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Emancipation and Contract Law:
Litigating Human Property After the Civil War

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Abstract:

I am interested in this paper in beginning to explore how the sudden move to uncompensated emancipation in the 13th Amendment was resisted and undermined in the South, and also in examining the ideological consequences of emancipation for property law and constitutional law. Emancipation was experienced simultaneously as an instance of property confiscation and also the constitutional eradication of the recognition of human property. This contradiction quickly led to litigation and debate over the right to property, personhood, and racial equality under the Constitution.

There are dozens and dozens of state and federal cases in which the status of slave property was litigated after emancipation, in marriage cases, in tax cases, in wills and estates, in disputes over state constitutional provisions, and in federal constitutional cases. Indeed, in Supreme Court cases like *Boyce v. Tabb* and *Osborne v. Nicholson*, litigation over slavery extended in the 1860s, 70s and 80s. At the heart of this litigation was the extent to which contracts with slave property as consideration could be enforced under the 13th and 14th Amendment, and whether state constitutional provisions voiding these contracts violated the contracts clause of the Constitution.

In this way, burgeoning just compensation principles in the post-war era and the Reconstruction amendments came repeatedly into conflict. At the outset of this new project, I am interested in testing how courts, legal scholars and freed slaves debated the legal meaning of emancipation, and how this debate brought to the fore conflicting ideological commitments to both the property protecting provisions of the Constitution, and also to the constitutional and legal destruction of human property in the wake of the Civil War. I look forward to your comments at the retreat.

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In 1859, in *United States v. Amy*, Chief Justice Roger Taney was asked to rule on a claim by a Virginia slave owner that it was a violation of the Fifth Amendment to send his slave to prison.¹ Amy had allegedly stolen a letter from the post office and was prosecuted under an 1825 federal law that provided that “if any person shall steal a letter from the mail, the offender shall be imprisoned not less than two and not more than ten years.”² At trial, Amy had no defense attorney of her own, instead her owner was represented by one John Howard. Howard asserted, first, that a slave was not a “person” for the purposes of the act, and second that the criminal statute was unconstitutional if applied to Amy on the grounds that during the term of her imprisonment her master would be deprived of private property put to public use without just compensation.³ District Court Judge James Halyburton stopped the trial on the grounds that these were novel issues and announced that Chief Justice Roger Taney was riding circuit, was soon expected in the jurisdiction, and could address these questions.

The question of the status of slave property under the Fifth Amendment was suddenly timely. The issue had recently been litigated by the Supreme Court in the Dred Scott case where Taney seemed to declare that slaves were definitively a kind of property protected by the Amendment.⁴ For decades the federal government, and particularly

¹ *United States v. Amy*, 24 Federal Cases 792 (C.C.Va. 1859).

² *Ibid.*, at 809.

³ U.S. Constitution, Amendment V. The Fifth Amendment provides, in relevant part: “No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.”

⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

federal courts, had in multiple ways protected slavery.⁵ Yet slaves were conspicuously never explicitly categorized as property in the Constitution and not until Dred Scott had the Supreme Court so openly asserted that slaves were property for purposes of the Amendment. In antebellum congressional debates over emancipation in Washington, D.C. Senator John C. Calhoun argued that slavery was a type of property protected by the Fifth Amendment. Yet while “Calhoun himself acknowledged that that his interpretation of the due process clause as a bulwark of slavery lacked broad support in the Senate” his view was “judicially confirmed two decades later in the Dred Scott decision.”⁶

With this recent precedent in place, Taney was asked to consider the extent to which Amy’s constitutional status as property undermined her status as a legal person, and also whether her status as property required the state to pay her owner compensation if she was imprisoned. Justice Taney, sitting in Circuit Court, declared: “It is true that a slave is property of the master, and it is equally true that he is not a citizen.” Yet, in the eyes of the law, “he is a person” and in “expounding the law we must not lose sight the twofold character that belongs to the slave. He is a person and also property.”⁷ As for the claim for just compensation Taney asserted that it “cannot upon any fair interpretation, apply to the case of a slave who is punished in his own person. Although the punishment may incidentally affect the property of another to whom he belongs.”⁸

U.S. v. Amy was hardly a victory for Amy, but it does illustrate, first, some of the unintended consequences of the Dred Scott case for Taney and, second, that not even

⁵ See Paul Finkelman, “The Centrality of Slavery In American Legal Development,” in *Slavery and the Law*, ed. Paul Finkelman, (Madison: Madison House Press, 1997), 4—26; Don E. Fehrenbacher (completed by Ward E. McAfee), *The Slaveholding Republic*, (Oxford: Oxford University Press, 2001).

