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THE ENFORCEABILITY AFTER EMANCIPATION OF DEBTS CONTRACTED FOR THE PURCHASE OF SLAVES

Andrew Kull*

INTRODUCTION

What should be the effect of the abolition of slavery on outstanding debts for the purchase of slaves? The question, intensely controversial during a brief period of Reconstruction, gave rise to an intricate final chapter in the American law of slavery. Viewing the problem first as a matter of commercial law, courts in every southern state but one held that emancipation had no effect on debts for slaves. The United States Supreme Court took the same view. When six former slave states enacted constitutions and ordinances barring the enforcement of contracts for “slave consideration,” four of the five state courts that passed on the question held that such prohibitions violated the federal Constitution, being state laws “impairing the obligation of contracts.” Again the United States Supreme Court agreed. Of the few modern commentators who have noticed this old controversy, most see in the courts’ reaction a grudging attitude toward the scope of the Thirteenth Amendment and the work of Reconstruction.1

The question was inevitably more complex. The immediate controversy in each case, after all, was not between slavery and freedom, but between two former slaveholders. One was a debtor, the other a

* Professor of Law, Emory University. The author has profited from the generous comments and helpful suggestions of Michael A. Bellesiles, John F. Burleigh, Richard Epstein, Paul Finkelman, George Fredrickson, Robert W. Gordon, Ariela Gross, Richard W. Hulbert, Richard S. Kay, and Richard H. Kilbourne, Jr.

1. For Professors Hyman and Wiecek, the fact that any judges at all blessed the slave contracts gave credence to arguments that no revolution in federalism had occurred by reason of the Thirteenth Amendment; that the Constitution’s contract clause took precedence over the Bill of Rights and the Thirteenth Amendment; and that the Civil Rights and Freedmen’s Bureau laws had limited impacts.

HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 428 (1982). Professor Soifer similarly sees in these decisions a “use of everyday legal doctrines to confine or reject the freedom guaranteed in the thirteenth amendment.” Aviam Soifer, Reviewing Legal Fictions, 20 GA. L. REV. 871, 890 (1986). Richard Kilbourne makes the very different observation that in Louisiana, whose Reconstruction-era courts were the first to refuse to enforce promissory notes given for slaves, “The supreme court’s largely unenounced policy was to preserve the plantation as the basic unit of production in the hands of its prewar owner.” RICHARD H. KILBOURNE, JR., DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA 1825-1885, at 9 (1995).
creditor; one a buyer, the other a seller of slaves at the twilight of the institution of slavery. The decision whether to enforce a promissory note given for slaves may possibly have obliged courts to pass retrospective judgment on a legal regime that permitted property in human beings, though whether it had this significance in the view of contemporaries depended very much upon the observer. What was unmistakable was that a refusal to enforce the note reversed the transaction between the last buyer and the last seller, back-dating the effective date of freedom so as to shift the loss from the party who had lost by emancipation to the party who had thought to escape its effects. Southerners who debated the status of slave contracts were acutely aware of this relationship; among the reasons for the broad movement to prohibit the enforcement of slave contracts, a determination to favor buyers over sellers in the last slave transactions was probably as significant as the impulse to pass judgment on a former state of things. Two very different reasons for doing the same thing appealed, predictably, to two very different groups.

The first part of the following discussion introduces the different strands of the "slave consideration" controversy and explains how it turned out. The second part summarizes the arguments that were advanced on either side of the enforceability issue—in the courts, in state constitutional conventions, and (briefly) in the United States Congress. The final section suggests the range of motivations that lay behind the impulse to deny enforcement of debts for slaves.

I. WHAT THEY DID

The abolition of slavery left many former slaveholders deeply indebted for the purchase of property they no longer owned. Those who were sued on notes given for slaves prior to emancipation responded that obligations of this character should no longer be enforceable. Title to the property had failed—so ran the usual defense—resulting in a breach of the seller's warranty and a failure of consideration. Arguments along these lines, framed in terms of the law of sales, were considered by courts in every state of the former Confederacy, in several border states, and by the United States Supreme Court; they were rejected in every jurisdiction save Louisiana. The standard answer to the buyer's plea was that a debt,

2. The following are the principal decisions in the several jurisdictions. (Unless otherwise indicated, each holds slave debts fully enforceable.)

Alabama: McElvain v. Mudd, 44 Ala. 48 (1870); Fitzpatrick v. Hearne, 44 Ala. 171 (1870).
arising from a sale that was legal and valid when and where it was made, was not rendered unenforceable by a supervening change in the law governing the subject matter of the sale; that destruction of property in slaves by emancipation was a risk that passed with the title, comparable to the risk of loss by illness, casualty, or escape; and that, as buyers and sellers alike fully appreciated these risks, they set their prices and took their chances accordingly.\(^3\)

The question of enforcing "slave contracts" was not confined to courtrooms. During the winter and spring of 1867-1868, constitutional conventions assembled in ten of the eleven states of the former Confederacy. The convention delegates had been elected under military supervision, in obedience to the command of the Reconstruction Act, by the male citizens of each state "of whatever race, color, or previous condition . . . except such as may be disfranchised for participation in the rebellion."\(^4\) The inclusion of black voters, the exclusion of anyone who would not take a congressionally prescribed loyalty oath, and the initial determination of many white conservatives to boycott the entire process, produced conventions radically unlike the bodies that had written the earlier constitutions of the southern states. Their membership was composed largely of northern "carpetbaggers" (both black


Florida: Walker v. Gatlin, 12 Fla. 9 (1867); McNealy v. Gregory, 13 Fla. 417 (1870).


Mississippi: Bradford v. Jenkins, 41 Miss. 328 (1867).

Missouri: Phillips v. Evans, 38 Mo. 305 (1866).

North Carolina: Harrell v. Watson, 63 N.C. 454 (1869); West v. Hall, 64 N.C. 43 (1870).

South Carolina: Calhoun v. Calhoun, 2 S.C. 283 (1870).

Tennesee: Young v. Thompson, 42 Tenn. (2 Cold.) 596 (1865); Curd v. Bonner, 44 Tenn. (4 Cold.) 632 (1867); Lewis v. Woodfolk, 61 Tenn. 25 (1872).

Texas: The Emancipation Proclamation Cases (Hall v. Keese), 31 Tex. 504 (1868).

Virginia: Scott's Ex'x v. Scott, 59 Va. (18 Gratt.) 150 (1868).


3. The arguments on either side of the enforcement question are more fully discussed in Part II of this article. See infra pp. 507-22.

4. Reconstruction Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429. (Tennessee, alone among the former confederate states, had already been readmitted to representation in Congress.) Detailed instructions for conducting the elections of convention delegates were set forth in the Supplementary Reconstruction Act of Mar. 23, 1867, ch. 6, 15 Stat. 2.
and white); white southern "scalawags"; and those southerners who, whether free blacks or slaves, had until then been disfranchised altogether. Politically as well as racially, the Reconstruction conventions had no parallel among lawmaking bodies previously assembled anywhere in the country. The question whether to enforce debts originating in the hire or purchase of slaves was presented for consideration in all ten of the Reconstruction conventions; six of the ten acted to prohibit enforcement. The new constitutions of Arkansas, Florida, Georgia, Louisiana, and South Carolina contained provisions denying the enforceability of slave contracts, while Alabama's constitutional convention enacted an ordinance to the same effect.5

The question of slave contracts was not treated by the conventions in isolation, as involving only the issues peculiar to slavery and its abolition. Rather, the enforceability of such debts was part of a broader debate over debt relief generally. "Relief" was the issue that, more than any other, preoccupied the delegates' deliberations and their political calculations. The variety of relief measures undertaken by the conventions included constitutional provisions for homestead allowances (making real and personal property to a specified value immune from execution); the abolition of imprisonment for debt; the passage of "stay laws" suspending for a stated time actions for debt and the execution of judgments, or else (depending on the convention's conception of its legislative authority) petitions to the military authorities requesting that they promulgate orders to the same effect; and the "scaling" or downward adjustment of debts contracted in confederate currency. The most ambitious plans called for an across-the-board reduction or forgiveness of private debts contracted prior to a specified date, with exceptions for certain favored categories of obligations, such as wages.6 Proposals to prohibit the enforcement of slave contracts were usually presented as relief measures—though a species of relief, assuredly, to which special considerations attached.

Prohibitions limited to slave contracts fared much better in the conventions than did the more radical debt relief program. Of the five state constitutions of 1868 that mention debts for slaves, four (Arkans-
sas, Florida, Louisiana, and South Carolina) contain freestanding provisions relating to slave contracts and no general limitation, apart from the homestead, on the enforceability of other debts. Georgia's proposed constitution, by contrast, included as its most controversial provision a blanket nullification of most debts contracted prior to June 1, 1865. In the course of extended convention debate on the issue of relief generally, a specific ban on the enforcement of debts for the purchase or hire of slaves was appended as a proviso to Georgia's broader relief article, by means of a floor amendment accepted without a vote and (judging by the silence of newspaper reports) without sustained discussion. 7

To the extent that any of these relief measures involved the nullification of existing indebtedness or the security therefor, they were open to the objection that such action violated the federal constitutional prohibition of state laws impairing the obligation of contracts. 8

In Georgia, and to a lesser extent in other states, debate over the constitutionality of a bar to enforcement of slave debts was commonly subsumed within the broader question of the constitutionality of relief measures in general; but there is no doubt that limitations on slave contracts were understood to raise squarely the constitutional issue. 9

The federal constitutional objection to relief or "repudiation," as opponents called it, was already being debated before the conventions met, in the election campaigns of some of the delegates; 10 it was a principal theme of opposition to relief during the conventions them-

7. The pertinent section of Georgia's 1868 constitution, as originally proposed and ratified, is set forth in the Appendix. See infra app. pp. 534-35. For the addition of the "slave consideration" proviso (on the motion of Isaac Seeley, carpetbagger and native of New York), see JOURNAL OF THE PROCEEDINGS OF THE GEORGIA CONSTITUTIONAL CONVENTION 233 (1868) [hereinafter GEORGIA CONSTITUTIONAL CONVENTION] (proceedings of Feb. 4, 1868).


9. Thus when the Judiciary Committee of Virginia's constitutional convention reported unfavorably on a resolution nullifying debts for slaves, it placed its objections primarily on constitutional grounds. See infra app. p. 537.

10. Addressing local voters in the days preceding the election, the foremost opponent of relief in the Georgia convention, Amos T. Akerman of Elbert County, had written that "much of this hope of relief is stimulated by ambitious men who are deceiving the people with promises that never can be fulfilled, well knowing that the judiciary will overturn their work." Letter dated Oct. 9, 1867, reprinted in DAILY INTELLIGENCER (Atlanta), Dec. 13, 1867, at 2, cols. 1-2. Akerman, born in 1821 in Portsmouth, New Hampshire, moved south in 1842: first a school teacher, he later studied and practiced law, settling in Elberton, Georgia. Akerman served as President Grant's Attorney General in 1870-1871, launching a vigorous prosecution of Ku Klux Klan violence before his abrupt dismissal amid a controversy over railroad land grants. See William S. McFeely, AMOS T. AKERMAN: THE LAWYER AND RACIAL JUSTICE, IN REGION, RACE, AND RECONSTRUCTION 395 (J. Morgan Kousser & James M. McPherson eds., 1982).
selves. In Georgia, where the proposed scope of relief was the most ambitious, its constitutionality became one of the dominant issues in the post-convention debate over ratification.

All parties in Georgia made the same blunt assessment of the significance of the relief section to the prospects of a proposed constitution that (in obedience to the requirements of Congress) contained no racial restrictions on the elective franchise. Relief was the "one redeeming feature" for "many men who feel but very little interest in the Constitution we may frame... men who are gentlemen, whole-souled and honest, who have some prejudice against extending privileges to colored men." It was, in other words, "a sugar-coated pill to assist degenerate Georgians in swallowing the bitter dose of Universal Suffrage." Opponents derided the "relief swindle," charging that Radicals felt free to "put as much 'Relief' in as you please to get votes," knowing that either Congress or the courts "would have to knock it out."

Rebutting the charge, former governor Joseph E. Brown—éminence grise of Georgia's Republican party and the leading spokesman for ratification—argued that relief was secure because the question of its constitutionality could never reach the courts:

It is said the measure is unconstitutional, and will be set aside by the courts... But how are the courts to get at it? The Constitution gives no court in the State jurisdiction of the question. How is a Judge to try a case of which he has no jurisdiction?

... But it is said the Constitution of the United States forbids any State to impair the obligation of a contract. This is true, but it does

11. See, e.g., Debates and Proceedings of the Virginia Constitutional Convention 496-98 (1868) [hereinafter Virginia Constitutional Convention] (report of the Judiciary Committee); Georgia Constitutional Convention, supra note 7, at 205-06 (minority report of the Committee on Relief).

12. W. L. Goodwin of Bartow County, addressing the Georgia convention (Jan. 31, 1868), Daily New Era (Atlanta), Feb. 2, 1868, at 2, col. 5. Later in the year, during the Senate debate on the Omnibus Bill, John Sherman of Ohio referred to the widespread perception that "without what is called the relief clause in the constitution of Georgia, that constitution would probably have failed." Cong. Globe, 40th Cong., 2d Sess. 2968 (June 9, 1868).


