government from holding persons in bondage; the Fourteenth restrained only states, a growing consensus insisted. The Fifteenth added strength to that consensus. While the Fifteenth inhibited both national and state actions, it did not constrain individuals' behavior—if the Thirteenth was assumed to have been superseded or was otherwise ignored.

And that is what happened. Between 1870 and the mid-1880s, administrators, judges, lawyers, and legislators all but lost sight of the Thirteenth Amendment as the standard by which to measure the nation's duty to every individual as against every other person or unit of government, concerning defenses of national rights.

HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 464 (1982).

103. *See id.* at 391 (describing the view of a Louisiana Republican in 1865, the authors wrote, "many good lawyers' among Republicans thought the enforcement clause [of the Thirteenth Amendment] superfluous").

guity brought about by the context of the time, a context which "[did] not suggest a tightly limited meaning for the Thirteenth Amendment,"¹⁰⁴ imprecision inhered in it.

[T]he Congressmen of 1865, creating the Thirteenth Amendment, failed fully to specify their immediate intentions. But positive enforcement was part of the Thirteenth Amendment's context. Enforcement of what? Of protection . . . from involuntary servitude and violence, and of all the full and equal rights of freedom, some of which history had identified and a multitude of which remained for the inscrutable future to reveal.¹⁰⁵

Southern states had shown a resistance to every measure that would have enhanced the condition of former slaves; the Act's shortcomings invited a court like that in *Bowlin* to distort the intended goal into something unrecognizable. Prior to the bill's passage, certain members of Congress made the same criticism as the *Bowlin* court: the bill exceeded Congressional authority under the Thirteenth Amendment.¹⁰⁶ Even the abolitionist and Republican Representative, John Bingham, who drafted the first section of the Fourteenth Amendment, opposed the Act for, among other reasons, its inapplicability to non-citizens, a defect which he believed directly violated constitutional principles.

This bill . . . departs from [the Constitution of the United States]. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience . . . Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says 'no person,' not 'no citizen,' 'shall be deprived of life, liberty, or property,' without due process of law.

If the bill of rights . . . does not limit the powers of States and prohibit such gross injustice by States, it does limit the power of Congress and prohibit any such legislation by Congress.¹⁰⁷

Of greater significance, the President's veto message presaged the criticisms raised in *Bowlin* while calling attention to the possibility of enfranchisement for persons of color, a topic unaddressed by the Act.¹⁰⁸ As an ineffectual attempt at advancing the authority of the Thirteenth Amendment, the Act could not withstand the almost matter-of-fact states rights argument put forth by *Bowlin*. That decision declaimed ultimately against the evils that observance of the Act

104. *Id.* at 389.

105. *Id.* at 390.

106. *See, e.g.,* CONG. GLOBE, *supra* note 3, at 1156-57 (statement of Rep. Thornton).

107. *Id.* at 1292.

108. *Id.* at 1679-81.

would surely promote and, in recalling the President's veto message, unmasked a regional fear of extinction of a civilization.

Such a monstrous construction of the second clause [of the Thirteenth Amendment] would yield to the arbitrary will of Congress absolute control over the interests and destiny of the black race, and the like control over the white race, so far as its rights might, *in the opinion of Congress*, conflict with the *interest* of the blacks. And on this theory Congress might take from white citizens their property and give it to black citizens; and might, as assumed in the 'civil rights bill,' legislate over *all* contracts in the States to which black citizens are, in any way, parties. And the unqualified 'same power to make and enforce contracts' attempted to be given by that bill to black citizens would legalize intermarriages between the two races deteriorating to the Caucasian blood, and destructive of the social and legislative decorum of States.¹⁰⁹

B. *A Constitutional Declaration of Rights*

Part of the language of the Civil Rights Act reappeared in the Thirteenth Amendment's final by-product, the Fourteenth Amendment, which was ratified in 1868. "By-product" because neither the earlier amendment nor its enforcing legislation, the Civil Rights Act, had successfully impressed on the South that persons of color were more than merely free. Section 1 provided:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹¹⁰

Despite the apparent resolution of the citizenship issue, state courts found room to maneuver around the amendment's direct prescription.¹¹¹ This was an unsurprising result in view of the amendment's hard-won ratification process, made so by southern obstinacy and northern indecision.

Before the end of 1866 Texas, South Carolina, Georgia, Florida, North Carolina, Arkansas, and Alabama had rejected the Fourteenth Amendment. In the first months of 1867 Virginia, Louisiana, and Mississippi turned it down

. . . . Aside from Connecticut and New Hampshire . . . most of the other Northern states either dragged their feet or gave no imme-

109. *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5, 9 (1867).

110. U.S. CONST. amend. XIV, § 1.

111. See, e.g., *McDonel v. State*, 90 Ind. 320, 323 (1883) (holding that one may be a citizen of a state and yet not a citizen of the United States).

ciate consideration to the Amendment Gradually, in the winter and spring of 1867 the Northern states ratified the Fourteenth Amendment, but not before they had set a bad example for the Southern states.¹¹²

Privileges or immunities, due process, and equal protection were phrases that sounded as much like a moral imperative as a legal mandate. On both levels they furnished courts with decades of opportunity for interpretation. This second Reconstruction amendment amplified a national message of rights for former slaves, but its command that states refrain from enacting repressive laws or depriving citizens of rights was an abstraction. Southern states had so far shown no inclination to assist voluntarily in the rehabilitation of former slaves despite the prod of the earlier constitutional amendment, federal legislation, and a continued federal military presence. Efforts by Congress to redeem the aims of the Fourteenth Amendment with appropriate enforcement legislation were likewise hindered by federal courts unwilling to invade the states-rights sanctum.¹¹³

Within two years enfranchisement for persons of African descent was promised with the ratification of the Fifteenth Amendment. "Black suffrage . . . presented an opportunity to end the post-war era and its seemingly intractable problems."¹¹⁴ Coinciding with the rise of terror throughout the South, this last Civil War amendment proved a harbinger of what *was* to come—although not in the foreseeable future. At the time of its adoption, it was fresh fuel to a fire of bigotry that would alternately blaze and smolder.

IV. AVOIDANCE AND COLLABORATION: MOB RULE, THE CLIMATE OF INDULGENCE, AND RECONSTRUCTION'S TENUOUS GAINS

A. *Methods of Abuse*

1. The Ku Klux Klan

Contemporaneous with the war amendments were the creation and dispersion of terrorist organizations devoted to the cause of white supremacy.¹¹⁵ Noteworthy among these groups was the Ku Klux

112. FRANKLIN, *supra* note 76, at 67-68.

113. See *infra* part V.

114. LIVELY, *supra* note 29, at 54.

115. See, e.g., 2 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 331 (1907). Testimony included in an Alabama report on the Ku Klux Klan identified the growth of Union League chapters as "the prime moving cause" of the Klan's existence. *Id.* This is but another variation on the white supremacy theme as membership in the League, begun as white loyalist societies, became nearly all black after the war. Additionally, protection of white wo-

Klan, hatched in the offices of a Tennessee judge with the help of six wellborn ex-Confederates, including the judge's son.¹¹⁶ Although there were many other groups that furthered white supremacy, the Klan, despite initially elaborate schemes to conceal its identity, was the most infamous.¹¹⁷ All of these groups recalled the wayward element of slave patrollers. Under that earlier system, in some places consisting of "all white males over eighteen,"¹¹⁸ the patrollers roamed southern areas at night checking on or apprehending persons of color who might or might not be slaves. Their official duties, often supplementing local militias, did not prevent gross abuses.¹¹⁹

Conventional analysis of the Ku Klux Klan suggests that the paramount force behind its violence was political. To prevent the spread or entrenchment of Republicanism in any form, the Klan would go to any lengths. That many white persons were its victims makes this a credible but superficial claim, as does the *apparent* truism that "[n]one but Democrats belong or can belong to these societies."¹²⁰ But "[l]ong before Negroes became a political factor and while the governments of the Southern states were still in the hands of the former Confederates, the Klan organization was being perfected and was spreading to many parts of the South."¹²¹ Additionally, extra-political measures adopted in some of the defeated rebel states after the war would have encouraged broader sympathies for the Klan. Before the war in South Carolina, for example, the state derived most of its income from a head tax on slaves. Afterwards, land was taxed more heavily and the assessed value of property rose considerably.¹²² The

manhood figured in the Alabama report as well as one from North Carolina. Recorded in 1871, testimony from the latter state included the statement, "The poorer classes [of white women] . . . would only go [to town] when they could form large companies for mutual protection. . . . [T]hey were afraid to go . . . alone for fear of being insulted or ravished by negroes . . ." *Id.* at 333.

116. For a definitive treatment on the Klan, see ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

117. Other known groups who committed atrocities in the region were members of the "Regulators, Jayhawkers, the Black Horse Cavalry, the Knights of the White Camellia, the Constitutional Union Guards, the Pale Faces, the White Brotherhood, the Council of Safety, the '76 Association, [and] the Rifle Clubs of South Carolina." LOGAN, *supra* note 51, at 21; see also TRELEASE, *supra* note 116, at 81.

118. JOHN H. FRANKLIN, *THE MILITANT SOUTH, 1800-1861*, at 72 (1956).

119. See *id.* at 73; see also V. P. FRANKLIN, *BLACK SELF-DETERMINATION: A CULTURAL HISTORY OF AFRICAN-AMERICAN RESISTANCE* 112-16 (1992).