⁶ Fehrenbacher, *The Slaveholding Republic*, 80.

⁷ *U.S. v. Amy*, 809-810.

⁸ *Ibid.*, at 810.

Taney was willing to disrupt the law's longstanding ambivalent treatment of human property. To be sure, the status of Amy as property was in crucial ways quite clear. Most immediately, she could be bought or sold at auction at anytime, she could be mortgaged and seized by creditors if her owner defaulted, she could be leased to someone else without her consent. Yet her status as property was not total, she did have some legal personality in the eyes of the law. As Ariela Gross and others have demonstrated, there was a complex and uneasy relationship in the antebellum era between treating slaves as primarily people or primarily as property in the eyes of the law.⁹ This ambivalence remained part of the law even after slaves were freed, and human property was continually recognized by the courts for decades after emancipation.

It is customary to treat the adoption of the thirteenth amendment in 1865 as a decisive moment when slavery, and human property, was forever abolished in American law and the Constitution.¹⁰ Of course it cannot be denied that the 13th Amendment freed millions of people still in bondage, and prohibited the reinstatement of chattel slavery.¹¹ It is certainly the case that one of the signal changes of the Civil War, and one of the major shifts in the history of American property law, was the legal removal of millions of people from established categories of property, without compensation. Yet the long debate over the legal protection of human property did not end the instant the Amendment took effect, and the legacy of slave property survived emancipation, in surprising and important ways.

⁹ Ariela J. Gross, *Double Character: Slavery and Freedom in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000).

¹⁰ U.S. Constitution, Amendment XIII, provides "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

¹¹ For an excellent account on the drafting and passage of the Thirteenth Amendment, see Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery and the Thirteenth Amendment* (Cambridge: Cambridge University Press, 2001).

In particular, the debate over the place of human property in American law and the Constitution came to the fore in cases contesting the status of contracts made for the sale of slaves made before emancipation. In these cases, courts were asked to reconcile competing commitments both to the protection of property and contract and also to some measure of racial equality in the 13th and 14th amendments. At the heart of this litigation was the extent to which contracts with slave property as consideration could be enforced under the 13th and 14th Amendment, and whether state constitutional provisions voiding these contracts violated the contracts clause of the Constitution. In these contract cases, state legislatures and district courts seeking to enforce a broad conception of emancipation clashed with a Supreme Court unwilling to demolish all legal vestiges of human property. The Supreme Court was called upon, in cases that rippled out across several decades, to determine the extent to which the recognition of human property had been eradicated from the private law.

The emancipation of four million slaves without compensation during the Civil War emancipation is what property scholar Carol Rose calls one of the three examples of revolutionary property expropriation in American history.¹² Indeed it is fair to say that the federal emancipation of million of slaves was the biggest act of property confiscation in the history of the United States, and one of the biggest in the history of the world. Before the war, slaves were, after decades of settled law and precedent, a type of property recognized by the Constitution and the Congress. William Lloyd Garrison had burned the Constitution as a “covenant with death,” and abolitionism was before the war

¹² Carol M. Rose, “Property and Expropriation: Themes and Variations in American Law,” *Utah Law Review* (2000) 1, 24. For Rose, the other two are the confiscation of loyalist property during the American Revolution and the expropriation of land from Native Americans.

confined to a small number of vocal activists whose views were at odds with seventy-five years of legal precedent and constitutional interpretation recognizing and protecting slave property.¹³ The 36th Congress, in the original Thirteenth Amendment passed in January 1860, was willing to make explicit what had been recognized as implicit and to add to the Constitution a clause prohibiting the federal government from ever interfering with slavery in states where it existed.