14. Speech of Benjamin H. Hill in Atlanta, March 10, 1868, in Daily New Era (Atlanta), Mar. 13, 1868, at 2, cols. 6-7. After Congress had in fact deleted most of the relief section from the Georgia constitution, the Milledgeville Federal Union celebrated the fact in a gloating editorial:

This must be humiliating to those white men who voted for the whole catalogue of abominations called a Constitution, for the sake of avoiding the payment of their honest debts. They literally sold their birthright for a mess of pottage, and now they will be cheated out of their pottage. Well, they have nobody to blame but themselves. We told you how it would be. We told you over and over again that the Radicals in Congress could not and dare not sanction repudiation. Federal Union (Milledgeville, Georgia), June 9, 1868, at 2, col. 1.
not compel any State to form Courts with jurisdiction to enforce contracts.¹⁵

The Reconstruction Act required that the new constitutions be ratified by referendum in each state, then submitted to Congress for approval. Alone among the proposed constitutions, Georgia's attracted unfavorable attention and revision at the hands of Congress. The troublesome provision, not surprisingly, was the aggressive treatment of debt relief. Debate over Georgia's relief provisions obliged Congress to pay some glancing attention to the question of slave contracts, but the references to the subject in the Congressional Globe are just enough to make it plain that Congress was not deeply interested.

The "Omnibus Bill" for the readmission of North Carolina, South Carolina, Louisiana, Georgia, and Alabama under their newly framed constitutions came before the House in mid-May, during the last days of the presidential impeachment trial in the Senate. Thaddeus Stevens of Pennsylvania promptly offered "an amendment to the constitution of Georgia" to limit the effect of the relief provisions:

_And be it further enacted_, That the provisions of section seventeen, article five of the constitution of Georgia shall not apply to a debt due to any person who, during the whole time of the rebellion, was loyal to the United States and opposed to secession.¹⁶

Stevens was receiving letters from unhappy creditors in Georgia, urging him not to approve the constitution with debt relief intact: his correspondents assured him that Georgia's creditors were predominantly loyal men, while her debtors were overwhelmingly rebels.¹⁷

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¹⁵. Speech of Joseph E. Brown at Marietta, Georgia (Mar. 18, 1868), _in Daily New Era_ (Atlanta), Mar. 24, 1868, at 2, cols. 2-3. Other proponents of relief refused to be detained by such legalisms. "Shall we heed their cry of unconstitutional," demanded W. L. Goodwin, when any relief measure is offered for their consideration? No, never, never will I shape my course in this matter to suit the wishes of a few avaricious money thirsty individuals, who, without the slightest remorse of conscience, would willingly see every debtor of our State hurled down into the dark, yawning abyss of financial ruin, lost beyond the possibility of redemption; with his family beggard and set adrift on the charities of this cold, bleak world.

_daily new era_ (Atlanta), Feb. 2, 1868, at 2, col. 6.


¹⁷. Three letters to this effect survive from May 1868, though all are dated subsequent to Stevens's introduction of his amendment. B. M. Long & J. W. Stewart to Stevens & W. D. Kelly [William D. Kelley of Pennsylvania] (May 15, 1868); E. H. L. Keister to Stevens (May 18, 1868); Jno. McK. Gunn to Stevens (May 26, 1868); all in Stevens Papers, Library of Congress. Long and Stewart, of Carrollton, Georgia, explained the preponderance of loyal creditors by the fact that:

Such men and only such refused Confederate currency for debts contracted before the war and because of their opposition to secession and refusing to receive Confederate currency many were forced to leave their homes or be insulted and in danger of mobs—We claim to have been of this number. But now when repudiation is inserted in the constitution of our state in order to catch secession votes and almost every other question is lost sight of with the white voters—the argument used for ratification and repu-
amendment—exempting loyal creditors from Georgia's debt relief—
was actually passed by the House, notwithstanding its evident diffi-
culty of application. By the first week in June, however, when the
Omnibus Bill was introduced in the Senate, the Republican Conven-
tion in Chicago had adopted a platform denouncing "all forms of re-
pudiation as a national crime."  

Georgians were not the only observers to see a contradiction between the Republican platform and the Republican program of relief for Georgia. The Senate Judiciary Committee thought it advisable to delete the whole of Georgia's debt relief section, leaving only the proviso applying to debts contracted for the sale or hire of slaves. The Omnibus Bill was amended accordingly, and Georgia's 1868 constitution received its final form—in which only slave debts were nullified—at the hands of the United States Congress.

The Republican leadership in the Senate took the position that Georgia's relief clause was "palpably unconstitutional," being a direct impairment of the obligation of contracts. But what then of the proviso left standing in Georgia—and the parallel provisions in the constitutions of four other states—barring enforcement of debts for slaves? The question was briefly addressed. One Republican senator, George Williams of Oregon, asked why the extinction of debts for slaves was any less an impairment of contract than the rest of the clause. George Edmunds of Vermont replied simply that "There we stand on the higher law." Williams persisted: "If the contract was legal and valid at the time it was made, and the proviso undertakes to abolish the contract, does it not impair its obligation?" Oliver P. Morton, former Republican governor of Indiana, offered an answer that seems to have satisfied most of the members:

diation was, "That the Patriots during the war took confederate money and only Tories would lose by repudiation."

Stevens Papers, supra.

18. EDWARD MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES 364 (1871).

19. See FEDERAL UNION (Milledgeville, Georgia), May 26, 1868, at 2, col. 1 ("They de-
nounced repudiation as a crime. The pivot on which the Georgia Constitution turned was repu-
diation"). Jno. McK. Gunn, proprietor of a collection agency in Cuthbert, Georgia, wrote to reproach Thaddeus Stevens that "the repudiation clause ... will not seem consistent with the platform Genl. Grant is nominated on." Gunn to Stevens, supra note 17. During debate on the clause in the Senate, Oliver P. Morton of Indiana said of Georgia's attempt at relief that "dis-
guise this as we will, it is simply repudiation. ... [W]e cannot and dare not give it our indorsement ... I ask how the Republican party, the party of good faith, would be paralyzed if it should dare to justify the State of Georgia in repudiating honest debts ... ."

CONG. GLOBE, 40th Cong., 2d Sess. 2970 (June 9, 1868).

20. CONG. GLOBE, 40th Cong., 2d Sess. 2858-59 (June 5, 1868).

21. Id. at 2969 (June 9, 1868) (Lyman Trumbull of Illinois).
I am not disposed to argue the question in regard to slave property. It may, in one sense, impair the obligation. I mean to say, however, that contracts of that kind are held... to stand upon a different obligation, a different footing morally, and perhaps legally, from contracts of any other kind. Slave property was swept away; those owning slaves lost them; and it was perhaps just as proper that those owning choses in action, debts, promissory notes, and bills of exchange given for slaves should lose them, also.\(^{22}\)

These—as we shall see—were standard arguments on the merits of enforcement, not on the constitutionality of a legislative prohibition. Congress was evidently prepared to leave the latter question to the courts.

The judicial response was clear. State supreme courts in four of the six states that attempted to prohibit the enforcement of slave contracts found such measures unconstitutional.\(^{23}\) The supreme court of Louisiana declined to rule on the constitutionality of that state’s constitutional prohibition: slave contracts were already unenforceable in Louisiana as a matter of contract law, so that a constitutional provision to the same effect was superfluous.\(^{24}\) Only the Georgia Supreme Court—where the champion of repudiation, former governor Joseph E. Brown, now sat as Chief Justice—held that a constitutional provision nullifying slave debts might escape the prohibition of the federal contracts clause.\(^{25}\) During the ratification campaign of 1868, Brown had argued that a state did not impair the obligation of contracts if it simply failed to create courts with jurisdiction to enforce them.\(^{26}\) In *Shorter v. Cobb*, Brown stressed a different argument: that Georgia’s nullification of obligations for slaves (assuming it impaired them) was outside the reach of the federal contracts clause. When Georgia adopted her 1868 constitution, Georgia had been out of the Union and was therefore not subject to the constitutional limitations on “states.” Moreover, Georgia’s 1868 constitution had been “dictated by Congress, as the representative of the conqueror”; it was “sanctioned” by Congress with the slave proviso intact; and Congress was free, as the states were not, to impair the obligation of contracts as it chose.\(^{27}\)

\(^{22}\) *Id.* at 2999, 3005 (June 10, 1868).

\(^{23}\) For the disposition of this question in Alabama, Arkansas, Florida, and South Carolina, see *infra* app. pp. 533-37.

\(^{24}\) Dranguet v. Rost, 21 La. Ann. 538 (1869).


\(^{26}\) *See supra* text accompanying note 15.

\(^{27}\) *Shorter*, 39 Ga. at 287-94, 303-04.
A different and possibly more attractive argument for the constitutionality of the state prohibitions appears in the one federal case refusing to enforce a debt for the purchase of slaves. The circuit court opinion in Osborn v. Nicholson\(^2\) relied primarily on natural law and public policy in denying enforcement, but it found further authority in the provision of the Arkansas Constitution declaring such contracts "null and void.” Defending the legitimacy of state prohibition under the federal contracts clause, Judge Henry C. Caldwell\(^2\) suggested that the Thirteenth and Fourteenth Amendments to the Constitution had necessarily qualified the contracts clause insofar as the latter protected contracts whose execution presumed the existence of slavery. Assume a debt, said Caldwell, secured by a mortgage on slaves; or a contract for the sale of slaves at a future date; or a note, payable in slaves. The obligation of contracts in all these cases is obviously impaired by emancipation, yet we would not think for that reason that provisions of state constitutions declaring the abolition of slavery were void under the contracts clause.\(^3\) The weakness of Caldwell's analogies is evident: where creditors sought the payment of a money obligation, contractual performance was not dependent on the continued existence of slavery. The Thirteenth Amendment could have no bearing on the question unless the enforcement of a slave debt somehow implied the permanence of the institution. In the eyes of some observers, however, this is precisely what it did.

The different strands of the slave-contract problem, complicated by some knotty issues of federal jurisdiction, came together in a quintet of cases decided by the United States Supreme Court, in opinions by Justice Noah Swayne of Ohio, in April 1872.

The first three decisions, announced together on April 1, 1872, turned on the limits of federal jurisdiction to review state court judgments. Palmer v. Marston\(^3\) was a case in which the Louisiana Supreme Court, consistent with its prior course of decision, had refused to enforce a promissory note given for a slave. Counsel for the creditor had argued that the slave-contract provision of Louisiana's 1868 constitution was in violation of the federal Constitution. The

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29. Caldwell, a young lawyer and state legislator from Iowa, commanded an Iowa cavalry regiment at the capture of Little Rock in September 1863. In June 1864, while Caldwell was serving with his regiment in Tennessee, he was appointed federal district judge for the District of Arkansas by President Lincoln. See 1 JOHN HALLUM, BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS 481-88 (1887).
30. Osborn, 18 F. Cas. at 853-54.
31. 81 U.S. (14 Wall.) 10 (1872).
Louisiana court held to its earlier position: while the federal contracts-clause issue might "possess considerable speculative interest," it could not "have a practical influence on the result," inasmuch as the state constitutional prohibition was specifically disavowed as the basis of decision.\textsuperscript{32} The Supreme Court agreed. Because the Louisiana court had based its judgment on "the settled principles of the jurisprudence of the State," and not on any statutory or constitutional enactment that might be found to conflict with the federal Constitution, the state court judgment presented no question susceptible of Supreme Court review. The creditor's writ of error was dismissed for want of jurisdiction.\textsuperscript{33}

In \textit{Jacoway v. Denton}\textsuperscript{34} and \textit{Sevier v. Haskell},\textsuperscript{35} two cases from Arkansas, the state supreme court had held slave debts enforceable on common-law grounds. In both cases, moreover, the state court had considered the effect of Arkansas's 1868 constitution, which declared slave contracts (and judgments thereon) null and void, holding this provision of the new state constitution invalid under the federal contracts clause.\textsuperscript{36} The only question in either case that could have been the basis of federal review was thus the correctness of Arkansas's holding that Arkansas's constitutional provision violated the federal Constitution. But the Judiciary Act of 1789, as amended in 1867, still restricted federal jurisdiction to review state court judgments, in cases of alleged conflict between state and federal laws, to judgments in which the state court had upheld the validity of the state law.\textsuperscript{37} In

\textsuperscript{32} The relevant portion of the Louisiana opinion, which does not appear in the Louisiana Annual Reports, is set forth in the Supreme Court's opinion. \textit{Id.} at 11-12.

\textsuperscript{33} \textit{Id.} at 12. The disposition of \textit{Palmer v. Marston} is fully intelligible only when it is recalled that, by the settled interpretation of the contracts clause, only the enacted law of a state—as opposed to the decisional law made by its judges—was considered to fall within the prohibition of article I, section 10, forbidding a state to "pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I § 10. Were it otherwise,

\begin{quote}
\text{every case of a contract held by the state court not to be binding, for any cause whatever, [could] . . . be brought to this court for review, and we should thus become the court of final resort in all cases of contract where the decisions of state courts were against the validity of the contracts . . . .}
\end{quote}

\text{This, obviously, was not the purpose of the judiciary act. It must be the Constitution, or some law of the state, which impairs the obligation of the contract . . . and the decision of the state court must sustain the law or Constitution of the state in the matter in which the conflict is supposed to exist, or the case for this court does not arise.}


\textsuperscript{34} 154 U.S. 583 (1872).