120. CONG. GLOBE, 42nd Cong., 1st Sess. 437 (1871) (statement of Rep. Cobb).

121. FRANKLIN, *supra* note 76, at 154.

122. Lou F. Williams, *The Constitution and the Ku Klux Klan on Trial: Federal Enforcement and Local Resistance in South Carolina, 1871-1872*, II GA. J. S. LEGAL HIST. 46 (1993) ("[H]igh property taxes, the primary source of state revenue in Reconstruction South Carolina, was a vast change from pre-war policy, when a head tax on slaves had provided most of the state's income. Real estate had been consistently undervalued for tax purposes. . . ."). *But cf.* FRANKLIN, *supra*

shift was significant: underassessed land was a consolation for pre-war taxes on slaves while post-war higher taxes on land carried no such setoff. Radical Republicans hoped and planned for redistribution of land to free persons through forfeiture of land to the state, which would then resell it at modest cost.¹²³ It was a successful plan with a predictable effect. "The Republican tax program released vast quantities of land But it also increased the antagonism of the majority of the white citizens of the state—the property owners—toward the government,"¹²⁴ which was heavily represented by free persons of color.

The indiscriminateness of Klan violence against persons of African descent, regardless of political affiliation or lack of it, demands a broader explanation. Likewise, the continuation of violence beyond 1871, when the first wave of most statewide elections had concluded as well as the frequent raids to seize weapons, provides evidence of something other than factional motivation.¹²⁵ One ostensibly nonpolitical target was education for former slaves. "In Mississippi the Klan took on new life in 1870 in order to oppose the establishment of schools for Negroes and to resist the new taxes that it regarded as unreasonable."¹²⁶ Whether it was discouraging black voters from going to the polls, providing a service to white landowners seeking to prevent or undo the sale of land to persons of color, punishing a real or imagined crime or insult to a white person, or simply running amok, the Klan's ultimate cruelty was lynching.¹²⁷

note 76, at 142 ("To finance their operations the Radicals of South Carolina instituted a 'uniform rate of assessment of all property at its fair money value,' in contrast to the ante-bellum system that was easy on land and slaves and hard on mercantile, professional, and banking interests.").

123. Williams, *supra* note 122, at 46.

124. *Id.*

125. See, e.g., Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 927 (1984) (citing J. Williamson: "The timing of the [Klan] riots, which occurred after the October 1870 elections . . . and the loose organization of the Klan suggest that they were more the product of collective social frustration than political anxiety.").

126. FRANKLIN, *supra* note 76, at 165. Certainly education had political implications as it would prepare its beneficiaries to exercise politically-conferred rights.

127. There has always been debate over what constitutes lynching. In its narrowest sense, it is the abduction and murder of one accused of a crime from the jurisdiction of a law enforcement agent. A body of literature on the work of "Judge Lynch" began to grow at the end of the last century. See, e.g., Charles J. Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L.J. 335 (1899). In its generic sense, used here, it incorporates vigilante acts after the Civil War and into this century—roughly, a century; custody by law enforcement officials is not a prerequisite. Beginning in 1882, Tuskegee Institute in Alabama, aided later by the National Association for the Advancement of Colored People, gathered figures on lynchings throughout the country. In 1969 the Tuskegee Archive Coordinator for those figures wrote:

In an overwhelming majority of the instances of Negroes lynched the charge is some offense against whites. The graver offenses—murder, rape, arson, assault—

Documentation on Klan violence is plentiful. A congressional committee, which convened in 1871 to take testimony about Klan activity, listened to the account of a Mississippi black man who "was whipped because he had not lifted his hat when he met a white man on the road."¹²⁸

Representative of the Klan's actions, with admittedly political overtones, was the brutalizing in 1868 of Caswell Holt in North Carolina on suspicion of theft. Holt lodged a formal complaint against his attackers whom he recognized and who were arrested. Later released for lack of evidence beyond Holt's word, they returned a year later to shoot him, although not mortally.¹²⁹

In Georgia, refusal to join the Democratic Club earned Perry Jeffers an assault. His personal belongings were burned, his son killed, and his wife hung. With his remaining family he abandoned the land on which he was a tenant farmer and sought refuge in the local jail. Klan threats ended the inquest into his son's death while the sheriff and a Freedmen's Bureau agent advised him to flee by train. Forcibly removed from a train coach, he was fatally shot.¹³⁰

Henry Lowther, an "active Republican" in Georgia who had successfully engaged in his trade, sued white persons for money due. The Klan members who visited him shortly thereafter offered him the choice of death or castration. He chose the latter and lived.¹³¹

Typical of Klan actions resulting in property loss was the South Carolina murder of Tom Roundtree for "belligerence." Although described as a "leader among the Negroes of the vicinity,"¹³² his death appears not to have been strictly politically motivated. The arrests and conviction of some of the group who were identified by his widow were thwarted by a "former legislator" who presided over the local Klan council and who provided alibis for the accused. The Roundtree family was forced to abandon its home and belongings.¹³³

predominate; but in many cases the charges are of strikingly trivial sort, such as slapping a white child, using offensive or boastful language, suing or testifying against a white, expressing sympathy for a lynched Negro, or seeking employment in a restaurant. Another cause of lynchings is to be found in the quick and passionate resentment among large sections of the southern whites against any gesture of equality on the part of the Negro.

Daniel T. Williams, *The Lynching Records at Tuskegee Institute; with Lynching in America: A Bibliography*, in EIGHT NEGRO BIBLIOGRAPHIES 2 (1970).

128. FRANKLIN, *supra* note 76, at 170.

129. TRELEASE, *supra* note 116, at 293.

130. *Id.* at 228-30.

131. *Id.* at 324.

132. *Id.* at 364.

133. *Id.* at 363-64.

In instances like those above, denial of economic rights, including the direct loss of property, has an individual focus. Descriptions of property ownership on a collective scale show it to have been no less vulnerable. In 1866, Georgia had “ninety-six schools supported in whole or in part by the freedmen, who owned fifty-seven of the buildings.”¹³⁴ Within two years it was the site of at least one assault on a black teacher coupled with a warning to discontinue planning a school; relocating the school to a nearby church led to that building’s deliberate destruction by fire.¹³⁵

Many atrocities occurred because of the withdrawal of federal troops and the inability or unwillingness of local law enforcement to act as a substitute. In some instances, however, the troops themselves would not intervene. Evidence from Louisiana revealed the paradox in a refusal by a garrison general to battle “fifteen thousand” Knights of the White Camelia. Representative Benjamin F. Butler of Massachusetts commented:

And yet [the Democratic major] general had under his command, to enforce the laws of the United States in time of peace, in the city of New Orleans, more United States troops than another general, commanding there in 1862, had in the city with which to keep at bay a rebel army.¹³⁶

Threats to personal security and opposition to acquiring property or skills were overlapping obstacles with one frequently complementing the other. In parts of Georgia “Klan activity was aimed more exclusively at keeping the black man in his place economically and socially,” resulting in widespread murder and destruction with loss of crops and possessions.¹³⁷ As one of the most notorious sites of Klan terror, York County, South Carolina, saw many persons of African descent flee leaving behind “homes, crops, and belongings.”¹³⁸ It was the large-scale violence in South Carolina that would precipitate a test of enforcement legislation in federal court.¹³⁹

Although outrages attributable directly to the Klan declined in the early 1870s, primarily because of federal intervention, other groups or renegade Klansmen continued their attacks. In Louisiana, after a three year hiatus, a reincarnated version of mob violence took

134. MEIER & RUDWICK, *supra* note 5, at 160.

135. TRELEASE, *supra* note 116, at 329.

136. CONG. GLOBE, *supra* note 120, at 444 (Representative Butler was referring to himself as the “Democratic major general.” A Union general, he changed his party affiliation from Democratic to Republican.).

137. TRELEASE, *supra* note 116, at 320.

138. *Id.* at 366.

139. See *infra* notes 228-35 and accompanying text.

hold in 1872 "finally achiev[ing] the overthrow of the state government in 1877."¹⁴⁰ Attempts in Alabama to dissolve the Klan failed as attacks continued.¹⁴¹ The group's birthplace was no more successful in eradicating raids by 1870.¹⁴² Mississippi fared as badly as Tennessee.¹⁴³

By the early 1870s the Klan, although persisting, trailed off into disorganized remnants marked by discord between those who favored disbanding to avoid "military occupation"¹⁴⁴ or who disapproved of the raids,¹⁴⁵ and those determined to continue. But the conditioning it had fostered endured. The Mississippi Plan, begun in that state in 1875 and exported to South Carolina, Florida, and, with modifications, Alabama, was unequivocally political in its end.

[Its architects and practitioners] organized themselves into irregular militia companies and armed themselves with rifles. They drilled and paraded through the areas of heavy Negro population; they enrolled Negro leaders in so-called 'dead-books'; they dispersed Republican meetings; they forced Negroes at rifle point to listen to Democratic speakers; they deliberately provoked riots in which hundreds of Negroes were killed; and they posted armed pickets at registration places to prevent Negroes from registering.¹⁴⁶

2. Law Enforcement Undermined

Two demonstrable facts combined to ensure the victimization of persons of color: the refusal by sheriffs and others charged with law enforcement to curb abuse through arrests of violators and defense of the innocent; and the failure of judicial officers at all levels to prosecute in such a way as to obtain convictions followed by imprisonment. Certainly, arrests and prosecutions occurred. But the frequency of these in proportion to the pervasion of mistreatment was nearly inconsequential.