\textsuperscript{35} 81 U.S. (14 Wall.) 12 (1872).

\textsuperscript{36} Haskell v. Sevier, 25 Ark. 152 (1867), aff'd, 26 Ark. 133 (1870), error dismissed, 81 U.S. (14 Wall.) 12 (1872); Jacoway v. Denton, 25 Ark. 625 (1869).

\textsuperscript{37} Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386.
Jacoway and Sevier, the situation was the reverse. The Supreme Court dismissed the writs of error in both cases for want of jurisdiction.

Three weeks later, on April 22, 1872, the Court finally took up the dual controversy on the merits. White v. Hart, the case in which the Supreme Court addressed the constitutional issue, had been a companion to Shorter v. Cobb, in which the Georgia Supreme Court refused to enforce a debt for slaves on the authority of the slave-contract proviso in Georgia's 1868 constitution and denied that the constitutional prohibition violated the federal contracts clause. No counsel for the debtor appeared in the Supreme Court, "the reliance of that party apparently having been on the argument contained in the opinion given by Brown, C.J., in behalf of the Supreme Court of Georgia." Brown's arguments were now briskly rejected. Georgia had never been out of the Union. (This was something of an oversimplification, but it was an oversimplification the Court had recently agreed to adopt.) More to the point, it would not do to admit that Georgia, "after her rebellion and before her representation was restored," had any more power "to grant a title of nobility, to pass a bill of attainder, an ex post facto law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the Constitution of the United States, than she had before her rebellion began, or after her restoration to her normal position in this Union." The contention that Georgia's constitution "was adopted under the dictation and coercion of Congress, and is the act of Congress, rather than of the State" was "clearly unsound." Nor could Georgia maintain that in denying jurisdiction to enforce a class of contracts there was no impairment of the obligation. "When the contract here in question was entered into, ample remedies existed. All were taken away by the proviso in the new constitution. Not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract." The states could not, consistent with the contracts clause, prohibit the enforcement of debts for slaves.

Finally, Osborn v. Nicholson presented the enforcement question stripped of the constitutional issue, as a matter of federal com-

38. 80 U.S. (13 Wall.) 646 (1872), rev'g 39 Ga. 306 (1869).
40. White, 80 U.S. (13 Wall.) at 647 (reporter's note).
41. See Texas v. White, 74 U.S. (7 Wall.) 700 (1869).
42. White, 80 U.S. (13 Wall.) at 652.
43. Id. at 649.
44. Id. at 654.
45. 80 U.S. (13 Wall.) 654 (1872).
mon law. Judge Caldwell of the Eastern District of Arkansas had held slave contracts unenforceable, emphasizing arguments drawn from natural law, public policy, and the perceived implications of the Thirteenth and Fourteenth Amendments.\textsuperscript{46} Reversing the decision of the lower court, Justice Swayne brought federal common law on this point into accord with the laws of every state except Louisiana. The contract in question, he noted, had been valid when made; with the passage of title to the property, the buyer had assumed the risk of loss from whatever source; observations about the natural law of slavery and freedom did not alter the fact that slavery had existed among us by positive law. “We cannot regard \ldots [the contract] as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place,” wrote Swayne. “Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached.”\textsuperscript{47} As a practical matter, the controversy over slave contracts was essentially over.

Only Chief Justice Salmon P. Chase—whose work in the antislavery cause during the 1840s had earned him the title “Attorney General for Fugitive Slaves”\textsuperscript{48}—dissented from the decisions in \textit{White v. Hart} and \textit{Osborn v. Nicholson}. Chase’s declining health left him without the strength to argue, and he appended to Swayne’s opinion the mere outline of an abolitionist dissent:

The CHIEF JUSTICE dissented in this case and in the preceding one of \textit{White v. Hart}, on the grounds:

1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.

2d. That the laws of the several States by which alone slavery and slave contracts could be supported, were annulled by the thirteenth amendment of the Constitution which abolished slavery.

3d. That thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late Slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence, and this court has properly refused to interfere with those decisions.

\textsuperscript{46} 18 F. Cas. 846 (C.C.E.D. Ark. 1870) (No. 10,595). \textit{See supra} text accompanying note 30.
\textsuperscript{47} \textit{Osborn}, 80 U.S. (13 Wall.) at 663.
\textsuperscript{48} \textsc{Paul Finkelman}, \textit{An Imperfect Union: Slavery, Federalism, and Comity} 157 (1981). For a discussion on Chase’s activities as an abolitionist lawyer in Ohio, see \textit{id.} at 155-76.
4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.

5th. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.49

The combination of *Palmer v. Marston* (allowing Louisiana to impair slave obligations so long as it did so by judicial decision) and *Osborn v. Nicholson* (holding such obligations enforceable in the federal courts) yielded the result, in the era of *Swift v. Tyson*,50 that a given promissory note might be null and void in a Louisiana state court yet fully enforceable in the federal court down the street, if it were in the hands of an out-of-state resident who could gain access by diversity of citizenship. When *Boyce v. Tabb*51 presented precisely this situation, the Supreme Court affirmed a judgment of the Circuit Court for the District of Louisiana enforcing a promissory note given for slaves in 1861. The distasteful possibility that United States courts might provide a forum in which debts for slaves were still enforced had led Charles Sumner of Massachusetts, some years earlier, to introduce a bill that would have withdrawn federal jurisdiction to hear this class of cases.52 Nothing came of the proposal in Congress, but Sumner's initiative won him the praise—as Charles Fairman recounts—of Gideon J. Pillow, late Brigadier General, C.S.A., who wrote from his law office in Memphis to explain the urgent need for such protection:

I am myself sued for $150,000 & a Decree was had against me for it,—on slave contracts,—The suit is now pending in the Supreme Court of Arkansas .... If not pressed through Congress, your measure of relief & justice will come too late. There are now in suit in the Southern States, I should think, not less than 250 million of these claims.53

49. *Osborn*, 80 U.S. (13 Wall.) at 663-64.

50. 41 U.S. (16 Pet.) 1, 19 (1842) (Story, J.) (federal "rules of decision" governing "contracts and other instruments of a commercial nature ... to be sought not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence"), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

51. 85 U.S. (18 Wall.) 546 (1873).


53. Letter from Gideon J. Pillow to Charles Sumner (Apr. 6, 1869), quoted in Charles Fairman, *Reconstruction and Reunion*, 1864-88, Part One 860 n.289 (1971). The debt to which Pillow refers originated in a purchase of eighty-five slaves in December 1860 for $109,286; payment was by promissory notes at one, two, three, and four years' maturities. *Pillow v. Brown & Childress*, 26 Ark. 240, 243 (1870). Pillow, owner of "a small empire in eastern Arkansas," is thought to have been (in 1860) the sixth largest slaveholder in that state; he ranked third among
The unaccustomed convergence of views between the abolitionist senator and the former slaveholder reminds us that the idea of refusing to enforce debts for slaves attracted its various supporters for very different reasons.

II. What They Said

The contention that debts for slaves should be unenforceable after emancipation began as a lawyer's argument on behalf of a debtor defending a suit on a promissory note. At this first level of debate, the debtor for slaves offered a defense framed in familiar terms of commercial law: payment was not due because emancipation had brought about a breach of the seller's warranties and a failure of consideration. Considered as it was offered—as turning on a question of the law of sales—such a defense did not deserve to succeed, and it did not. The argument against enforcement was pursued at a deeper level outside the courtrooms, particularly in the Reconstruction conventions, where the nullification of slave debts became a common objective of groups whose purposes were nearly diametrically opposed.

The starting point of the argument about breach of warranty was the widespread practice by which a seller of slaves would warrant to the buyer, in the bill of sale, that the persons being sold were "slaves for life." Buyers in the post-war cases commonly argued that emancipation resulted in a breach of this warranty. It was reasonably plain, however, that the "slave for life" warranty was understood in no such sense. As the Georgia Supreme Court explained in an early decision:

[T]hese words were used to describe the then present status of the negroes; they were slaves for life in contradistinction to slaves for a shorter period of time. By the laws of some of the States, slaves were freed on arriving at certain ages; by the laws of others, free negroes, for crime, were sold into slavery for certain periods of time; and this covenant was introduced to guard against frauds in the sale of such negroes, and all others whose legal status was to be that of freedom at some future time . . . .

There was no reason why a seller could not, if he chose, offer slaves with a lifetime guarantee against emancipation. But "if such had been the intention and understanding of the parties to this contract," observed the Florida Supreme Court, "they would doubtless have been

slaveholders in Tennessee. By March 1863, with his property in both states under Union occupation, Pillow estimated that he had lost slaves to the value of more than $1 million. Nathaniel Cheairs Hughes, Jr. & Roy P. Stonesifer, Jr., The Life and Wars of Gideon J. Pillow 142-43, 246 (1993).

more explicit in making known that intention than by adopting a stereotyped formula, which had been in use under an entirely different condition of things for more than two hundred years."

A second version of the argument, that emancipation caused a breach of the seller's warranty of title, was likewise unavailing. As explained in South Carolina:

The emancipation of slaves by governmental authority was a possible contingency which must be assumed, from the peculiar character of the property, to have been understood by the parties treating for their sale and purchase. A warrantor of title is an insurer of it against all lawfully claiming by a better one. Emancipation, whether the act of the United States or the State, does not change the title by vesting it in another, but, in effect, declares that those on whom it operated shall not be the subject of property.

Alternatively, if there was a sense in which emancipation resembled a loss of property by the assertion of paramount title, the proper analogy was to eminent domain, which had never been held to constitute a breach of the vendor's warranty. When the issue of slave contracts came before the United States Supreme Court in Osborn v. Nicholson, the majority found the cases on warranty and eminent domain "strikingly apposite" to the point under consideration:

As regards the principle involved we see nothing to distinguish those cases from the one before us. In all of them the property was lost to the owner by the paramount act of the State, which neither party anticipated, and in regard to which the contract was silent. Emancipation and the eminent domain work the same result as regards the title and possession of the owner. . . . Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.

Buyers sometimes complained that emancipation brought about a "failure of consideration" justifying their refusal to pay. The Alabama ordinance, copied by the Florida constitution, employed this language to explain the nullification of slave contracts. But the expression "failure of consideration," used by a buyer of slaves, was merely a professional-sounding way of referring to the fact that the buyer had subsequently lost, without compensation, the "considera-

55. Walker v. Gatlin, 12 Fla. 9, 14 (1867). Counsel in a Missouri case argued similarly that "if any man ever did attempt to warrant that the people would never emancipate the slaves in this State, he would have required an extra price, and the terms of the warranty would have been clear and explicit." Phillips v. Evans, 38 Mo. 305, 311 (1866).
58. See, e.g., Calhoun, 2 S.C. at 286; Lewis v. Woodfolk, 61 Tenn. 25, 46 (1872).
59. The Alabama ordinance is set forth in the Appendix. See infra app. p. 533.
tion” he had bargained for. Certainly there was no failure of consider-
ation in a technical sense. 60 Buyers in the cases that concern us had already obtained full performance from sellers; their complaint was that their enjoyment of the property purchased was cut short by a supervening casualty.

But if slaves were like other property—the assumption on which this branch of the argument proceeded—then the allocation of the risk of loss by supervening casualty or eminent domain was a question as clearly and firmly settled as any in the law. The risk of loss followed the title, whether to land or to chattels; its incidence was governed by the maxim res perit domino, shorthand for the straightforward proposition that loss to property is for the account of the owner. The point of the maxim is at its sharpest when the supervening casualty arrives, not as a bolt from the blue, but as the realization of a risk with reference to which the parties must be deemed to have contracted.

Throughout the opinions that enforced slave contracts if valid when made, no theme appears more consistently or forcefully than the idea that justice between buyer and seller requires that the buyer bear the risk of loss once ownership has been transferred. 61 Such is the

60. “Failure of consideration” describes circumstances in which a buyer does not receive the seller’s promised performance. Examples in this context would include the purported sale of a “slave” after the effective date of emancipation; or the sale of a slave intended to take effect in the future, the slave being emancipated before title has passed. Cases involving slave contracts made after the Emancipation Proclamation (Jan. 1, 1863) often turned on an argument about the date at which slavery was in fact abolished at a particular locale: the usual view was that legal emancipation advanced pari passu with the military authority to enforce it, or else that it took place when decreed by state convention. See, e.g., Dorris v. Grace, 24 Ark. 326 (1866); Haslett v. Harris, 36 Ga. 632 (1867); The Emancipation Proclamation Cases (Hall v. Keese), 31 Tex. 504 (1868); Henderlite v. Thurman, 63 Va. (22 Gratt.) 466 (1872). The possibility of a failure of consideration where emancipation intervenes to foreclose passage of title under a valid executory contract is discussed in Atkins v. Busby, 25 Ark. 176 (1867), and Bradford v. Jenkins, 41 Miss. 328 (1867).

61. Decisions emphasizing the point, in addition to those quoted in the text, include: Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 659-60 (1872); Jacoway v. Denton, 25 Ark. 625, 628 (1869); Hand v. Armstrong, 34 Ga. 232, 237 (1866) (“The negroes belonged to Hand, not to Armstrong, and why then should Armstrong make good the losses of Hand?”); Bradford, 41 Miss. at 336; Curd v. Bonner, 44 Tenn. (4 Cold.) 632, 641-42 (1867) (“Individual hardships result, but they must be borne, as other great public calamities, by those upon whom they fall.”).

Pertinent English authority—arising out of the abolition of slavery a generation earlier in the West Indies—supported the view that the loss of slaves by emancipation was for the account of the owner. British abolition left former slaves in a state of mandatory “apprenticeship” to their former owners for a term of years. A former slaveholder in British Guiana sold “all his right, title and interest in and to the services and labour of 153 apprenticed labourers formerly slaves” for the sum of £7800, payable in six annual installments of £1300. Four payments had been made when the colonial authorities abolished the status of “apprenticeship,” thereby completing the emancipation of the former slaves. The buyer’s obligation to pay the balance of the price was held not to be discharged:
unquestioned rule where loss to property is caused by unforeseeable casualty. A seller of real estate who warrants title and "quiet enjoyment" is not responsible to the buyer, noted the Missouri court, should the property be swallowed up and destroyed by an earthquake . . . . We are unable to distinguish the case supposed from the one presented here at bar. The Ordinance of Emancipation caused a complete annihilation or destruction of all property in slaves. It could not be controlled by the parties, nor was it contemplated by them.\textsuperscript{62}

On the alternative view, no doubt more realistic, that the risk of destruction of slave property is necessarily contemplated by both buyers and sellers, the propriety of the rule appears \textit{a fortiori}. "The emancipation of slaves by governmental authority," observed Chief Justice Moses of South Carolina, "was a possible contingency which must be assumed, from the peculiar character of the property, to have been understood by the parties treating for their sale and purchase."\textsuperscript{63} The Virginia court made the point more elaborately:

The parties knew that the slaves were perishable, and that some or all of them might, at any time, die or run away, or otherwise cease to be slaves . . . . That some of them might run away, and thus become free, was not at all improbable. They lived on the Potomac river, near the border of the free States, where the facilities of escape were very great and often made available for that purpose. It was possible, though not so probable, that the slaves might all be swept off by cholera or other epidemic, or might cease to be slaves by the effects of war or the action of the government. The property, in its nature, was subject to many and peculiar perils. But all these perils were known to the parties . . . .\textsuperscript{64}

And the perils, being known, were inevitably reflected in the price. "It is well known that the value of slaves, at different times, was greatly affected by the political aspect of the country," wrote a South Carolina judge in 1866. "And I think it may be safely taken for granted that, when the intestate made the purchase, he took the chances of emancipation into consideration, and paid such a price as

\begin{quote}
[\textit{T}he whole question is, who shall bear the loss occasioned by a vis major. . . . The property in the services of these labourers had been transferred to the defendant. Then the question is analogous to those which often arise in cases of loss by fire; as, whether the goods were destroyed were in transitu or the transit was ended. If the property here had passed, and the residue of it was destroyed by a vis major, the loss must fall upon the proprietor of the thing, namely, of the services during the unexpired term.]
\end{quote}


\textsuperscript{63} Phillips v. Evans, 38 Mo. 305, 314 (1866).

\textsuperscript{64} Calhoun v. Calhoun, 2 S.C. 283, 303 (1873).

\textsuperscript{64} Scott's Ex'x v. Scott, 59 Va. (18 Gratt.) 150, 176 (1868).
he supposed the intrinsic value of the slaves, lessened by such chances, would justify him in doing.” 65 The available evidence on slave prices, which underwent a sharp decline from historic high levels as the Civil War came finally into prospect, fully supports the judge’s conjecture. 66 More generally, of course, every contract for the sale of goods of fluctuating value reflects the parties’ differing assessments of future contingencies: a primary function of contract law is to allow individuals to act on these assessments. The only peculiarity of the slave contracts in this regard lay in the nature of the contingency that the parties’ bargain inevitably appraised.

Commercial-law arguments based on “breach of warranty” and “failure of consideration” faced a second obstacle, equally as imposing as the settled authorities on risk of loss. Defendants in the slave-contract cases had given promissory notes for the purchase of slaves: the transactions remained executory in that the price had not yet been paid. But if these debtors could make out a defense in terms of warranty or “failure of consideration,” it was impossible to explain why a cause of action in similar terms should not arise in favor of all purchasers of slaves, whatever the date of the transaction, with respect to any slaves subsequently lost to emancipation. A warranty accompanying the sale of a slave would not lose its potency because the price was paid in cash, or because promissory notes had already been redeemed. Decisions enforcing debts for slaves frequently referred to this unacceptable consequence of a contrary holding. 67 The objection went unanswered by debtors and was, in truth, unanswerable.

The unpersuasive character of the commercial-law arguments against enforceability suggests that the real objections to enforcing slave contracts lay elsewhere. Louisiana was the one state whose courts refused to enforce slave contracts as a matter of decisional law.

66. Price quotations from auctioneering and trading firms in the Richmond market, collected by Michael Tadman, show slave prices holding firm, at or near their historic highs, from January 1859 through the late summer of 1860. The next (and last) available quotation, for January 1861, reflects a decline of approximately one-third. See Michael Tadman, Speculators and Slaves: Masters, Traders, and Slaves in the Old South 289-91, tbl. A6.3 (1989).
67. If the warranty of servitude be held to be broken because of the Government act of emancipation, then every such warranty of servitude of a slave thus emancipated must, for a like reason, be held to be broken, and a right of action for such breach would exist from the date of emancipation, although made fifty years ago, for time cannot affect the principle; nor can the fact as to whether the purchase money was or was not paid. Haskill v. Sevier, 25 Ark. 152, 157-58 (1867). “If the abolition of slavery could have such an effect, then all persons who had paid money or property might sue for and recover it back, as having been paid without consideration.” Roundtree v. Baker, 52 Ill. 241, 249 (1869).
In the leading case of *Wainwright v. Bridges*, two opinions for the majority purport to rely on a theory of warranty. But the subsequent course of decision indicates that the Louisiana court soon adopted a more radical view of the question. The note sued upon in *Rodriquez v. Bienvenu* had been given for the hire of slaves; the term of hire had been completed, and the services fully performed under the contract, prior to emancipation and prior to the making of the note. No argument about warranty or failure of consideration was possible in such circumstances. The court declared instead that "[w]ith the end of the status or condition of slavery, every contract founded upon, or growing out of that condition, necessarily came to an end also, whether such contract was previously valid or not."

This more radical way of putting the matter introduces the more interesting arguments against enforcing slave contracts, those based on notions—sometimes dramatically conflicting—of public policy and natural law. The simplest assertion was that the dignity and policy of the state required that her courts no longer be open to hear the disputes of slaveowners and their successors in interest. Arguments framed in terms of commercial law led inexorably to the conclusion that justice between buyer and seller required that the buyer be held to his undertaking; better to deny that justice between the buyers and sellers of slaves could ever again be a concern of the courts. Courts were not open to resolve the quarrels of horse thieves, or to enforce "obligations payable to robbers," William J. Whipper declared to the South Carolina convention; he was "not willing that the machinery of our Courts should be used for the purpose of wringing the bone from the two dogs." "Could it have been intended," demanded Judge Caldwell in Arkansas, "that free citizens should still be the subject matter of litigation in the courts of justice, as chattels?" Was it possible "that the courts are still to guard this relic of a condemned system by adjusting the balance of justice between the buyer and seller under

69. True, the vendor complied with his part of the agreement by transfer of the title and delivery of the slave; but surely the vendee's consent was given under the assurance that he was to be maintained in the possession of the slave, and to receive his labor and services during life.
Id. at 239. A concurring opinion noted that the seller "would be entitled to recover if there was no warranty in the sale." Id. at 240.
70. 22 La. Ann. 300 (1870)
71. Id. at 301.
72. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 230-32 (1868) [hereinafter SOUTH CAROLINA CONSTITUTIONAL CONVENTION].
such painful and exasperating circumstances?" 73 Denying that such disputes were any longer cognizable by the courts made a relatively strong argument against enforcement: it was a position that could be rejected but not refuted. But this form of the argument was relatively rare. The "balance of justice between the buyer and seller," and the terms on which it should be adjusted, were evidently of vital interest to most participants in the debate. This made it difficult to say that they were matters beneath judicial notice.

A more frequent argument asserted that courts could no longer enforce slave contracts—concededly valid when made—because the destruction of slavery destroyed the legal foundation of the obligation. This was the reasoning of the Louisiana court in *Rodriquez v. Bienvenu*:

The existence of a state of slavery, sanctioned by law, lay at the foundation of the contract of hire [or purchase] of slaves. The laws, which authorized and enforced the contract, were necessarily abolished by the subversion of slavery. Persons could no longer be sold or hired. Existing obligations for the price or the hire could not be enforced, for there was no longer any law authorizing their enforcement. 74

A dissenting opinion in the Alabama Supreme Court offered the same reasoning. "Every contract, to have validity, must be founded upon a law," proposed Judge Peters. "If the law is taken away the obligation of the contract is gone."

To say that [slave contracts] were once legal, and therefore remain legal, is not enough. It must appear that the law upon which they originally rested, still remains a law . . . . But nothing of this kind can be shown. Sublato fundamento cadit opus. Upon the extinction of the law of slavery these contracts became illegal . . . . 75

The argument, in fact, is the one we have already observed in the skeleton opinion of Chief Justice Chase, dissenting in *Osborn v. Nicholson* on the grounds:

1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.


74. 22 La. Ann. at 301-02. *Compare* Wainwright v. Bridges, 19 La. Ann. 234, 241 (1867) (Howell, J., concurring) ("Property in slaves being prohibited, all contracts based upon such property are, necessarily, stricken with nullity.").

75. *McElvain v. Mudd*, 44 Ala. 48, 75-76 (1870) (citations omitted).
2d. That the laws of the several States by which alone slavery and slave contracts could be supported, were annulled by the thirteenth amendment of the Constitution which abolished slavery. 76

The point being asserted in these and similar statements was derived, in attenuated form, from Lord Mansfield's famous dictum in Somerset's Case: that slavery being contrary to the law of nature, "nothing can be suffered to support it, but positive law." 77 Positive law protecting slavery had at last been obliterated by the Thirteenth Amendment. The institution had fallen; everything that was necessarily based on slavery had necessarily fallen with it. There was undeniably a sense in which outstanding debts for the purchase and hire of slaves were "based on slavery"—hence the argument that they had become unenforceable as lacking a legal "foundation." And yet the continued existence of slavery was in no sense necessary to the enforcement of debts for slaves. The legal foundation of the enforcement of a debt, after all, was not the law of slavery but the law of contracts.

Statements of the kind already quoted, asserting that the abolition of slavery nullified outstanding debts relating to slaves, depended on the view that to enforce a debt for a slave was in some sense to enforce slavery itself. The view was widely held. "Shall we now, after having succeeded in getting free from this terrible curse, still continue to recognize its legality in any shape or form?" asked B. O. Duncan in the South Carolina convention. "I contend that still to recognize debts or obligations of any kind for slaves, is still to recognize rights in slavery." 78 Addressing the convention shortly after its opening in December 1868, former South Carolina governor James L. Orr—who coolly advised the delegates that "the intelligence, refinement and wealth of the State is not represented by your body"—lectured them.

76. 80 U.S. (13 Wall.) 654, 663 (1872) (Chase, C.J., dissenting).
77. Somerset v. Stewart, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772). Celebrated American decisions had adopted Mansfield's position: because slavery was a violation of natural law, it could exist only where established and protected by positive law. See, e.g., United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C. Mass. 1822) (No. 15,551) (Story, J.); The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (Marshall, C.J.); Commonwealth v. Ayes (Med's Case), 35 Mass. (18 Pick.) 193 (1836) (Shaw, C.J.). The common legal shorthand for the rule of Somerset's Case appears in the remarks by which Oliver P. Morton of Indiana defended the slave-contract proviso to the Georgia relief clause, during Senate debate:

What is the reason of it? It stands upon the general principle that has been recognized by the laws of the United States, that slavery does not exist by virtue of national [sic] law, but only by virtue of positive law, and that slaves are no consideration for a contract except by virtue of positive law; and that when that positive law is withdrawn the consideration falls to the ground.