Invariably, the judicial process at the state and local level was overcome by manufactured alibis and intimidated witnesses, judges, and prosecuting attorneys.¹⁴⁷ If prosecutions were begun, the ac-

140. TRELEASE, *supra* note 116, at 136.

141. *Id.* at 247.

142. *Id.* at 278.

143. *Id.* at 308.

144. *Id.* at 206 (North Carolina).

145. *Id.* at 247, 308 (Alabama).

146. STAMPP, *supra* note 90, at 201-02.

147. See TRELEASE, *supra* note 116, at 201.

cused's supporters neutralized their effectiveness, among other means, with well-financed defense teams.¹⁴⁸

Legislative enactments designed to weaken the Klan's effect were ignored. In Alabama, measures adopted in December of 1868 to compensate victims for Klan attacks if they did not recover damages from the offenders were worthless.¹⁴⁹ Nor was a secret service fund established in Mississippi in the spring of 1870 sufficient incentive to entice informers into giving information leading to convictions of Klan members.¹⁵⁰

Meanwhile, fear of retribution impelled law enforcers in some states to execute their mandates selectively. If a vigilante group held sway in a locality or was *perceived* to rule, sheriffs and their deputies would desist from interfering. The sheriffs in Sumter, Tuscaloosa, and Huntsville, Alabama all deferred to Klan terror in 1868 and 1869.¹⁵¹ Documentation on this point and the futility in opposing the Klan generally was provided to the Senate Committee during its investigation of the Klan prior to enactment of the Ku Klux Klan Act of 1871.¹⁵² Testimony regarding the Klan in North Carolina, for example, recounted the death of a sheriff for aiding in the arrest of a member of the Klan.¹⁵³ Contrary to being afraid, some law enforcement agents—the sheriff in Crittenden County, Arkansas, for one—actively participated in the Klan.¹⁵⁴

Local misconduct by sheriffs or deputies and scattered prosecutions by lawyers and judges appear as uncatalogued examples suggesting randomness or irregularity. A systematic disinterest in defending persons of African descent, however, is observable indirectly from the facts surrounding financial benefits for officials. Many southern states used some variant of the fee system, which has been described in connection with its early twentieth century form.

148. By the end of 1871 approximately 600 arrests had been made in South Carolina. The state courts were ill-equipped to handle that volume, "and only the worst offenders were proceeded against with any seriousness." *Id.* at 406. Of those cases that came to trial in the United States Circuit Court during that period there were five convictions. In North Carolina "a total of 763 indictments had been made Of this number, 23 pleaded guilty, 24 were tried and convicted, 13 were acquitted, and 9 cases were dropped in a subsequent court term; the great majority still awaited trial at the end of the year [1870]." *Id.* at 408. After a series of arrests in 1871, the Democratic legislature in North Carolina caused the release of those accused by "repeal[ing] the law on which the felony indictments were based." *Id.* at 409.

149. *Id.* at 246-47.

150. *Id.* at 277-78.

151. *Id.* at 247, 257, 263.

152. CONG. GLOBE, *supra* note 120, at 443-49.

153. *Id.* at 444 (quoted by Rep. Butler).

154. TRELEASE, *supra* note 116, at 167.

According to this plan, constables and other petty officers receive no regular salaries, but are paid per capita persons arrested. Judges and other officials receive a portion of the court costs. Such officers are tempted to make as much as possible out of their position by frequent arrests of Negroes for petty law violations.¹⁵⁵

An example of this arrangement was a woman "convicted of using 'abusive language' and fined She worked out the fine in two days, but it required nearly a year of labor to satisfy the 'costs' consisting of fees to judge, sheriff, clerks and witnesses" ¹⁵⁶

These laws predated emancipation and, in their earliest days, merely reflected the machinery for compensating court officials. Following the entrance of four million persons of color into free southern society, southern lawmakers and law enforcers recognized another use for the fee system. Especially after Reconstruction had ended, minor breaches of sometimes vague laws made the system a device for controlling blacks, whose omnipresence as free persons was found offensive by many whites. Arrests and confinements helped supply the labor needs of a white society that had yet to adapt to shifting labor patterns.¹⁵⁷

The laws of nineteenth-century Arkansas typify the several levels on which the fee system operated. Although judges of the county courts received salaries and a two hundred dollar annual bonus, sheriffs and clerks were remunerated through fees "taxed as costs."¹⁵⁸ Conviction for a misdemeanor resulted in fines and costs which, if unpaid, entitled the county to jail the convict until transfer to a contractor "at such place as the contractor may designate, who shall keep and work such prisoner for the time he shall have been adjudged to be imprisoned, *and for the further time as will discharge all fines and costs for which he may be committed . . .*."¹⁵⁹ The contractor was the sole arbiter of time necessary to work off the fine, a fact implicit in the statute's wording. While the Justice of the Peace or the clerk had the duty to file a document setting forth the sentence, fine, and costs, he was also obligated to provide "a concise statement of the time such

155. JOHN G. VAN DEUSEN, *THE BLACK MAN IN WHITE AMERICA* 146 (rev. ed. 1944).

156. *Id.*

157. The wage incentive used after emancipation to lure former slaves back to plantations "failed to provide the manpower base essential to plantation agriculture." See MANDLE, *supra* note 7, at 17. The evolution of the sharecropping system over the next twenty years and the limitation on black employment outside the South by discrimination or anti-enticement laws was like a funnel guiding blacks toward any contrivance that might mimic the South's vanished era. *Id.* at 17-24.

158. 1883 Ark. Acts 20, §§ 7-9.

159. *Id.* 78, § 5 (emphasis added).

convict may be held to labor in discharge of the [fine and costs].”¹⁶⁰ For his part, the contractor was required to file a monthly statement of the time worked by the prisoner “together with all lost time” on account of weather or the contractor’s fault.¹⁶¹ The prisoner was not to be charged for loss of time on this basis. Failure by the contractor to submit the monthly statement would result in forfeiture of the convicts in custody. However, the contractor was under no duty to account for the inability of the convict to work and could easily make a claim to that effect. The statement filed only had to indicate that the fine had not yet been discharged because of the prisoner’s fault. Since the law used discretionary language for the time that might be necessary, imposed no limit, and made no provision for the misdemeanor to challenge the contractor’s accounting, the system facilitated abuse. And since prisoners served a dual function—income-generating devices for court officials and long-term, inexpensive, and easily exploitable labor for anyone willing to pay the moneys owed—the system’s beneficiaries would be loath to protect the interests of the prisoners.

B. *Controlling Opportunities for Wealth*

1. The Freedmen’s Bureau

Accounts of asset deprivation through involuntary abandonment, confiscation, and theft confirm that persons of color could expect negligible assistance in ending the pattern of mistreatment existing in the South even as constitutional amendments were ratified and Congress legislated protection. While the Committee on Reconstruction had established the Bureau of Refugees, Freedmen, and Abandoned Lands at war’s end to assist the newly emancipated, that organization was often powerless to prevent abuses that hampered the resettlement of former slaves. Marshall, Texas was one area that became a crowded haven for “[f]reedmen flying for their lives . . . having been driven from their homes and forced to give up their crops.”¹⁶² Regional offices of the Bureau had already retracted promises of land ownership to free persons when President Johnson offered amnesty to Confederates who would return to the fold. Initial confusion as to the effect of a presidential pardon delayed divestment of land from ex-slaves. The Bureau was guided by its reluctance to reconvey land to former owners in the absence of a clear directive from the executive

160. *Id.* § 15.

161. *Id.*

162. TRELEASE, *supra* note 116, at 106.

branch. This was not long in coming. Using a Tennessee case, President Johnson "directed [Bureau Commissioner Oliver O.] Howard to have his assistant at Nashville restore [the former owner's] property immediately. Furthermore, the Commissioner was instructed to take 'the same action . . . in all similar cases.'"¹⁶³ This policy had a serious regressive effect in areas where blacks had already begun to advance their fortunes such as the Sea Islands.¹⁶⁴

In some places the Freedmen's Bureau itself, rather than aid in the resettlement effort, acted complicitously to force former slaves into labor contracts pursuant to the vagrancy provisions of the Black Codes.¹⁶⁵ Minnesota's representative in Congress had denounced several provisions from the Codes that made this result possible.¹⁶⁶

2. Manifest Signs of Wealth

Realty was key to asset accumulation by persons of color and, while its loss is not quantifiable with precision, facts concerning it are more plentiful than data on personalty. Nevertheless, certain forms of personal property were likely to be wrested from blacks. Foremost among these were weapons that white persons associated with being overpowered by persons of color in small combinations or as members of local militias. Theft of animals also occurred in certain regions. In North Carolina the Constitutional Union Guard, counting a lawyer and deputy sheriff among its members, embarked on a campaign of horse stealing, the animals later to be sold in other counties.¹⁶⁷

Areas did exist where ex-slaves could tenant farm or provide their labor under contract for actual, perhaps liberal returns. Reduction of income occurred nonetheless at the consumption end. Blacks in the Sea Islands, for example, earned real wages because of their long settlements there and strong assistance from northern philan-

163. DORRIS, *supra* note 55, at 229.

164. See, e.g., W. E. Burghardt Du Bois, *The Black Proletariat in South Carolina*, in RECONSTRUCTION IN THE SOUTH 62, 65 (Edwin C. Rozwenc ed., 1952).