Cong. Globe, 40th Cong., 2d Sess. 3005 (June 10, 1868).
78. South Carolina Constitutional Convention, supra note 72, at 215-16.
as to the necessity of debt relief generally and the "wiping out" of slave debts in particular. "If these debts are recognized," advised the former governor, "it is a recognition of that institution, of its propriety, its justice and morality."79

In traditional legal contemplation, however, such was demonstrably not the case. Lord Mansfield himself, in another portion of Somerset's Case, had observed that "[c]ontract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement."80

In his renowned decision in Commonwealth v. Aves, holding slavery nonexistent under the law of Massachusetts, Chief Justice Lemuel Shaw described the institution as "contrary to natural right, to the principles of justice, humanity and sound policy" even as he distinguished the enforceability of contracts relating thereto:

So, in pursuance of a well known maxim, that in the construction of contracts, the lex loci contractus shall govern, if a person, having in other respects a right to sue in our courts, shall bring an action against another . . . upon a contract made upon the subject of slavery in a state where slavery is allowed by law, the law here would give it effect. As if a note of hand made in New Orleans were sued on here, and the defence should be, that it was on a bad consideration, or without consideration, because given for the price of a slave sold, it may well be admitted, that such a defence could not prevail, because the contract was a legal one by the law of the place where it was made.81

All this, to be sure, was prior to the Thirteenth Amendment. But the commercial rationale of lex loci contractus seemed to extend to the enforceability of a contract that was legal and enforceable when and where it was made, notwithstanding an intervening change in the law of that jurisdiction. (The authority of Mittelholzer v. Fullarton82 was squarely to this effect.) The claim that the abolition of slavery had also nullified debts for slaves thus met the judicial rejoinder that a

79. Id. at 47, 51.
80. Lofft at 17, 98 Eng. Rep. at 509. The distinction between the legal impossibility of slavery under English law, and the enforceability in England of an obligation relating to slaves located in a jurisdiction where slavery was legal, had been established well before Mansfield. In Smith v. Brown and Cooper, 2 Salkeld 666, 91 Eng. Rep. 566 (Q.B. 1705), Chief Justice Holt stated that "as soon as a negro comes into England, he becomes free," while indicating that he would enforce a debt "for a negro sold here at London" if the declaration averred "that the said negro at the time of sale was in Virginia, and that negroes, by the laws and statutes of Virginia, are saleable as chattels." 91 Eng. Rep. at 566-67.
promissory note was not a "contract for the sale of a slave." According to the Supreme Court of Illinois:

Our courts would not enforce a contract for the sale of a slave, whether made in this State, where slavery has always been prohibited, or in a State where such contracts are binding, because it is against public policy. But after the parties have fully executed their contract, and a note is given for the price, under this comity which exists between the States of the republic, the note may be collected, and it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse to lend the aid of the courts for the collection of the money. It is not against the policy of our State to allow its collection, nor is it contrary to the interests of our citizens. Under the laws of Kentucky the sale was authorized, and there was a sufficient consideration. 83

An Arkansas decision made the point more succinctly:

It is argued that, upon an agreement to perform an act which becomes unlawful to do, the obligor is excused. Be that true, it is in no way applicable to the case at bar. Jacoway executed his writing obligatory, by which he was to pay $4,500 and interest. It is certainly not unlawful for his representatives to pay off his written obligation, and hence not a parallel case to those cited. 84

Such answers may seem lawyerly and literal-minded, oblivious to the moral issues that many saw in the question. In traditional legal terms, however—the terms in which the challenge to enforcement was posed by the arguments considered so far—the judges' response was both accurate and cogent.

The most interesting and provocative of the arguments raised against the post-emancipation enforcement of "slave contracts" met no answer in traditional legal terms, because they had nothing to do with commercial law. Two very different sorts of considerations led Reconstruction southerners to common conclusions about debts for slaves. For some, the overriding issue presented by slave contracts was the perceived effect of legal enforcement to justify, retrospectively, the institution of slavery that all agreed was gone forever. For others, the heart of the enforcement question was a matter of equity toward the former slaveowner. The manifest injustice of emancipation, in the eyes of the white South, lay in the fact that it took property without compensation. The national government refused compensation; the southern states had no compensation to offer; the Fourteenth Amendment (section 4) now prohibited compensation in any event.

84. Jacoway v. Denton, 25 Ark. 625, 636-37 (1869), error dismissed 154 U.S. 583 (1872). Compare Bradford v. Jenkins, 41 Miss. 328, 336 (1867) ("The contract of the purchaser to pay the purchase-money has not become one which it is unlawful or impossible for him to perform").
But by nullifying outstanding debts for slaves, the states might at least avoid compounding the original injustice: forcing persons already stripped of property to pay for what had been taken from them. Nullification of slave debts caused that loss to be shared in some rough measure, affording a partial indemnity to certain former slaveowners at someone else’s expense.

It strained logic to say that the enforcement of a debt for slaves implied the continuing existence of slavery; it was easy to respond that the law enforced not slavery, but the debt. The more telling argument was at first sight the more fanciful one: that to enforce a debt for slaves was to assert that persons might be chattels. And yet this latter proposition was in fact irrefutable. That slavery might exist, where established by positive law; that where it did exist, it formed the basis of commercial obligations entitled to judicial recognition: these propositions were the undeniable foundation of lex loci contractus, of Somerset’s Case, and of the standard argument for enforceability. But Lord Mansfield’s distinction might be rejected. It had been rejected by every abolitionist who denied that there ever was or ever could be “property in man.” If positive law is powerless to recognize slavery, it follows (in any jurisdiction where this truth is acknowledged) that no sale of slaves was ever legal and valid, and that no debt for slaves was ever based on good consideration. One of the deeper currents of opposition to enforcing slave contracts—the neoabolitionist strain—was thus the continuation of a longstanding argument, the issue being the legality of slavery in states where slavery is established by law.

An argument that denied the legality of slavery, even where slavery was recognized by positive law, was not an argument for the law courts. It appears repeatedly and explicitly, by contrast, in the debates of the South Carolina convention, the only one of the Reconstruction conventions for which we have a record of extended debate on the “slave contracts” issue. The argument was concisely introduced by Jonathan J. Wright, a black native of Pennsylvania who was a delegate from Beaufort County. To show the justice of a measure prohibiting the enforcement of debts for slaves, Wright suggested, it was enough to assert “that there never has been, nor never could be,

85. Wright, born near Lancaster, Pennsylvania and educated in Ithaca, New York, became the first black member of the Pennsylvania bar; in South Carolina after the war he was legal adviser to the Freedmen’s Bureau and the state’s first black lawyer. Wright later served in the state senate (1868-1870), and as associate justice of the supreme court (1870-1877). Eric Foner, Freedom’s Lawmakers: A Directory of Black Officeholders During Reconstruction 236 (1993).
property in man. Therefore I lay down this proposition, that whenever a debt was contracted, the proposed consideration of which was a slave, there was no consideration received, and where there was no consideration the debt was null and void. Landon S. Langley, another Beaufort delegate and a mulatto native of Vermont, favored nullification of slave debts so that "it will go forth to the State, and to the world, as the opinion of this body, as the opinion of the radical republican party of South Carolina, that there is not, nor cannot be, any right of property in man." Benjamin F. Randolph of Orangeburg—a mulatto, raised in Ohio—declared that "we come here to day to propose that slave debts shall be repudiated. Why? For no other reason in the world but that we propose to disallow the principle of the right of property in human flesh." Beaufort delegate William J. Whipper, a mulatto native of Philadelphia, echoed Wright's demonstration:

If there was the obligation of a contract, there was property in the thing sold. If there was no property in the thing sold there was no obligation, and I hold that men cannot be the subject of property by whatever law you may claim. Just so long then as man is not property now, he never was, and hence there never was an obligation.

The next day, Alonzo J. Ransier, a free mulatto native of Charleston, resumed the argument in the abolitionist cadences of a generation earlier:

86. *South Carolina Constitutional Convention,* supra note 72, at 217.
87. *Foner,* supra note 85, at 127.
88. *South Carolina Constitutional Convention,* supra note 72, at 225.
89. Randolph, a graduate of Oberlin College, became a minister and editor in Charleston where he began an active political career. In 1868 Randolph was chairman of South Carolina's Republican state committee; represented Orangeburg County in the state senate; and served as county schools commissioner. He was assassinated by the Ku Klux Klan in October 1868, during the Republican presidential campaign. *Foner,* supra note 85, at 175-76.
90. *South Carolina Constitutional Convention,* supra note 72, at 226.
91. Like Wright and Langley—his fellow delegates from Beaufort—Whipper was a mulatto, born and educated in the North, who moved to South Carolina after the war, worked for the Freedmen's Bureau, and practiced law in Beaufort. Whipper studied law in Detroit and practiced in Ohio before coming South with the Union Army. Later a newspaper publisher and a planter, Whipper had a long career in Beaufort County politics, holding a variety of offices and judgeships including three terms in the South Carolina legislature. "Whipper was said to have lost $75,000 in a night of poker in 1875, including $30,000 on four aces defeated by a straight flush held by another black legislator." *Foner,* supra note 85, at 227.
92. *South Carolina Constitutional Convention,* supra note 72, at 231 (emphasis added).
93. Employed as a clerk before the war, Ransier later represented Charleston in the state legislature (1868-1870). He succeeded Benjamin F. Randolph as Republican state chairman after Randolph's assassination, see supra note 89, and served as Lieutenant Governor of South Carolina (1870-1872) and as a member of the 43d Congress (1873-1875). *Foner,* supra note 85, at 176-77.
[A] contract, the proposed consideration of which was based on man as property, never did have, never can have, any binding force. It was void of itself; void from the very nature of the case; void because it was and is violative of the fundamental principle of the moral law; a principle recognized by the founders of this Government, and expressed in unmistakable language in our declaration of independence; void because it is violative of the natural and inalienable right of man to liberty and the pursuit of happiness.\(^94\)

“If I said these debts should be paid,” Ransier concluded, “I recognize the binding force of a contract that I regard as having no binding force, and concede that there is such a thing as property in man, which cannot be.”\(^95\) Charleston delegate Gilbert Pillsbury, a white Massachusetts abolitionist (and brother of the antislavery radical Parker Pillsbury),\(^96\) “never supposed that one man could either morally or legally own another man, as property”; he was naturally ready “to pronounce against the validity of notes and bonds arising from such illegal, inhuman traffic.”\(^97\)

Concluding three days of debate on February 4, 1868, the South Carolina convention, by a vote of ninety to nineteen, passed an ordinance nullifying contracts for the sale of slaves.\(^98\) Slave contracts recurred six weeks later as the final substantive business of the convention, the question this time being whether to repeat the substance of the ordinance in a constitutional provision. Both William Whipper and Jonathan Wright switched sides to oppose the measure in its constitutional form; Wright now expressed the opinion that the Ordinance violated the federal Constitution. Alonzo Ransier repeated his earlier arguments in favor: “Do this, and we emphatically deny that there ever was or could be property in man.” But the most striking remarks in the brief second round of debate were those of Robert DeLarge, a Charleston barber who had been born a free mulatto in Aiken, South Carolina:\(^99\)

I am not willing to admit that either myself or my fellow being ever was property. I am not willing to admit it, and when men who are

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94. SOUTH CAROLINA CONSTITUTIONAL CONVENTION, supra note 72, at 237.
95. Id.
97. SOUTH CAROLINA CONSTITUTIONAL CONVENTION, supra note 72, at 248.
98. Id. at 248-49 (tally of vote, text of ordinance).
99. DeLarge was “the son of a slaveholding free black tailor and a mother of Haitian ancestry.” He served in the South Carolina House of Representatives (1868-1870), as head of the state land commission, and as a member of the 42d Congress (1871-1873). FONER, supra note 85, at 61.
identified with the race to which I belong, who have felt the heel of oppression, rise, and by their voice or action, acknowledge that they or their fellow-men were property, it stings me to the heart. They should blush to acknowledge it. . . . Let us, by our votes, deny that any human being was ever a chattel or a slave. 100

From denying that there ever could be property in man—even where slavery was recognized by law—it was a short step, indeed, to denying that anyone had ever been a slave.

By the same reasoning, of course, a slaveowner could have no claim to compensation for emancipated slaves: what he claimed to have lost was not legally property and never could have been. But it was the contrary viewpoint, in which the slaveowner appeared to be the victim of an uncompensated taking, that gave rise to the second principal current of opposition to enforcement of debts for slaves. Nullification measures enjoyed such broad appeal in the constitutional conventions because they promised partial justice for the former slaveowner even as they advanced a neoabolitionist argument about the retrospective illegality of slavery.

The argument in the courts was that the state could not equitably compel a defendant to pay for what the state had, without compensation, taken from him. In the words of counsel for a Louisiana debtor:

Not a soul of us would wish to be forced to pay for what had been taken from him against his will.

And it cannot be our intention, as a sovereign, to wrest a negro or any other property from a citizen, and then compel him to pay for the same. Such conduct would do for robbers . . . . 101

The same argument for the defendant is discernible in other cases, as when the Virginia Court of Appeals notes that “[t]he gross injustice of the government, in requiring the citizen to pay for property wrested from him by the sovereign power, has been strongly pressed upon our consideration.” 102 The argument normally foundered, as we have seen, on the analogy of loss by emancipation to loss by other supervening casualty, like cholera or earthquake. But it was enthusiastically adopted by ex-governor Joseph E. Brown, now Chief Justice of

100. South Carolina Constitutional Convention, supra note 72, at 914-15 (emphasis added).


102. Henderlite v. Thurman, 63 Va. (22 Gratt.) 466, 478 (1872). See also McNealy v. Gregory, 13 Fla. 417, 431 (1870) (if state “has the right to destroy and take away, without compensation, one kind of property from the people, it surely has the right to take away other kinds”); Hand v. Armstrong, 34 Ga. 232, 237 (1866) (“wrong to compel Hand to pay Armstrong for these negroes, after they have been taken from him by action of the Government”).
the Georgia Supreme Court, in explaining why notes for slaves had been rendered unenforceable:

Upon what principle of justice or equity can the Government enforce the payment of all notes given for slaves, in the hands of vendors, when the slaves for whom they were given . . . were emancipated by the Government in the hands of the vendees, without compensation, and in many cases without any pretence of fault on their part? What solid distinction in principle can be drawn between the right of property in a slave, and the right of property in a note given for the same slave?103

Brown had been one of the principal architects of the relief provisions of Georgia's 1868 constitution; his statements at the time suggest the extent to which the case for debt relief was associated—for popular consumption, at least—with the lingering injustice of uncompensated emancipation. “[T]he property in the hands of debtors, with which they expected to make payment, has been destroyed by the Government,” wrote Brown:

Had not their property been destroyed by the government, they would have made payment, and had ample means left. The war, for which they were no more responsible than the creditors, has caused the Government to destroy their property without compensation. In such a state of things, I hold that it is right that the loss be divided between debtor and creditor . . . .104

In all the Reconstruction conventions, as already noted, the issue of enforcing slave contracts was treated as a subdivision of the broader issue of debt relief. Proposals to erase slave debts might be referred to, and were plainly understood, as measures “for the relief of purchasers of slaves.”105 A resolution offered in the Virginia convention by George Teamoh—himself a former slave106—made the reasoning explicit: “Resolved, That all debts contracted, and obligations incurred, by the purchase or sale of slaves since January 1st, 1860, be declared null and void, in view of the fact that no just remuneration was received for the obligation or debts thus incurred.”107

105. GEORGIA CONSTITUTIONAL CONVENTION, supra note 7, at 94 (Jan. 9, 1868).
106. Teamoh, a mulatto delegate from Portsmouth, had been born a slave in 1818 but (following his parents' death) was raised by his owners with their own children. He “hired his own time” as a caulker and carpenter in the Portsmouth shipyards, then escaped from slavery when his owners hired him out as carpenter on a ship bound for Bremen and New York. Returning to Portsmouth after the Civil War, Teamoh employed his talent for public speaking as a Union League organizer; he served in the state senate from 1869 to 1871, and “worked as a caulker to the end of his life” in 1883. FONER, supra note 85, at 209-10.
107. VIRGINIA CONSTITUTIONAL CONVENTION, supra note 11, at 98 (Dec. 14, 1867).
The neoabolitionist position, which maintained that the seller of slaves had no property to convey, readily accommodated the view that the buyer of slaves had received no property for which he ought to be made to pay. Black delegates to the South Carolina convention sometimes adopted the arguments of the plantation owners. Thus Robert G. DeLarge, the Charleston barber, told the convention that "it would be unjust to require a purchaser to pay for so-called property, taken from him by the Act of the State without any compensation."\(^{108}\) Vermont native Landon S. Langley explicitly accepted the parallel between compensation and liability:

I hold all law founded in justice, and if it is right for individuals to pay for slaves, it is right for the Government to pay for them. To be consistent, therefore, if I were to give my vote in this body against the [slave contract] Ordinance we are considering, I would also raise my voice in favor of the Government of the United States paying for every slave emancipated by virtue of the laws of the United States.\(^{109}\)

Neither the former Confederate governor Joseph E. Brown of Georgia, nor even a wealthy rebel like General Gideon J. Pillow of Tennessee, would have put the matter any differently.

III. What They Thought They Were Doing

On the neoabolitionist side, the motives for opposing the enforcement of debts for slaves are already complex but not overly difficult to discern. To men like Charles Sumner (who would have stripped the federal courts of jurisdiction to hear such cases) and the northern-born black delegates in the South Carolina convention, the spectacle of continued litigation over debts for slaves was a relic of barbarism and a moral affront: this was reason enough to prohibit it. At a deeper level, these men saw in the controversy over enforceability an opportunity to declare a belated victory in an old abolitionist crusade, an argument over the legal status of slavery. If Mansfield, Story, and Shaw were all wrong—if slavery was a violation of natural law so profound as to be incapable of legal existence—it followed that debts for slaves had never been enforceable in the courts of civilized nations, no matter where they were contracted. The Reconstruction conventions could not, by their action on slave contracts, prove the point; but by nullifying debts for slaves they could bear tangible witness to a deeply held belief.

108. SOUTH CAROLINA CONSTITUTIONAL CONVENTION, supra note 72, at 219-20.
109. Id. at 224.
The neoabolitionists were not alone either in seeing these implications of the question or in their willingness to pursue the argument. The passionate speeches of the South Carolina convention find their mirror image in an 1872 opinion by Judge Waller R. Staples of the Virginia Court of Appeals:110

We are now told that public policy requires the courts to annul any and every contract entered into during this period, based upon the sale of property thus recognized and sanctioned for generations by the sentiments, the laws and the tastes of the people of Virginia. The proposition involves, in my judgment, an admission derogatory to our whole previous history. . . . [We are expected] to surrender all our previous convictions, to yield our faith and consciences to the keeping of others, and henceforth to believe that slavery was wrong in itself—a curse upon our country—a moral leprosy which corrupted the life-blood of the nation. The proposition now advanced means this, or it amounts to nothing. If slavery was lawful—if it was not opposed to good morals and national honor—it is idle to say that the destruction of the institution can impair or affect contracts made during the period of its legal and constitutional existence.111

Motivations on the "reparation" side of the question are, in important respects, more difficult to ascertain. The nullification of slave debts offered partial relief to a particular group of relatively wealthy debtors. That such a result was politically attractive is interesting in itself. Relief necessarily came at the expense of a particular group of creditors. Proponents of nullification, like Joseph E. Brown, often spoke of the justice of causing buyer and seller to share the loss from emancipation. Refusal to enforce the buyer's promissory note would result in a sharing of the loss if one or more installments of the price had already been paid, or if courts allowed sellers to recover for the hire of slaves for the intermediate period between sale and emancipation.112 Frequently, however, the loss to the seller would be total, particularly where slaves had been sold relatively late in the game. In

110. Staples, a member of the Confederate Congress during the Civil War, was appointed to Virginia's highest court in 1870, when "the ground-swell of reconstruction had subsided, and when Virginia was again free to choose her own officers." Henry E. Blair, Waller R. Staples, Memorial Address Before the Bar of Montgomery County, at Christiansburg (Nov. 26, 1897), in 3 VA. L. REG. 689, 694 (1898).


112. A sold B a slave in 1860 for $1,000 and took his note. In 1865 the Government took the slave from B, and made him free. If A had kept him, the Government would have done the same. A has lost nothing but the hire of the slave for the time B held him.

The equities of the case require that B pay him hire for the time he used the slave. Brown to Parrott, Dec. 10, 1867, supra note 104. The slave-contract clauses ultimately enacted in Georgia and elsewhere made no allowance for a quasi-contractual claim of the kind suggested by Brown. Judgment by a Louisiana trial court, allowing a seller's claim to the extent of the value
every case, moreover, the effect of nullification was to reverse—to the extent of any amount of the price remaining unpaid—the contractual allocation of risk regarding the future value of slave property that formed, as we have seen, an unmistakable element of the great majority of the transactions in question. Nullification, in other words, pushed back the effective date of emancipation as between these buyers and these sellers, denying to the seller the fruit of his favorable bargain and relieving the buyer from the consequences of his unfavorable one.

Who then were the buyers, and who the sellers, that intervention in this form should have been felt to be just? The beneficiaries of relief measures in general, and of relief from slave debts in particular, were both white and relatively well-off. Slaves had incurred no debts. Nor was debt relief of any particular interest to the poorer whites. Ratification of Georgia's 1868 constitution was widely attributed to the political popularity of the relief clause, but the same constitution guaranteed to each head of a household a homestead—that is, an exemption from attachment for debt—covering real property "to the value of two thousand dollars, in specie, and personal property to the value of one thousand dollars in specie, both to be valued at the time they are set apart." Particularly in view of the depressed property values prevailing in 1868, a homestead allowance aggregating $3,000 meant that a debtor had to be in fairly comfortable circumstances before debt relief would avoid the first dollar of obligation he could be forced to pay. Amos T. Akerman may have exaggerated when he charged, in the Georgia convention, that the object of relief was "to uphold a landed aristocracy at the expense of the creditor"; but Jno. McK. Gunn, the Cuthbert, Georgia collection agent, was probably not far from the mark when he advised Thaddeus Stevens that "the Dr. class as a class are as able to pay as the Creditor class are to loose."

Even if wholesale debt relief, as attempted in Georgia, is invariably a populist program—in that debtors are bound to be both more numerous and less wealthy than creditors—there are reasons to doubt that "relief for purchasers of slaves" ought to be so regarded. Persons indebted for slaves were certainly wealthier than debtors generally, so long at least as their debts remained unpaid. Simeon Corley, a white

of a slave's services prior to emancipation, was reversed by the Louisiana Supreme Court in Tate v. Fletcher, 19 La. Ann. 371 (1867).

113. GA. CONST. of 1868, art. VII, § 1.
114. DAILY REPUBLICAN (Savannah), Feb. 7, 1868, at 1, col. 2 (proceedings of Feb. 4, 1868).
115. Gunn to Stevens (May 26, 1868), supra note 17.
tailor from Lexington, South Carolina who had been “persecuted and spit upon” for his Unionist views, advised the South Carolina convention that he would “not consent to relieve this class of creditors; while my poorer neighbors, whose debts for property, more wisely and judiciously contracted, are, at least, as justly entitled to relief by repudiation as any of those quondam slaveholders.” Comparing creditors for slaves and debtors for slaves, moreover, there seems to be no reason to suppose that creditors as a class were significantly wealthier than debtors—disregarding, again, the transfer of wealth that enforcement would bring about. Unlike credit transactions in general, in which people with greater wealth must tend to be creditors of people with less, the sale of slaves on credit appears to have taken place for the most part between people whose economic circumstances were roughly comparable.

The political appeal of “relief for purchasers of slaves” would be readily explained if, as was sometimes asserted, the creditors on slave contracts were typically professional slave traders while the debtors were plantation owners. William J. Whipper painted one such portrait before the South Carolina convention:

If certain parties who dealt in human flesh, men who brought slaves to this country, or men whose province it was to sell slaves to the man who cultivated the land, who made their living and their fortunes from selling human flesh, have not succeeded in obtaining their money, I am not one desirous or willing to assist them in obtaining it. . . . Who is [the debt] to be paid to? It is to be paid to the men who traded all his life in slave property, who made their money by it, and who secured passage of that odious fugitive slave law which enabled them to go North, hunt down freemen and bring them to South Carolina and sell them . . . .

Whipper, it should be remembered, had only recently arrived in South Carolina from Ohio, and his ideas about the slave trade inevitably owed more to Uncle Tom’s Cabin than to any knowledge of the Charleston slave market. The picture of the interstate trader as principal creditor on “slave contracts” was particularly implausible in South Carolina, because the state had been a substantial net exporter of slaves, second only to Virginia, since the 1820s.

The weight of the available evidence suggests, on the contrary, that professional traders are relatively unlikely to figure as creditors

116. South Carolina Constitutional Convention, supra note 72, at 200-01; Hume, supra note 96, at 454.
117. South Carolina Constitutional Convention, supra note 72, at 124-25.
118. See Tadman, supra note 66, tbl. 2.1 at 12.
on the debts that interest us. Despite one salient piece of conflicting evidence—a celebrated suit over slave contracts that reached the Supreme Court in 1841—modern analysis of traders’ business records suggests that dealers were rarely if ever willing to sell for the long-term paper typically involved in the slave contract cases. An authoritative recent study by Michael Tadman, summarizing the results of his own and others’ research into the records of slave trading firms, concludes that the professional trader had a “very strong preference for payment in cash or its near equivalent”—the usual equivalent being acceptances of sixty or ninety days’ maturity. New studies based on court records confirm the inference drawn from traders’ accounts: that the ordinary commercial sale of slaves was almost always for cash or short credit. It is significant, therefore, not only that the

119. Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841). The famous commerce-clause case of Groves v. Slaughter began as an attempt to enforce a buyer’s notes for $7,000 and $7,875, at twelve and twenty-four months, respectively, in the face of a clause in the Mississippi constitution of 1832 forbidding the importation of slaves for sale within the state. (The defendants in Groves were accommodation endorsers, not makers, of the notes sued upon. As such they were probably factors of the plantation owner, who had become his sureties as the most convenient way of extending him credit.) Henry Clay, who together with Daniel Webster appeared as counsel for the slave dealer, informed the Supreme Court that the “universal habit of all the planting States has been to buy slaves on credit, leaving the product of planting to pay for them”; and that, in consequence, “more than three millions of dollars” was then “due by citizens of the state of Mississippi, to citizens of Virginia, Maryland, Kentucky, and other slave states.” Id. at 481-82 (arguments of counsel). Describing the same market in the same era, the historian Wendell Stephenson reported that:

Many of the slaves sold in the Natchez market were conveyed on credit, the traders retaining a mortgage on the property. It was not uncommon in the halcyon days preceding the Panic of 1837 for would-be planters to purchase slaves with only a small payment, hoping that a few cotton crops would enable them to settle their notes. WENDELL HOLMES STEPHENSON, ISAAC FRANKLIN: SLAVE TRADER AND PLANTER OF THE OLD SOUTH 63 (1938). These assertions of Clay and Stephenson about the prevalence of credit sales, even as regards the Natchez market of the 1830s, are not borne out by more modern research. See infra notes 120-21.