165. See, e.g., WILSON, *supra* note 40, at 59.

166. Republican Representative Donnelly cited a Virginia stipulation under which:

[a]ny man who will not work for 'the common wages given to other laborers' shall be deemed a vagrant; the masters have formed combinations and have put down the rate of wages to the freedmen below a living price; the negro refusing to work for these wages is seized as a vagrant, sold to service 'for the best wages that can be procured' for three months; if he runs off he shall work another month with ball and chain for nothing.

CONG. GLOBE, *supra* note 3, at 589. While in Tennessee "the vagrant negro may be sold to the highest bidder to pay his jail fees; and to make sure that he be kept a vagrant no housekeeper shall harbor him . . ." *Id.*

167. TRELEASE, *supra* note 116, at 189.

thropists as early as 1862. Even ex-slaves dissatisfied with their wages from certain relocated northerners could rely on being paid. Moreover, their protests could and did lead to increases in pay, dispensed with the paternalism of their employers.¹⁶⁸ But persons of color in this altruistic environment often found their resources depleted at the white-owned country stores. "Prices paid by blacks varied 'from 20 to 100 percent above the market value of the goods, according to the amount of competition among the storekeepers.'"¹⁶⁹

The circumstances surrounding tenant farming often made it a perilous occupation. Incorporated in its issues of safety and enjoyment of possessions was the fact of debt peonage.¹⁷⁰ Although originally perpetuated by vagrancy laws, debt peonage was incidental but routine in the context of sharecropping or tenant farming.¹⁷¹ In examining the phenomenon of sharecropping in Georgia and elsewhere in the South, one economist outlined its expansion beginning in the "late 1860s, [although] it took some years thereafter for it to become the dominant organizational basis for plantation agriculture in the South."¹⁷² Advancement of seed and other necessities by the landowner in exchange for repayment when the tenant's crop was harvested and sold almost never allowed for satisfaction of the debt.

168. A notable example was the black laborers of Edward Philbrick, son of a famed Boston abolitionist, who defended his payment of less than he would have paid for northern labor on the ground that "a rapid rise in wages would enable the Negroes to secure [household and personal] goods with a minimum of effort, thus defeating the purpose [of stimulating industry among black workers]." WILLIE LEE ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT* 301 (1964); see also Sarah W. Foster & John T. Foster, Jr., *Chloe Merrick Reed: Freedom's First Lady*, 71 *FLA. HIST. Q.* 279, 283-84 (1993) (Northern teachers were recruited by Freedmen's Relief Associations to assist in the relocation and education of ex-slaves in the Sea Islands following conquest of the area in 1862.).

169. HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 626 n.5 (1976).

170. The Black Codes introduced this practice through their vagrancy provisions directed at former slaves despite general language. Mississippi was typical in authorizing the arrest of those, on the ground of vagrancy, who had not signed labor contracts by January 1, 1866. "[I]f convicted and unable to pay the fine of \$50.00, [they] were to be hired out to the person who would pay the fine and require the shortest period of labor in return." FRANKLIN, *supra* note 76, at 49; see also WILSON, *supra* note 40, at 101 (describing Virginia's law of 1865-1866 under which "[t]he convicted vagrant might be put to work by the town or county or hired out for any term not exceeding three months").

171. These terms are often used synonymously although there are differences. See *Appling v. Odom*, 46 Ga. 583, 584-85 (1872).

There is an obvious distinction between a cropper and a tenant. One has a possession of the premises, exclusive of the landlord; the other has not. The one has a right for a fixed time; the other has only a right to go on the land to plant, work and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant.

Id.

172. See MANDLE, *supra* note 7, at 19.

Advances made periodically carried higher repayment rates that would allow the landowner to appropriate the tenant's portion. Obligated to the landowner from year to year, the tenant had little chance of extinguishing his debt and acquiring assets from his share of the crop. Unless the landowner could effectively bind the tenant to him from season to season, however, this would not qualify as peonage. One of two events occurred, either one of which guaranteed a state of poverty for the tenant; and one of them approximated a strict definition of peonage. Encompassing the period immediately after emancipation and beyond, writers have noted that landowners, often with the aid of local law enforcement, coerced the tenant to remain,¹⁷³ or the tenants disappeared.¹⁷⁴ If debt could be avoided, planters' cartels contrived to limit payment to tenants under the terms of their contracts.¹⁷⁵ In the last decade of the nineteenth century the practice of "whitecapping" attempted to block "the unsupervised rental of land to blacks and hoped to frighten the black tenants into accepting employment on the plantations of resident landlords. To accomplish their ends . . . [secret organizations of farmers] issued warnings, burned homes, beat blacks, and fired shots into houses."¹⁷⁶ Whitecapping caused blacks to flee from some areas of the South.¹⁷⁷

Finally, in the strictest sense, peonage occurred through kidnappings and imprisonment on plantations to ease labor shortages. The violence in Alabama in late 1870 and 1871 left areas without workers and exposed persons of color in nearby Mississippi to peril by "white gangs who crossed the state line to kidnap them."¹⁷⁸

The difficulty in evaluating the degree of deprivation that persons of color experienced as a result of violence is compounded by conflicting interpretations. Even an assessment cast in the most favorable light, however, leads to the conclusion that, in the last third of the nineteenth century, most southern blacks remained poor. Two areas of inquiry for any such evaluation are land and utilizable skills. One economic historian has stated that "[i]n every Southern state success-

173. *Id.* at 20. Acknowledging the omission of another observer to explicitly quantify such peonage, Mandle nonetheless accepts the other's account—representing the years of sharecropping's growth: "[B]y 1901 southern society had reached the point where a debt-labor system characterized by violence and the corruption or acquiescence of local police officers was openly tolerated." *Id.*

174. See HIGGS, *supra* note 11, at 59 (in the context of escaping debt to the landowner, "Once again the black man's mobility . . . was his ultimate reliance in resisting oppression").

175. *Id.* at 47.

176. *Id.* at 76.

177. *Id.*

178. TRELEASE, *supra* note 116, at 290.

ful tenants used the proceeds of a particularly good year to purchase farms."¹⁷⁹ Land ownership, then, can operate as both a reliable indicator of proceeds sufficient to buy land and *access* to land. As of 1876, the Department of Agriculture ascertained that black land ownership in the South (excluding Virginia and Kentucky but including Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas) was eight percent or less and usually five percent or less.¹⁸⁰ Those persons of color who owned land often attained a level of prosperity comparable to that of whites during slavery. Among Sea Islanders, whose freedom preceded that of mainland southern blacks, "a number of freedmen had bought at the auctions the town houses of the late white residents [of Beaufort]."¹⁸¹ Collective purchase and ownership likewise occurred. "A Port Royal Island plantation called Ederly was bought . . . in 1863 by the Negroes who lived on the land, and it was worked successfully in common, entirely without white direction."¹⁸² In Louisiana, before the war, free black planters—often slaveholders—"on a considerable scale" had title to thousands of acres.¹⁸³

Two reasons, however, account for the negligible landowning figures throughout the region. For the first fifteen years after emancipation, limitations on land acquisition "probably resulted more from simple poverty than from racial discrimination in the land market."¹⁸⁴ Complementing that theory is the belief that "the sale of land . . . was an act of patronage" that occurred as a reward for "socially acceptable behavior."¹⁸⁵ Under either explanation, land ownership remained meager.

179. See HIGGS, *supra* note 11, at 51.

180. *Id.* at 51-52.

181. ROSE, *supra* note 168, at 314.

182. *Id.* at 315.

183. See, e.g., ULRICH B. PHILLIPS, *AMERICAN NEGRO SLAVERY* 434 (1918).

184. HIGGS, *supra* note 11, at 52.

185. MANDLE, *supra* note 7, at 29; see also TRELEASE, *supra* note 116, at 288 (dangers awaited whites who sold land to persons of color). No wave of farm ownership had occurred by the century's end. The United States Census Bureau calculated that in the South—defined as the South Atlantic (Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, and Florida); East South Central (Kentucky, Tennessee, Alabama, and Mississippi); and West South Central (Arkansas, Louisiana, Oklahoma, and Texas)—"the percentage owned increased for Negro farm homes from 8.9 per cent in 1890 to 11.2 per cent in 1900, the percentage of 11.1 for 1910 being practically the same as that for 1900." BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., *NEGRO POPULATION 1790-1915*, at 461 (1969).

3. Practical and Professional Talents

In the case of trades or professions, appreciable numbers of skilled blacks, who could acquire assets based on those skills, did not materialize until the turn of the century. These numbers depended in part on the region's trade laws; rarely were such persons to be found in rural settings where most blacks still lived.

States that regulated many aspects of commerce could place subtle obstacles in the paths of blacks who attempted simple trades. Even a transaction not intended to be commercial could be regarded as such, with adverse consequences. These regulations were especially onerous after Reconstruction. In 1884, Virginia's laws illustrated the means by which a person of color, as the most available target, could be the unsuspecting quarry in a maze of rules. Its license laws were exhaustive, listing endeavors generally within mercantile, entertainment, and professional categories. Among the least skilled activities regulated was peddling, which required a minimum fee of fifty dollars for a license to travel on foot, with more expensive licenses corresponding to the mode of transit and area of operation.¹⁸⁶ Virginia defined a peddler as "Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, in transitu or otherwise . . ." ¹⁸⁷ A single instance of sale or exchange of any item for money, goods, or service without possession of a license would, if discovered, cost between one hundred and five hundred dollars as a fine. And to ensure compliance (at the same time inviting entrapment), the Commonwealth ordered that "one-half of [the fine] shall go to the informer . . ." ¹⁸⁸

As they had done during the Black Code years, some southern states later scrupulously refrained from specifying persons of color as the targets of laws enacted to control certain commercial activities.¹⁸⁹ But a comparison of statistics compiled by the Census Bureau gives one perspective on the accessibility of trades to blacks. In 1850, in Louisiana (the only southern state the Bureau categorized under occupations) there were 325 masons among a population of 2,809 free

186. 1884 Va. Acts § 33.

187. *Id.* at § 32.

188. *Id.*

189. See, e.g., WILSON, *supra* note 40, at 108. In 1866, "[t]he North Carolina vagrancy law was so written that no discrimination appears, yet it in fact opened the way to as much discrimination [against persons of color] as any county court judge cared to exercise." *Id.*

males of color fifteen years of age and older.¹⁹⁰ Likewise, there were 86 tailors.¹⁹¹ In 1910, the next year for which the Census Bureau compiled such figures, Louisiana had only 834 masons out of a total black male population of 259,937 ten years of age and older.¹⁹² There were 281 tailors among this population in that same year.¹⁹³ Over a period of sixty years, then, no real increase in these traditional occupations occurred; proportionally, the figures represent a loss.¹⁹⁴

In fact it was not until after 1890 that a southern black bourgeoisie of any appreciable size connected to entrepreneurial and professional undertakings began to emerge. One professional group that has been charted is black lawyers.¹⁹⁵ Although individual instances of admissions of persons of color to southern state bars occurred in the late 1860s, inroads for this group in the South began mainly in the 1870s, during Reconstruction. South Carolina is a case in point. When the University of South Carolina integrated its student body in 1873, withdrawal of white students opposed to this course "made the university 'predominantly black' until 1877."¹⁹⁶ The result was the graduation of "several blacks from its law school" during this period.¹⁹⁷ With the end of Reconstruction "the prospects for law as a profession for blacks [in South Carolina] faded for nearly a quarter of a century,"¹⁹⁸ and the numbers of black lawyers in general remained exceedingly small.¹⁹⁹

190. BUREAU OF THE CENSUS, *supra* note 185, at 511.

191. *Id.*

192. *Id.* at 518.

193. *Id.*

194. In 1850, black masons represented 11.6 % of free blacks as a whole (325 masons divided by 2,809); and tailors made up 3 % (86 tailors divided by 2,809). *Id.* at 511. If slave artisans were counted and the population adjusted to include both slaves and free people, the percentages might increase or decrease depending on whether the number of slave artisans to slave population was high or low. Percentages for 1910 reveal that neither masons nor tailors were artisans of any numerical consequence. In the former case, they were .3 % of the free male population (834 divided by 259,937); in the latter case, they were .1 % of the free male population (281 divided by 259,937). *Id.* at 518. Census records indicate the percentage of persons of color between five and fourteen in Louisiana for the year 1910. Excluding that group (a larger segment than necessary since the 1910 artisan figures were based on a population ten years old and above) to loosely resemble the age group for the 1850 figures but keeping the 1910 artisan figures unchanged results in virtually no increase in those minuscule percentages. A rise in the numbers, then—from 325 to 834, and 86 to 281—does not correspond to a proportionate gain in skilled workers sixty years later. See *id.* at 179 (for a breakdown of age groupings in 1910 Louisiana).

195. See generally J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* (1993).

196. *Id.* at 219.

197. *Id.*

198. *Id.* at 223.

199. The Census Bureau recorded a figure of 798 black lawyers, judges, and justices throughout the country as a whole in 1910, representing a ratio of 12,315 persons of color to every black

Mainly, "the process [of an emerging black bourgeoisie] occurred at different rates and times in different cities, most markedly in those communities where the largest in-migration and residential segregation were taking place."²⁰⁰ Clearly this phenomenon did not have a significant influence on the masses of ex-slaves throughout the rural South.

C. *Reconstruction's Demise and the Revival of White Authoritarianism*

What then was the mitigating effect of Reconstruction on personal safety and wealth acquisition among persons of African descent? Did the influx of black legislators to statehouses and Congress deliver the masses from the abuses of slavery's residual effects? Although "politically aggressive" enough to demand and get a presence in these bodies commensurate with their numbers, that aggressiveness "did not extend to other phases of human relations."²⁰¹ They continued to "observe carefully the etiquette of the Southern caste system."²⁰² Or, as another historian noted, "[W]hile [Negroes] had influence in all of the southern radical governments . . . they did not control any of them."²⁰³

Far from lasting a decade or more throughout the South as is commonly believed, the period of Reconstruction varied from four to ten years—1867 to 1877. In Georgia, it ended with the inauguration of the Democratic governor, James Smith, in 1871.²⁰⁴ Democrats controlled Virginia as early as 1870, as well as North Carolina and Tennessee.²⁰⁵ Texas ousted its Republicans in 1873, Alabama and Arkansas in 1874, and Mississippi in 1875.²⁰⁶ Exceptional instances of a black political presence and pockets of activity by persons of color in judicial or administrative affairs existed in some places until the turn of the century, but these were uncommon in the region as a whole.²⁰⁷ Adding to the brevity of the Reconstruction program in most southern states was the undermining of policies as Reconstruction un-

lawyer. The comparable ratio for whites was 718 persons to each white lawyer. BUREAU OF THE CENSUS, *supra* note 185, at 510.

200. MEIER & RUDWICK, *supra* note 5, at 199.

201. Francis B. Simkins, *New Viewpoints of Southern Reconstruction*, in RECONSTRUCTION IN THE SOUTH 84, 86 (Edwin C. Rozwenc ed., 1952).

202. *Id.*

203. STAMPP, *supra* note 90, at 167.

204. FRANKLIN, *supra* note 76, at 196.

205. *Id.* at 197.

206. *Id.*

207. *See infra* note 209.

folded. Opposition was not merely external. White Republicans often disagreed with their black counterparts.

Many of the native whites who held office were as opposed to the equality of Negroes as were many of the disfranchised former Confederates. It was the native whites who insisted on segregated schools and laws against intermarriage. Nor was there agreement among the Radicals regarding the proposed social programs of the reconstruction governments. Debates over the establishment of orphanages and insane asylums were often sharp and bitter, and decisions to subsidize railroads and public works were reached only after extensive wrangling among the lawmakers.²⁰⁸

The actions and achievements of black elected officials in the South declined markedly with their numbers, and in many places disappeared at the end of this period, not to resume until the next century.²⁰⁹

Reducing Reconstruction's initiatives to the most outward of appearances in three fundamental categories, and contrary to "[a] truly radical program," the balance sheet shows that land was not redistributed, suffrage was not "meaningful," and skills were not retained.²¹⁰ The Black Codes and their successors saw to the last of these, while straightforward opposition by the national government stifled the echoes of previous utterances in the direction of land redistribution.²¹¹

Dilution of a black political presence in legislatures and through statewide activities took many forms. South Carolina accomplished this directly and indirectly with tactics including:

[T]he increase of the dubious white majority in the legislature of 1877 by the expulsion of Negro members from Charleston; the banishment of Negro political leaders; a control of election machinery so rigid that the Republicans deemed it useless to contest the election of 1878; [and] the adoption of a gerrymandering scheme that

208. FRANKLIN, *supra* note 76, at 195-96.

209. In South Carolina, Florida, Arkansas, and Kentucky, a black man was elected as judge or justice during the 1880s in areas of large black populations. In Virginia, Arkansas, and Tennessee from 1880 until 1888 four black men served in those state legislatures. Two black men went to Congress from North Carolina in 1882 and 1897, one from South Carolina in 1888, and one from Virginia in 1890. See SMITH, *supra* note 195, at 203-04, 214, 220, 230, 231, 277, 325, 328, 338.

210. Simkins, *supra* note 201, at 88.

211. See, e.g., FRANKLIN, *supra* note 76, at 179. "Neither Congress nor the Radical state legislatures seriously considered measures leading to the redistribution of land. The small planting class continued to dominate that most important asset." *Id.* Census takers contributed to the confusion and inaccurate reports of land ownership among persons of African descent. In Louisiana "[t]he misconception [of redistribution] arose from the fact that large landowners continued to own and control many acres which some observers, including census reporters, mistakenly recorded as the property of small [tenant] farmers who lived on them." *Id.*

concentrated 25,000 of the state's 30,000 Negro majority in one Congressional district"²¹²

The South never rid itself of violence in the nineteenth century and beyond even as Reconstruction died with the withdrawal of northern pressure. Abuses assumed an unqualified racial aspect as groups resisted the incorporation of persons of color into the fabric of southern living. Yet the white South would not let them go. Efforts to recruit free persons to northern cities were defeated by anti-enticement laws imposing licensing fees on recruiters and obligating them to satisfy debts of those who would migrate.²¹³ Georgia amended its law in 1883 to reflect its dependence on blacks for its agricultural base. What had been understood before by "servant" to include persons of African descent who farmed the land was made explicit in a version that provided:

If any person, by himself or agent, shall be guilty of employing the servant, cropper or farm laborer of another, under a written contract, which shall be attested by one or more witnesses, during the term for which he, she or they may be employed, knowing that such servant, cropper or farm laborer was so employed; or if any person or persons shall entice, persuade or decoy, or attempt to entice, persuade or decoy any servant, cropper or farm laborer, whether under a written or parol contract, after he, she or they shall have actually entered the service of his or her employer, to leave his employer, either by offering higher wages, or any way whatever, during the term of service, knowing that said servant, cropper or farm laborer was so employed, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as prescribed. . . .²¹⁴

Rather than risk fines and imprisonment in southern jails, agents for those northern industrialists willing to hire black workers abandoned their plans.