120. TADMAN, supra note 66, at 103-05. Tadman’s review of the records of one firm in the Natchez market, between 1832 and 1834, revealed “that about 50 percent of sales were for cash, about 35 percent were for credit not exceeding six months (mostly, in fact, 60 days credit, with a 50 percent deposit), and the remaining 15 percent or so were on credit not exceeding twelve months.” Id. at 104. Other studies cited by Tadman showed a consistently high percentage of sales for cash and short-term acceptances. Id. at 104-05 & n.39.

121. Based on his survey of recorded sales of slaves in East Feliciana Parish, Louisiana, for the years 1847, 1850, 1853, 1856, and 1859, Richard H. Kilbourne concludes not only that credit sales of slaves were relatively infrequent (accounting for about 20 percent of the total dollar market for slaves), but that the credit extended in such sales was usually short-term: “Credit sales of slaves rarely had terms of longer than twelve months, whereas credit sales of land usually provided for extending payments over a period of two to five years.” Kilbourne, supra note 1, at 32. (Recorded sales are here a reliable index of total sales: “The particulars of Louisiana’s law of public registry for immovable property . . . ensured that all transactions within the parish involving land and slaves were recorded . . . .” Id. at 51.) Similarly, a recent survey of Natchez court records by Ariela Gross supports Michael Tadman’s conclusions based on the Natchez traders’ accounts. Gross has identified some 300 cases of civil litigation in the Natchez courts between 1798 and 1861 in which the personal character of a slave was put in issue. At least a third of
sales that concern us were made on credit, but that the notes at issue typically provided extended credit terms.\textsuperscript{122} Staggered maturities running from one to three, four, or five years seem to have been the most common, and substantially longer maturities appear as well.\textsuperscript{123}

Tadman reports that in local slave markets—including both private and public local sales, as distinguished from the interregional slave trade—"the overwhelming tendency was to sell, not for cash, but for long credit (most often a down payment of about one third, and the balance with interest over one, two, or three years)."\textsuperscript{124} Other observers support Tadman's finding that purchasers at judicial sales, unlike purchasers from dealers, were accustomed to buy on long credit.\textsuperscript{125} Long-term debts for slaves were very often created when a plantation was sold on the death of the owner, either as a going concern or "broken up." Even where slaves were to be sold separately at auction, a court order directing the judicial sale might specify standard credit terms.\textsuperscript{126} Executors of decedents' estates figure prominently as plaintiffs in the reported cases; defendants are not infrequently family

these were warranty actions against sellers; the others typically involved torts and contracts for hire. Where the underlying transactions in Gross's sample involved sales by professional dealers, such sales were almost uniformly for cash or short credit. E-mail from Ariela Gross to the author (Oct. 24, 1994) (on file with author); see generally Ariela Julie Gross, "Pandora's Box": Slave Character on Trial in the Antebellum Deep South (Ph.D. dissertation in progress, Stanford University).

\textsuperscript{122} Notes of less than one-year maturity are uncommon in these cases. Rare exceptions include: Osbom v. Nicholson, 80 U.S. (13 Wall.) 654 (1871) (nine months); Whitmer v. Nall's Ex'r, 2 Ky. Op. 361 (1868) (six months); and Douglass v. Cross, 46 Tenn. (6 Cold.) 416 (1869) (eleven months).

\textsuperscript{123} See, e.g., Roundtree v. Baker, 52 Ill. 241 (1869) (twenty years); Porter v. Ralston, 69 Ky. (6 Bush) 665 (1869) (twenty years); Calhoun v. Calhoun, 2 S.C. 283 (1870) (notes payable in five annual installments, commencing ten years from date).

\textsuperscript{124} \textsc{Tadman}, supra note 66, at 137.

\textsuperscript{125} Of 800 slaves sold by one master in chancery for the Charleston District of South Carolina in the period 1851-1859, "14 percent were sold for cash, 26 percent were sold for half cash and the balance paid in twelve months, and the rest (60 percent) were sold on a credit of two to three years." \textsc{Tadman}, \textit{supra} note 66, at 137 n.5. A recent study of judicial sales of slaves in South Carolina confirms that "long, inexpensive credit" was "the usual possibility at equity court and probate sales," while noting that a third form of judicial sale—the sheriff's sale, under the auspices of the law courts—was typically made for cash. Thomas D. Russell, \textit{South Carolina's Largest Slave Auctioneering Firm}, 68 CHI.-KENT L. REV. 1241, 1270 n.95 (1993). In his study of antebellum credit relationships in East Feliciana Parish, Louisiana, Richard H. Kilbourne observes that "although many, if not most, probate sales were simply mechanisms for partitioning estate property among coheirs," the credit terms customary at probate sales "were sufficient to attract unrelated third-party purchasers, and such sales offered a rare opportunity to purchase slaves on twelve months', and sometimes twenty-four months', credit." \textsc{Kilbourne}, \textit{supra} note 1, at 55.

\textsuperscript{126} One Tennessee case, for example, reports a court order "directing the clerk of said court, to sell said slaves to the highest bidder, on a credit of twelve months, taking from the purchaser notes with securities for the payment of the purchase-money, except the sum of $100, which was required to be paid in cash." Young v. Thompson, 42 Tenn. (2 Cold.) 596, 597 (1865). In another, "The slaves were directed to be sold on a credit of twelve months, with the lands at
The slave contract creditor, in fact, was far more likely to be a widow or an orphan than a dealer.\textsuperscript{128}

We may assume then, as a working hypothesis, that the typical long-term debt for slaves was created when one plantation owner bought or hired slaves from another plantation owner (or from his estate), without the intermediary of the professional slave dealer, and that both debtors and creditors belonged to a relatively wealthy segment of the southern white population. What facts distinguished creditors and debtors on outstanding slave contracts in 1867 and 1868 that might help to explain why nullification of slave debts—involving the relief of debtors at the expense of creditors—enjoyed such widespread appeal as a political program?

Those slave contracts most clearly in view had been entered into shortly before the war, or after its inception. (The resolution offered in the Virginia convention applied, by its terms, only to debts for slaves contracted after January 1, 1860.\textsuperscript{129}) The transactions that were reversed, as between buyer and seller, were those in which slaves had been sold during the twilight of slavery as an institution. Prices were falling sharply.\textsuperscript{130} Sellers at this period were those slaveholders who were prepared to sell slaves—and slavery—short. Buyers were those who stood ready to buy slaves in a falling market, and who lost their property with slavery's demise.

The distinction, with its political overtones, was clearly present to the minds of contemporary observers. Judicial opinions, as we have already seen, referred to the political calculation that after a certain point was inherent in every slave bargain. "Each party had the same means of knowing the future condition of the slave," wrote the Texas Supreme Court, "and acted upon his own ideas as to the result of the war. That the cause which proved mortal to slavery would soon sweep one and two years, with bonds and security for the payment of the purchase money." Polk v. Heirs of Pledge, 45 Tenn. (5 Cold.) 384, 385 (1868).

\textsuperscript{127} A study of Maryland court records (Anne Arundel County) for the period 1831-1844 found that 40 percent of all slaves included in decedents' estates were sold to relatives of the decedent; another 40 percent were sold outside the family (including sales to traders); while the executors' ultimate disposition of the remaining 20 percent was unknown. See William Calderhead, \textit{How Extensive was the Border State Slave Trade? A New Look}, 18 CIV. WAR HIST. 42, 47 (1972).

\textsuperscript{128} For references—by no means jocular—to widows and orphans as creditors, see \textit{South Carolina Constitutional Convention}, \textit{supra} note 72, at 221, 244. Criticizing the slave contract clause of the proposed Arkansas constitution, a hostile editorial charged that it would "sweep away the property of thousands, many of whom are widows and orphan children." \textit{Arkansas Gazette} (Little Rock), Feb. 29, 1868, at 2, col. 1.

\textsuperscript{129} See \textit{infra} app. p. 537.

\textsuperscript{130} See \textit{supra} note 66.
over the land was apparent to some, and disbelieved by others."

In a case involving the sale of a slave in August 1864—slavery ended in Texas, the court had found, only in June 1865—its tone was even darker: "Those who speculated upon the success of the rebellion against the United States, and made contracts founded upon chances of this success will not be heard in the courts of the United States in their request for relief from the iniquitous contracts."

Southern-born delegates to the South Carolina convention, both black and white, may have been more sensitive to this relation between buyer and seller than were their northern-born colleagues. According to white Unionist Simeon Corley, "those who are indebted for slaves were stronger props in the rebellion than those who felt slavery insecure, and sold out." Still more telling remarks were offered by Francis L. Cardozo, a free mulatto native of Charleston:

The buyer not only received the value of his money, but he bought that slave in the midst of a war waged for the abolition of slavery, the corner stone of the war. Every person of ordinary intelligence knew that the existence of slavery was involved in that contest, and yet, in the face of all these circumstances, the buyer of men goes forward and says I will receive your slaves; I will pledge myself to pay five or ten thousand dollars for them. Notwithstanding all the risks I run, I will take them . . . .

The buyer had already suffered the loss of his slave, and those who would cancel his debt were anxious to make the seller suffer as well:

That is the true character of the Ordinance. We are trying to make the seller suffer also. . . . But there is more involved in this question than any gentleman on the opposite side has referred to. These are the last dying throes of the slaveholder. . . . [The measure] is only to benefit a class, the buyers, and punish the sellers of slaves.

"The last dying throes of the slaveholder," as Cardozo aptly expressed it, were the claims for reparation on behalf of the last slaveholders: those who still held slaves when others had sold out, those in

131. The Emancipation Proclamation Cases (Hall v. Keese), 31 Tex. 504, 527 (1868).
133. SOUTHERN BIRTHRIGHT 1, supra note 72, at 200.
134. "Born in Charleston, the son of prominent Jewish businessman and economist Isaac N. Cardozo and a free black mother, Cardozo was educated in a school for free blacks in the city." FONER, supra note 85, at 39. Cardozo studied at the University of Glasgow and at Presbyterian seminaries in Britain; he served as wartime pastor of a New Haven church before returning to South Carolina to organize mission schools for freedmen. Cardozo became "the first black state official in South Carolina's history," serving first as Secretary of State (1868-1872), then Treasurer (1872-1877). He spent the last twenty-five years of his life in Washington, D.C. as "part of the city's upper-crust black society," employed first as a clerk in the Treasury Department, later as principal of a black high school. Id.
135. SOUTHERN BIRTHRIGHT 1, supra note 72, at 227-29.
whose hands slave property had ceased to exist. Ultimately, the most striking fact distinguishing buyers from sellers on the last slave contracts is that the sellers gave up on slavery before the buyers did. Cardozo thought this a reason to let the buyers suffer the consequences: "I think we should not go one foot out of our way to help them."

In the eyes of some other southerners, the same fact enhanced the buyers’ claim to relief.

Depending on the viewpoint of the observer, the nullification of slave debts was thus either the last tribute due to loyalty, or the last exaction of a Bourbon class, advanced in the name of its final representatives. Inevitably it was both at once, besides being (in the eyes of others still) the final vindication of longstanding abolitionist doctrine on the illegality of slavery by natural law. A single proposal carried protean significations that were inextricably intertwined. Its manifold possibilities explain something of the interest that the question held for Reconstruction southerners, while they warn us against deciding the question too quickly for ourselves.

**Conclusion**

To many modern observers it appears painfully obvious that a suit to enforce a debt for slaves should not be cognizable in the courts of a free nation. The reasons advanced today were voiced a hundred twenty-five years ago. On its face, the adjudication of legal claims that rest on a right of property in human beings appears repugnant to our most basic political values. Courts will not enforce bargains between thieves; why then should they concern themselves with the disputes of former slaveowners? It is logically impossible, moreover—for the reasons developed in the South Carolina debate—to enforce a slave contract without finding that the plaintiff gave good consideration, hence that men could be property. An assertion that the nation has so solemnly disavowed must henceforth, one might think, be inadmissible in the courts.

To contemporaries these answers were not obvious. The reasons help to illuminate, from an unaccustomed perspective, the accommodation made by a newly free nation with its slave past.

It was not possible, to begin with, for the courts to occupy moral high ground that was plainly marked out: for instance, to repudiate slavery simply by refusing to hear claims premised on its former exist-

136. *Id.* at 228.
ence. Under the circumstances, a judicial refusal to intervene in the matter (by refusing to try the parties' case) inevitably constituted an intervention of another sort. By closing the courthouse door to one class of plaintiffs, a judge might avoid hearing their disputes; but he could do so only by altering a rule of law in favor of the corresponding class of defendants, likewise former slaveholders and, some thought, "stronger props in the rebellion"\textsuperscript{137} than those whose suit was now rejected.