Immigration policies also assured regional confinement of black persons. The North did not want black workers—yet—and so sought laborers elsewhere. "Between 1870 and 1920 immigration to the United States averaged in excess of 500,000 per year, or almost seven immigrants per 1,000 of the population annually."²¹⁵ While any limitations on immigration conceivably meant more opportunities for blacks in manufacturing jobs, the anti-recruitment laws of the nine-

212. FRANCIS B. SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN 75 n.16 (1967).

213. MANDLE, *supra* note 7, at 23.

214. 1883 Ga. Laws, pt. 1, tit. IV, § I.

215. MANDLE, *supra* note 7, at 72; see also STAMPP, *supra* note 90, at 19 (Liberal immigration hastened the end of Reconstruction by fostering stereotypes among the northern middle class—who likened the burden of their unpolished and unschooled immigrants to the burden of southern blacks, and who then sympathized with southern whites.).

teenth century helped create the barrier against an exodus north where most such jobs were located. Consequently, openings in northern industries attracted only northern black residents, and these were disproportionately few between 1870 and 1900.²¹⁶

Restricted to the South, persons of African descent faced the violence they had seen during Reconstruction made worse by openly hostile state officials. There was no question that a state's chief executive could influence and *control* the incidence of mob violence. Ben Tillman, South Carolina's governor from 1890 to 1894, appealed for an end to lynching in his first inaugural address "so that the finger of scorn could no longer be pointed at South Carolina."²¹⁷ Although the legislature refused to authorize him to oust sheriffs who gave no protection to prisoners against the mobs, he conveyed his message nonetheless. As his biographer observed:

[T]he first year of the Tillman administration was not disgraced by a single lynching, a pleasant contrast to the twelve in one year (1889) of the previous administration. There can be little doubt that Tillman's vigorous attitude toward law enforcement had something to do with the improvement.²¹⁸

While never an advocate for black advancement, Tillman voiced sentiments contrary to those in his first address at the time of his second term, expressing his willingness to participate in lynching. His "attitude may have been partly responsible for the sixteen lynchings . . . during his second term."²¹⁹

216. The ratio of blacks in the South to blacks in the North was reported as follows: in 1870, 4,420,811 to 452,818; in 1880, 5,953,903 to 615,038; in 1890, 6,760,577 to 701,018; and in 1900, 7,922,969 to 880,771. BUREAU OF THE CENSUS, *supra* note 185, at 33. The figures of black distribution also indicate that between 1860 and 1890 the increase in black population in the North (360,778) was far outdistanced by the growth of persons of African descent in the South for the same period (2,663,466). *Id.* "[O]pportunities for blacks in the North increased only when immigration slowed and opportunities decreased when the inflow of migrants picked up. In short, though immigrants and southern blacks were both potentially available for northern industrial employment, invariably it was the immigrants who were selected for these employment opportunities." See MANDLE, *supra* note 7, at 22

217. SIMKINS, *supra* note 212, at 171.

218. *Id.* at 174.

219. VAN DEUSEN, *supra* note 155, at 164; see also Simkins, *supra* note 201, at 85 (describing Tillman's authority in launching an end-of-century regional campaign "to eliminate the Negro vote").

V. CONFRONTATION: JUDICIAL MANEUVERS CHALLENGE RENEWED CONGRESSIONAL EFFORTS

A. *Enforcement Legislation of the 1870s*

Optimism for relief, if not deliverance, from lawlessness and its consequences in the South emerged with the passage of the Enforcement Act of 1870²²⁰ and the Ku Klux Klan Act in 1871.²²¹ Although the Enforcement Act was passed pursuant to the Fifteenth Amendment, its scope went beyond the protection of voting rights. Section 6 stated in part,

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof shall be fined or imprisoned, or both²²²

As an amendment to the original version this section, despite its general language, was intended to address mob violence in the context of suffrage. Senator John Pool, a North Carolina Republican and the section's sponsor, thought the original bill was incomplete. He said,

Suppose there shall be an organization of individuals, or . . . a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. . . . That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books²²³

Its utility for later federal trials, however, was that attacks against persons of color would *always* have a derivative effect of threatening would be voters—in the panoply of rights that would be foreclosed to them, voting was one.

For the seven months following its passage, it failed to live up to its promise. Expecting that its mere existence would render their actions unnecessary, federal officials “made almost no effort to enforce

220. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

221. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871).

222. § 6, 16 Stat. at 141.

223. CONG. GLOBE, 41st Cong., 2nd Sess. 3612 (1870).

the law against the Klan."²²⁴ In Alabama a recalcitrant grand jury and unpersuasive evidence undermined attempts to apply the Act, while in North Carolina acceptable, if not persuasive, alibis led to similar results.²²⁵ Actions brought under the Act in Mississippi were not concluded.²²⁶

Barely a year after passage of the Enforcement Act, Congress enacted the Ku Klux Klan Act in response to requests for legislative intervention by, among others, President Grant.²²⁷ South Carolina became the testing ground for constitutional arguments under both Acts. In response to unbridled violence there, the President had suspended the writ of habeas corpus, "an act unprecedented in the U.S. in peacetime."²²⁸ This action followed the governor's failed efforts to secure prosecution and the presidentially-endorsed arrests sabotaged by local law enforcement.²²⁹

1. Federal Court Response in the Decade's Early Years

From a judicial standpoint, the trials begun in South Carolina had the potential for invigorating the Fourteenth Amendment in a way that had never been attempted. Procedurally, there was a major impediment to the prosecution's goal of convincing the court that the Fourteenth Amendment incorporated the Bill of Rights: "Under the [Judiciary Act of 1869], the circuit judge held court with the federal district judge in a particular state."²³⁰ Judge Bond of the Fourth Circuit was a Republican while Judge Bryan, South Carolina's "first federal district judge following the Civil War,"²³¹ was a Democrat "with ties of kinship and friendship to many of South Carolina's most influential families."²³² Any disagreement between the judges would be appealed to the Supreme Court, an event the defense resolved to bring about in order that the Enforcement Act's constitutionality

224. TRELEASE, *supra* note 116, at 385.

225. *Id.* at 386.

226. *Id.* at 400.

227. CONG. GLOBE, *supra* note 120, at 236.

228. Williams, *supra* note 122, at 53.

229. Hall, *supra* note 125, at 925.

230. *Id.* at 933. The Judiciary Act of 1869 stated in relevant part:

The circuit courts in each circuit shall be held by the justice of the Supreme Court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by the justice of the Supreme Court and circuit judge sitting together, in which case the justice of the Supreme Court shall preside, or in the absence of either of them by the other, (who shall preside,) and the district judge.

Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44-45 (1869).

231. Hall, *supra* note 125, at 935.

232. *Id.*

could be determined at the highest level.²³³ Of the cases the circuit court heard, it agreed that the Fourth Amendment had not been incorporated into the Fourteenth, but it disagreed on the Second Amendment. The defense had its way although the Supreme Court "disposed of the appeal in quick order without deciding the issues involved."²³⁴ The Enforcement Act availed the victims of outrage nothing beyond a day in court. At no time did defense counsel deny the reprehensibility of the acts committed.²³⁵ This was not a contradiction of its role; the primary objective was to defeat an extension of federal authority into the state. By whatever standard one might measure the actions of lawyers or judges in these trials, the defense accomplished its goal.

The Ku Klux Klan Act was no more successful than its predecessor in extending the reach of the Fourteenth Amendment. Most indictments had been returned under the earlier legislation whose authors' intent was never fortified by judicial affirmation.

2. The Century's Last Federal Civil Rights Legislation

In 1875 Congress passed a Supplemental Civil Rights Act.²³⁶ Section 4 received particular judicial attention because it forbade disqualification of persons of color from juries. Although collateral to the focus of this article, the Act provides another means of determining the states' receptivity to the Fourteenth Amendment—that constitutional stimulant for equality which could release ex-slaves' freedom from its isolation. Unlike the criticism surrounding the Ku Klux Klan Act, which some members of Congress felt unnecessarily duplicated the Enforcement Act, for the 1875 law Congress desired stronger control over state action—in this case state courts—and acted on its will.²³⁷

While Congress might speculate on the South's reactions, it could not predict them. Each new appearance of enforcement legislation raised the possibility that the resistance of southern state courts or

233. *Id.* at 934.

234. *Id.* at 948.

235. "Throughout the trials, [defense counsel] avoided any argument that potentially legitimated the Klan's acts. . . . [B]oth denounced the Klan in open court." *Id.* at 936.

236. Supplemental Civil Rights Act, ch. 114, 18 Stat. 335 (1875).

237. The Act was passed with the prescription that courts of both "the United States, or of any State" could not disqualify eligible citizens. This version prevailed despite a vigorous and unsuccessful attempt to delete the language pertaining to states. See 43 CONG. REC. 1862 (1875) (statement of Sen. Carpenter); see also CONG. GLOBE, *supra* note 120, at 130 (regarding what would become the Ku Klux Klan Act, Republican Representative James Garfield of Ohio questioned, "[W]hat is wanting in the sixth section of the [Enforcement Act?]").

federal courts (with their state partisans) or both would diminish. An 1879 case before the Supreme Court seemed to bear this out. *Ex Parte the Commonwealth of Virginia*²³⁸ involved a Virginia court judge who had excluded persons of African descent from grand and petit juries. Following his arrest, the petitioner judge, joined by the Commonwealth of Virginia, challenged the jurisdiction of the district court in writs of habeas corpus and certiorari. Upholding the constitutionality of the 1875 Act, the Court reasoned that “[s]uch legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured.”²³⁹ Here was a clear wedge driven into a state action claim. Justice Strong, who delivered the opinion, disposed of the petitioners’ objections in sweeping language:

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional Amendment was adopted. The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial.²⁴⁰

Any prospects for change that this interpretation may have encouraged were short-lived. The *Civil Rights Cases* of 1883 eviscerated the 1875 law by declaring Sections 1 and 2 unconstitutional.²⁴¹ Exalting state action, the Supreme Court blocked what it saw as a Fourteenth Amendment encroachment.

At least one scholar has questioned the court’s motives more than its reasoning in rendering its decision.²⁴² The opinion’s author, Justice Bradley, had undergone a change of heart since his early thinking that even without additional enforcement legislation a climate of

238. 100 U.S. 339 (1879).

239. *Id.* at 347.

240. *Id.* at 346.

241. 109 U.S. 3, 26 (1883). Section 1 of the Act provided, in part, “That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” Supplemental Civil Rights Act, ch. 114, § 1, 18 Stat. 335, 336 (1875). Section 2 provided, in part,

That any person who shall violate the foregoing section . . . shall . . . forfeit and pay the sum of five hundred dollars to the person aggrieved thereby . . . and shall also . . . be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year

§ 2, 18 Stat. at 336.

242. See John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552 (1971).

“race war” justified intervention by federal authorities.²⁴³ Accepting this perspective as the primary impulse in Justice Bradley’s judicial reasoning, must one infer that the “war of race” had found resolution by 1883? Or that *he* considered the issue defunct? While his opinion in the *Civil Rights Cases* gives an affirmative answer to the latter question, events surrounding the end of Reconstruction and its aftermath may be more revealing.

Under the national compromise reached in 1877, “[t]he South agreed to cooperate with the election of [Rutherford B.] Hayes; [and] the North agreed to abandon its reconstruction aims and to renounce any further role in protecting and enforcing the rights of the freedman.”²⁴⁴ During the critical weeks before the compromise, Congress established the Electoral Commission to decide disputed returns. Included on the Commission were four Supreme Court Justices empowered to choose a fifth. Bradley was selected, becoming the fifteenth member of the Commission. “By a straight party vote, 8 [Republicans] - 7 [Democrats], the electoral votes of [the disputed returns in Florida, Louisiana, Oregon, and South Carolina] were awarded to the Republicans,” securing the presidency for Hayes “by a single [electoral] vote—185 - 184.”²⁴⁵ Questions about Bradley’s integrity on this issue²⁴⁶ were entwined with doubts as to his independence on the court.²⁴⁷ The collaboration between Chief Justice Waite and Justice Bradley has been examined for its possible taint of political expediency: the Chief Justice’s choice of Bradley for the Commission because he would “rubber stamp the sectional compromise.”²⁴⁸ If, as has been theorized, Chief Justice Waite engineered Bradley’s selection to the Electoral Commission with the understanding that Bradley would act on behalf of Rutherford Hayes, consequences at the executive level were predictable—Hayes would be elected; consequences for the Supreme Court were intimated—Bradley would acquiesce in

243. See *id.* at 559 (“*Ordinary* crimes, then, would be tried and punished in state courts, but crimes due to ‘the war of race’ would be tried and punished by federal authority.”).

244. *Id.* at 565. The “economic basis” often put forth as the impetus for the Compromise of 1877 is rooted in the federal subsidy that was to be appropriated for the building of the Texas and Pacific Railroad and improvements to southern infrastructures. Although Congress did not authorize the subsidy, Rutherford Hayes was elected nonetheless and proceeded to withdraw federal troops throughout the South with a consequent rise in violence. LOGAN, *supra* note 51, at 23-29.

245. Scott, *supra* note 242, at 565-66.

246. See *id.* at 566. The charge by Democrats against the Republican Bradley was vote selling: his election to the Commission and the resulting Republican victory—despite the tallying of votes from three southern states—was too facile a coincidence. *Id.*

247. *Id.*

248. *Id.* at 567.

the compromise by retreating from his reconstruction positions.²⁴⁹ Regardless of impulse, the Supreme Court declined to recognize federal authority in protecting the rights of persons of color. What remained was an unenforceable amendment glorifying the citizenship of persons recently enslaved. The legislation that Congress had produced over nearly a decade could find no objective beyond its own temporary existence. It was the legislation alone that “represented the post-war apex in federal accounting for civil rights.”²⁵⁰

3. State Court Action and Federal Validation

Is it possible that by the 1880s a tolerance in southern states for the exercise of rights by persons of color materialized which warranted the voiding of enforcement legislation? All evidence refutes this notion. Law enforcement officers, often intimidated or corrupted, were ineffectual in protecting the rights of black persons.²⁵¹ Labor, trade, and property constraints precluded or retarded the acquisition and enjoyment of wealth for most people of African descent. Neither personal security nor proprietary rights matters, which may have been litigated by blacks (but probably were not), were subjects for judicial review. This absence of scrutiny confirms the durability of the strained reality faced by persons of color in the South.

State judiciaries did nothing to upset the intrinsic inequality of southern society. The few instances of deference to the spirit and letter of the Fourteenth and Fifteenth Amendments were exceptions. One such anomaly is *Burns v. State*.²⁵² Arising out of an Alabama conviction for “solemnizing the rites of matrimony between a white person and a negro,”²⁵³ the case cited the Civil Rights Act of 1866 and the Fourteenth Amendment. The court found these justifiable grounds, consistent with the state constitution, for overturning the conviction.²⁵⁴ In a confident voice, the court observed:

249. See *id.* at 566-68. A reading of Chief Justice Waite’s papers disclosed the control he exerted over the court and his close relationship with Justice Bradley. Before selection of Bradley to the Commission—an assignment “made under Waite’s direction”—the Chief Justice considered a request not to appoint another Justice whose sentiments lay with Rutherford Hayes’s opponent. *Id.* After Hayes’s inauguration “a contradiction still remained to be resolved—the contradiction between the *actuality* of federal power as created by the Wartime Amendments and pursuant legislations, and the political imperative to dismantle this threat to states’ rights.” *Id.* at 568.

250. LIVELY, *supra* note 29, at 54-55.

251. See *supra* notes 151-61 and accompanying text.

252. 48 Ala. 195 (1872).

253. *Id.* at 196.

254. *Id.* at 198-99.

The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible. The very excess to which such a construction would lead is conclusive against it.²⁵⁵

In December of 1877, with the end of Reconstruction, the Alabama Supreme Court expressly overruled *Burns* in *Green v. State*.²⁵⁶ Berating the earlier court for its misinterpretation of a state statute that, so the later argument went, *did* preserve equality, the *Green* court said:

What the law declares to be a punishable offense, is, marriage *between* a white person and a negro. And it no more tolerates it in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent.²⁵⁷

As for the “so-called ‘civil rights act,’” the court noted that the northern representatives who voted for it came from states with laws similar to that under review. The Act’s failure to mention intermarriage led to the “presumption” that it did not accord greater rights to persons of color in the North than they already had.²⁵⁸

This was a shrewder move than Kentucky’s highest court had made in *Bowlin*,²⁵⁹ an outright protest against Fourteenth Amendment incursion. The *Green* court feigned compliance with a constitutional directive by a pretextual conformity with Congress’ electorate.

In the same year that the Supreme Court decided the *Civil Rights Cases*, it reviewed another Alabama case on a related topic: the constitutionality of an Alabama statute penalizing adultery between a white person and a person of color.²⁶⁰ The Court upheld the penalty with an argument that mirrored the language in *Green*. Alabama’s statute did not discriminate against either race because the same punishment was to be applied to both parties. A different *level* of punishment conditioned on whether the parties were of the same race or not

255. *Id.* at 197.

256. 58 Ala. 190 (1877).

257. *Id.* at 192.

258. *Id.* at 192-93.

259. See *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5 (1867).

260. *Pace v. Alabama*, 106 U.S. 584 (1883).

was "directed against the offense designated and not against the person of any particular color or race."²⁶¹

What little state appellate courts had done—albeit during Reconstruction—to broaden the range of rights for persons of color, the Supreme Court lent its might to remove that margin.