To refuse to hear the case was therefore to decide it. And to decide the case in favor of the buyer of slaves, whatever the grounds on which the court denied the seller's suit, was, as a matter of commercial law, to decide it wrong. Sellers won all the arguments in terms of ordinary doctrine because well-established contract principles (warranty, allocation of risk, \textit{res perit domino}) all came out the sellers' way. This is not to say that the slave contracts should necessarily have been treated as ordinary commercial disputes: that, of course, is what the argument was about. It is to say, however, that to decide them \textit{other} than as ordinary commercial disputes carried a social cost that judges, unless persuaded of the strength of countervailing considerations, would ordinarily seek to avoid. That cost consisted in the unsettling of expectations about legal rules in an area, that of commercial relationships, where fixed and uniform expectations about governing rules are rightly felt to be especially valuable.

Countervailing considerations did exist, but only in a peculiarly abstract and attenuated form. The reasons \textit{not} to treat slave contracts like other contracts pertained to what Otto Kirchheimer has styled "political justice": the use of judicial forms "to bolster or create new power positions," most notably in the trial and condemnation of a vanquished regime by its victorious successor.\textsuperscript{138} A refusal to enforce debts for slaves would have constituted, as we have seen, a retrospective judgment on the regime in which slavery had been possible. Commercial law might here have yielded to a political justice that denied the legality of slavery even where slavery was legally ordained.

The succession of regimes in the Reconstruction South might indeed have been the occasion of political justice in more direct and classic forms, such as prosecutions for treason and property redistribution. The striking fact is that it was not:

\textsuperscript{137} See \textit{supra} note 133 and accompanying text.

No mass arrests followed the collapse of the Confederacy; only Henry Wirtz, commandant of Andersonville prison camp, paid the ultimate penalty for treason. Jefferson Davis spent two years in federal prison but was never put on trial and lived to his eighty-second year; his Vice President, Alexander H. Stephens, served a brief imprisonment, returned to Congress in 1873, and died ten years later as governor of Georgia.  \(^{139}\)

The political disabilities imposed by the third section of the Fourteenth Amendment, barring former rebels from state or federal office, were removed by general amnesty only four years after they went into effect.  \(^{140}\) Meanwhile, recurring proposals "to overturn the plantation system and provide the former slaves with homesteads" (in the shape of "forty acres and a mule") remained, as Eric Foner has written, "[a]t the outer limits of Radical Republicanism,"  \(^{141}\) never to be seriously attempted.

The absence of these more radical measures reminds us how limited was the political revolution that Reconstruction imposed on the southern states. A retroactive revision of property relations is easily within the province of political justice, forming the basis of all confiscation and reallocation programs, but no such revision was attempted by the Thirteenth Amendment. Except for the denial of compensation to former slaveowners—the implications of which, in the circumstances of war, could be no more than ambiguous—nothing in national policy drew into question the former legality of slavery wherever slavery had existed by positive law. Slavery was ended from this day forward, but its previous existence was not challenged.

The arguments against enforcing slave contracts required, on the contrary, that emancipation be made retroactive. A suit between former slaveowners resembled a suit between thieves, a note given for the purchase of a slave lacked consideration, only if the courts were prepared to declare that slavery had always been as illegal as the country had now made it. This was precisely the neoabolitionist contention, but to give it practical effect would have involved the nation in a political revolution that Reconstruction did not envision. The Constitution of 1787 had allowed the states to maintain the institution of slavery. The Thirteenth Amendment altered that Constitution but did not seek to overthrow it.

139. Foner, supra note 6, at 190.
140. The General Amnesty Act removed the constitutional disability of all persons "except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States." Act of May 22, 1872, 17 Stat. 142.
141. Foner, supra note 6, at 235.
APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS
(PROPOSED OR ENACTED)
PROHIBITING THE ENFORCEMENT OF DEBTS FOR SLAVES

Alabama:

SEC. 3. And be it further ordained, and it is hereby declared, that there is a failure of consideration, and it shall be so held by the courts of the State, upon all deeds or bills of sale, given for slaves, with covenants of warranty of title or soundness, or both, and upon all bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves, which are now outstanding and unpaid, and no action shall be maintained thereon, and that all judgments and decrees rendered in any of the courts of this State since the 11th day of January, 1861, upon any deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defense in all actions to said suit; Provided, That settlements and compromises of such transactions, made between the parties thereto, shall be respected.

Alabama Constitutional Convention, Ordinance No. 38, § 3 (Dec. 6, 1867), 1868 Ala. Acts 185, 186. This section of Alabama's debt-relief ordinance was held unconstitutional in McElvain v. Mudd, 44 Ala. 48, 62 (1870). The author of the opinion, Chief Justice E. Wolsey Peck, served as president of the constitutional convention before his election to the state supreme court. Peck opposed the relief measure on the floor of the convention, declaring that "it was wholly unconstitutional and would not stand a test in the courts." Mobile Daily Advertiser and Register, Dec. 7, 1867, at 2, col. 4.

Arkansas:

All contracts for the sale or purchase of slaves are null and void, and no court of this State shall take cognizance of any suit founded on such contracts, nor shall any amount ever be collected or recovered on any judgment or decree which shall have been, or which hereafter may be, rendered on account of any such contract or obligation, on any pretext, legal or otherwise.

Florida:

Sec. 26. It shall be the duty of the courts to consider that there is a failure of consideration, and it shall be so held by the courts of this State, upon all deeds or bills of sale given for slaves with covenant or warrantee of title or soundness, or both; upon all bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves, which are now outstanding and unpaid, and no action shall be maintained thereon; and all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A.D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit; and that when money was due previous to the 10th day of January, 1861, and slaves were given in consideration for such money, there shall be deemed a failure of consideration for the debt: Provided, That settlements and compromises of such transactions made between the parties thereto shall be respected.

 Fla. Const. of 1868, art. XVII, § 26. Florida's constitutional provision was hastily adapted from Alabama's ordinance, as a comparison of the two makes clear. It was held unconstitutional in McNealy v. Gregory, 13 Fla. 417 (1870).

Georgia:

Sec. 17. One. No court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof.


The clause as passed on by the courts was all that remained of the original "relief" provision of Georgia's 1868 constitution. Congress had imposed as a "fundamental condition" of Georgia's readmission to representation:

that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition.

Act of June 25, 1868, ch. 70, 15 Stat. 73. As originally submitted to Congress, the first subdivision of section 17 read as follows:
I. No Court in this State shall have jurisdiction to try or determine any suit against any resident of this State upon any contract or agreement made or implied, or upon any contract made in renewal of any debt existing prior to the first day of June, 1865. Nor shall any Court or ministerial officer of this State have authority to enforce any judgment, execution or decree rendered or issued upon any contract or agreement made or implied, or upon any contract in renewal of a debt existing prior to the first day of June, 1865, except in the following cases:

1. In suits against trustees . . .
2. In suits for the benefit of minors . . .
3. In suits against corporations in their corporate capacity, but not so as to enforce the debt against the stockholders or officers thereof in their individual capacity.
4. In suits by charitable or literary institutions . . .
5. In suits on debts due for mechanical or manual labor, when the suit is by the mechanic or laborer.
6. In cases when the debt is set up by way of defence, and the debt set up exceeds any debt due by defendant to plaintiff of which the Courts are denied jurisdiction.
7. In all other cases in which the General Assembly shall by law give the said Courts and officers jurisdiction: Provided, that no Court or officer shall have, nor shall the General Assembly give jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof.

GEORGIA CONSTITUTIONAL CONVENTION, supra note 7, at 556-57. Ordinances “to declare illegal, null and void, all notes, bonds and executions for the purchase of slaves” and “for the relief of purchasers of slaves” had at one point been offered to the convention, id. at 81, 94, but with the inclusion of the proviso just quoted the proposed ordinances became superfluous.

Louisiana:

ART. 128. Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State.

LA. CONST. of 1868, tit. VI, art. 128. The constitutional provision was a distillation of resolutions, introduced early in the convention, proposing to nullify debts for slaves. See JOURNAL OF THE PROCEEDINGS OF THE LOUISIANA CONSTITUTIONAL CONVENTION 59 (1868) (proceedings of Dec. 12, 1867). The Louisiana Supreme Court declined to pass on the constitutionality of the provision: because debts for slaves were unenforceable in Louisiana as a matter of contract law, the constitutional prohibition was without effect. Dranguet v. Rost, 21 La.
Mississippi:

Whereas, Much of the present pecuniary embarrassment of the people and consequent depression of their energies, result from their indebtedness for the purchase of slaves; and

Whereas, By the late war, all property in them has been lost by the mutual wrong doings of buyer and seller, and by the acts and doings of the people of Mississippi and of the United States, through their public authorities, whereby contracts for such property have been not only impaired, but totally destroyed, and as public policy and justice to all concerned, demands relief from all obligations so incurred; therefore,

Be it ordained by this Convention, the people and Congress concurring, That all pecuniary liabilities of every sort, on account of the purchase of such property, are hereby declared void, and no process shall hereafter issue from any court of law or equity in this State to enforce them.

The foregoing ordinance, introduced in Mississippi’s constitutional convention on February 14, 1868, was referred to committee and never taken up; a similar ordinance, introduced on March 23, 1868, appears to have met the same fate. JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 197-98, 402-03 (1868).

North Carolina:

On January 21, 1868, a member of the North Carolina convention presented “a Memorial from the Citizens of Bladen County, asking ‘that Obligations incurred in the purchase of slaves be annulled.’” The memorial was referred to the Committee on the Judicial Department. It does not appear that the topic was taken up again. JOURNAL OF THE NORTH CAROLINA CONSTITUTIONAL CONVENTION 45 (1868).

South Carolina:

Sec. 34. All contracts, whether under seal or not, the consideration of which were for the purchase of slaves, are hereby declared null and void and of no effect, and no suit, either at law or equity, shall be commenced or prosecuted for the enforcement of such contracts, and all proceedings to enforce satisfaction or payment of judgments or decrees rendered, recorded, enrolled, or entered upon such contracts, in any Court of this State, are hereby prohibited, and
all orders heretofore made in any Court of this State in relation to such contracts, whereby property is held subject to decision as to the validity of such contracts, are also hereby declared null and void and of no effect.

S.C. Const. of 1868, art. IV, § 34. The provision is identical in substance to an ordinance enacted by the Constitutional Convention on February 4, 1868. South Carolina Constitutional Convention, supra note 72, at 249. Both the ordinance and the constitutional provision were held unconstitutional in Calhoun v. Calhoun, 2 S.C. 283 (1871).

Texas:

A resolution offered in the Texas Constitutional Convention on July 8, 1868 would have instructed the Committee on the Judiciary “to inquire into the expediency of the adoption of a declaration or resolution, declaring null and void, and of no effect, all notes, judgments, and promises to pay whatever, given, obtained, or made for the purchase of slaves, since the date of emancipation proclamation.” (No resolution in this sense appears to have been adopted.) Journal of the Texas Reconstruction Convention 247-48 (1870).

Virginia:

Resolved. That all debts contracted, and obligations incurred, by the purchase or sale of slaves since January 1st, 1860, be declared null and void, in view of the fact that no just remuneration was received for the obligation or debts thus incurred.

The foregoing resolution was offered in the Virginia Constitutional Convention on December 14, 1867, and referred to the Committee on the Judiciary. Virginia Constitutional Convention, supra note 11, at 98. On December 19 the Committee issued a formal report recommending unanimously against the adoption of the resolution: because “the power to pass any law or ordinance impairing the obligation of contracts is expressly denied to the State . . . this Convention has no authority to act in the premises whatever.” Id. at 135-36. In mid-January, a proposal for general debt relief—calling for the wholesale repudiation of debts contracted prior to April 9, 1865—met a similar rebuke from the Judiciary Committee in another formal report. Id. at 442, 496-98. The Committee’s rejection of any relief measures was subsequently debated and sustained by the Convention, the
vote being 72-6. **Daily Enquirer and Examiner** (Richmond, Va.), Feb. 11, 1868, at 1, col. 3.

**Federal:**

A BILL

To prevent the courts of the United States from enforcing contracts concerning slaves.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the courts of the United States shall not have cognizance of any suit to recover the contents of any promissory note, or other chose in action, or for the enforcement of any contract, given or made, wholly or in part, for the price of any person held in slavery or involuntary servitude: *Provided, however,* That the holder of any promissory note, who took the same before maturity, without notice of the nature of the consideration, shall not be affected thereby.

*Sec. 2. And be it further enacted,* That whenever any suit shall be pending in any court of the United States on any such obligation, or for the enforcement of any such contract as is described in the first section of this act, the court shall, on its own motion, dismiss the same.

*Sec. 3. And be it further enacted,* That all acts and parts of acts in conflict with the provisions of this act be, and the same are hereby, repealed.

S. 254, 41st Cong., 1st Sess. (1869). Senator Charles Sumner of Massachusetts introduced the foregoing bill on April 5, 1869. *Cong. Globe,* 41st Cong., 1st Sess. 492 (1869). It was referred to the Committee on the Judiciary, ordered to be printed, and never heard from again.