B. *Intimations of Redress for Mob Violence*

In the opening decade of the next century, the United States Circuit Court of Alabama declined to construe the Fourteenth Amendment as authorizing a federal prohibition against individual lawlessness.²⁶² While this act is unremarkable, the circuit court in *United States v. Powell*, a 1907 opinion, developed a singular line of reasoning that carved the beginnings of a ledge on which a fullblown state action by state inaction argument might someday stand. The defendant had been indicted for conspiracy "to injure, threaten, oppress, and intimidate" Horace Maples, a person of color, who had been arrested on a murder charge.²⁶³ The defendant was part of a lynch mob that took Maples from the Huntsville sheriff's custody and hanged him in the courthouse yard.²⁶⁴ Among other things, the defendant argued that the indictment did not show a "violat[ion of] any right, privilege, or immunity secured to Maples, under the Constitution or laws of the United States, or that any federal law had been violated."²⁶⁵

There were two components to the court's framing of the issue:

[W]hether a citizen lawfully held in the custody of the state, awaiting trial on a charge of crime, has any right or immunity, which Congress can protect under the fourteenth amendment, against lawless violence of private individuals, *which prevents, and is designed to prevent, the state from affording the accused, when it endeavors to do so, the benefit of a trial* according to the 'law of the land,' by the administration of the state's established course of judicial procedure.²⁶⁶

Distinguishing between negative and positive duties of the state, the court disposed straightforwardly of the first kind in the context of

261. *Id.* at 585. *But see Ex Parte Commonwealth of Virginia*, 100 U.S. 339, 347 (1879) ("Such legislation must act upon persons, not upon the abstract thing denominated a State . . ."). During the 1880s, some northern states, notably Pennsylvania, made judicial and legislative pronouncements against discrimination although within the narrow scope of public accommodations. See David McBride, *Mid-Atlantic State Courts and the Struggle with the "Separate but Equal" Doctrine: 1880-1939*, 17 RUTGERS L.J. 569 (1986).

262. *United States v. Powell*, 151 F. 648 (C.C.N.D. Ala. 1907), *aff'd*, 212 U.S. 564 (1909).

263. *Id.* at 649.

264. *Id.*

265. *Id.* at 650.

266. *Id.* (emphasis added).

equal protection. A negative duty required a state "not to do wrong, not to grant rights and privileges to one person, while denying them under the same circumstances to others."²⁶⁷ When a state is under this duty, a citizen has equal protection of laws and "it is impossible for private individuals to impair, in the constitutional sense, the enjoyment of the right" to such protection.²⁶⁸ Under this view, any act of terror or outrage, so long as it has no connection to the state or its agents, could not amount to a violation of rights secured under the Fourteenth Amendment. This had been, and would continue to be, the conventional approach to violence by private individuals or combinations of private individuals. But the *Powell* court added a feature that would link private individuals to the state. Corresponding to the second element of the issue, a positive duty on the state required it to "afford the prisoner the due administration of its 'established course of judicial procedure.'"²⁶⁹ Once the state had initiated its criminal justice procedures by taking an accused into custody, "[i]t must safely keep and protect him in prison, until it can give him the opportunity, as well as the right, to appear before its tribunal."²⁷⁰ Presuming that the framers of the Fourteenth Amendment were fully aware of mob violence and the taking of black prisoners, the court extended this premise: "[W]hat just foundation is there for holding that [the amendment's] framers intended that the attempt and failure of the state to fully perform these duties . . . should deprive Congress of all power to deal with private individuals, who designedly cause such failure?"²⁷¹

The court found no conflict between its position and that of the Supreme Court in either the *Slaughter-House Cases* or the *Civil Rights Cases*. Far from "degrad[ing] state governments by subjecting them to the control of Congress,"²⁷² it would recognize the power of Congress in a way not amounting to "'affirmative' enforcement of the right, since it is not usurpation or invasion of state power or state law."²⁷³ The federal legislation under which the indictment was brought did not violate the Constitution.

The court's analysis, however, was dictum. *Hodges v. United States*²⁷⁴ had been submitted to the Supreme Court during the same

267. *Id.* at 653.

268. *Id.*

269. *Id.* at 654.

270. *Id.*

271. *Id.* at 656.

272. *Id.* at 657.

273. *Id.* at 658.

274. 203 U.S. 1 (1906).

term as *Riggins v. United States*,²⁷⁵ which was the appeal of Powell's co-defendant. Both cases were decided before *Powell*. The *Riggins* trial, from which Powell had obtained a severance, upheld counts of an indictment charging Thirteenth and Fourteenth Amendment violations.²⁷⁶ On appeal, the Supreme Court in *Riggins* quashed a writ of habeas corpus on a procedural ground, without examining any constitutional issue. That Court's actions in *Hodges* were more significant. The primary issue in *Hodges* was whether a mob that had threatened several persons of African descent in their employment had violated their Thirteenth Amendment rights; secondarily, it considered if the indictment, founded on legislation pursuant to the Fourteenth Amendment, was sustainable.²⁷⁷ The Court held that since no violation of the Thirteenth Amendment had occurred, the protection of citizens rested solely with the state. On that basis, the federal courts "had no jurisdiction of the wrong charged in the indictment."²⁷⁸ The Court did not address constitutional issues beyond the Thirteenth Amendment question.

The circuit court in *Powell* might, therefore, have applied its analysis to the outcome in view of the Supreme Court's failure to illuminate its Fourteenth Amendment reasoning in *Hodges* beyond a citing of the Tenth Amendment and the *Slaughter-House Cases*. Acknowledging that no precedent barred its interpretation, the court in *Powell* observed, "After a very careful search of the decisions of the Supreme Court, not one can be found in which the precise question here was involved"²⁷⁹ Instead, however, the court deferred, stating:

While there may be doubt as to what it intended [in *Hodges*], the Supreme Court is the only court which can properly solve that doubt. If this court solves its own doubts as to the meaning of the Supreme Court against the defendant, and puts him to trial, and it turns out that this court is mistaken, it will inflict needless hardship upon the defendant, and put the government to much useless expense.²⁸⁰

On the authority of *Hodges*, the court held:

that no right, privilege, or immunity in respect of due process, at any stage in the duty of affording it, arises under the fourteenth amendment, unless there be denial of the right by the state or its officers,

275. 199 U.S. 547 (1905).

276. *Ex Parte Riggins*, 134 F. 404 (C.C.N.D. Ala. 1904), *rev'd*, 199 U.S. 547 (1905).

277. *Hodges*, 203 U.S. at 15.

278. *Id.* at 20.

279. *United States v. Powell*, 151 F. 648, 651 (C.C.N.D. Ala. 1907), *aff'd*, 212 U.S. 564 (1909).

280. *Id.* at 663.

and that no immunity whatever is secured under the Constitution or laws, in a case . . . against lawlessness of private individuals which frustrates the states's efforts to perform its constitutional duty, although thereby all enjoyment of the benefits of due process be prevented.²⁸¹

Powell was affirmed without opinion on appeal to the Supreme Court.²⁸² The same year as the high court's affirmation of *Powell*, it rendered a decision suggestive of the spirit of the Alabama Circuit Court's reasoning when it demonstrated a willingness to hold accountable state agents who would passively condone a lynching.²⁸³

No court of this era would definitively confront the problem of individual or mob violence against persons of African descent, former slaves and free, assaulted outside the bounds of an official structure. The organized terror of the late 1860s and 1870s, which was abetted by complicit sheriffs and deputies, and evasive judicial machinery, left an area rife with bigotry in all its manifestations.

CONCLUSION

Can facts and events serve as an inverse telescope giving one explanation for and one perspective on the sometimes nonexistent, always unsure foothold persons of African descent attempted in the living of their lives and the enjoyment of their possessions following the Civil War? Can one conclude that a climate of oversight and ambiguity, of reluctance or ineptitude in restraining abusive conduct, demonstrates the failure of a collective, regional, ultimately national intent to proceed toward a meaningful, if not a more perfect, union? The Civil War generated a patchwork of entities and policies purporting to establish rights for the newly freed, as well as to solidify or confirm the rights of previously free persons of color. But the hostility of a mostly vengeful white South, and the frailty of reconstructed governing bodies put the lie to any genuine promises of opportunity, much less equality.

State courts defied and circumvented executive and constitutional decrees; legislatures enacted measures or applied existing rules to dominate the least privileged racial category; enforcement officers coluded with or shrank from the most privileged racial segment in its perpetuation of violence; federal courts rejected the incremental efforts of constitutionally-inspired legislation to recognize indistinct yet

281. *Id.* at 664.

282. 212 U.S. 564 (1909).

283. *See United States v. Shipp*, 214 U.S. 386 (1909).

comprehensible civil rights. While the North, with its innumerable contradictions, was never irreproachable in its treatment of blacks during that epoch, it had taken a stand in the matter of slavery²⁸⁴ and had permitted an intensity of dialogue in a way the South would not have tolerated.

The Emancipation Proclamation and the Thirteenth and Fourteenth Amendments were like a freshly-kilned receptacle symbolizing freedom. Removed from its base and tested for soundness, it broke apart and remained so for generations until courts, legislatures, and, more fundamentally, attitudes began to apply the glue that has reassembled it to its current state—fault lines still perceptible.

284. See, e.g., *Lemmon v. People*, 20 N.Y. 562 (1860) (upholding a statute declaring free any slave introduced into the state while in transit with the consent of that person's owner); an appeal of *Lemmon* to the Supreme Court might have had disastrous results for the North. The Civil War's intervention prevented the high court from reprising its *Dred Scott* holding or a variation with the consequence of "some form of slavery in the North." PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 322-23 (1981).