The capital investment in slave property before the Civil War was astonishing. The economic historian Claudia Goldin estimates that “the capital value of all slaves in 1860 to have been 2.7 billion 1860 dollars.”¹⁴ Slaves were the single greatest economic asset in the South, other than land, worth somewhere between two to three trillion dollars in today’s currency. Given the value of slave property and decades of settled constitutional and state law protecting slave property, it was, before the Civil War, ideologically and legally inconceivable for the Congress to effectively seize from private owners one of the single biggest economic assets in the United States without compensation.¹⁵

By 1865 this is exactly what happened and slavery was abolished altogether without compensation in the Thirteenth Amendment. Yet the move to uncompensated

¹³ In the 1850s the anti-slavery movement had split into a militant faction, led by William Lloyd Garrison and Wendell Phillips, and a moderate faction, associated in the Congress with Charles Sumner, John Hale, and Benjamin Wade. The second faction had enjoyed increasing influence with the rise of the Republican Party. Before the war, their goals were organized in large part around preventing the expansion of slavery. The Garrisonians had been increasingly marginalized and frustrated with the massive legal and constitutional apparatus in place protecting slavery. With the outbreak of war, the Garrisonians gained influence as the whole of the movement shifted left. See William E. Gienapp, *The Origins of the Republican Party, 1852-1856* (New York: Oxford University Press, 1987) and James M. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* (Princeton: Princeton University Press, 1964).

¹⁴ Claudia Dale Goldin, “The Economics of Emancipation,” *The Journal of Economic History* 33 (1973): 66-85, 74.

¹⁵ See Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2007), 9-11.

emancipation was halting and at first incomplete. In April 1862, Congress abolished slavery in Washington, D.C. Importantly, though, slave owners in Washington had been compensated, signaling quite clearly that slaves were still in the eyes of a majority of the Congress a form of property requiring compensation when seized. Congress authorized emancipation in the federal territory of Washington, D.C., providing for compensation to slaveholders of up to \$2000 per slave. Ultimately, the Congress paid out some \$993,000 to slave owners to emancipate roughly 3100 slaves at an average of \$300 per slave.¹⁶

The text of the thirteenth amendment does not explicitly prohibit compensation by states of the federal government to former slaveowners. Taking advantage of this ambiguity, Georgia and West Virginia moved to compensate slaveowners for the emancipation of their slaves, and Georgia made it part of its 1865 state constitution that ratification of the 13th in that state “is not intended to operate as a relinquishment, waiver, or estoppel of such claim for compensation of loss sustained by reason of the emancipation of his slaves.”¹⁷

Ultimately, amid signs that states were still pursuing compensation for emancipation, and that the United States Congress, might yet pursue it, particularly under a Democratic administration, the Congress moved to include in the 14th Amendment an explicit ban on compensation for emancipation by states and the federal government.

Section 4 of the 14th Amendment reads:

Neither the United States nor any state shall assume or pay obligation incurred in aid of rebellion, or any claim for the loss or emancipation of any slave, but all such debts, obligations, and claims shall be held illegal and void. 18

¹⁶ “An Act for the Release of certain Persons held to Service or labor in the District of Columbia” 12 Stat. 376 (April 16, 1862). Page Milburn, “The Emancipation of the Slaves in the District of Columbia,” *Records of the Columbia Historical Society* (Washington, D.C. 1913) 96-119.

¹⁷ Georgia Const. of 1865, art. I, sec. 20.

¹⁸ U.S. Constitution, Amendment 14, Section Four.

Even then, with the text of the Constitution clear, the battle over compensation for slave property turned to the courts, specifically the question of what to do about contracts for slaves sales entered into before emancipation in which slaves formed the consideration, or installment contracts for the sale of slaves in which the installment payments were still due.¹⁹ The constitutional questions surrounding these contracts were considered in several state and federal cases, the most significant of which were two cases ultimately heard by the Supreme Court, *Osborn v. Nicholson*²⁰ and *White v. Hart* a companion case challenging a similar provision barring the enforcement of slave contracts in the Georgia constitution.²¹ *Osborn* was first heard in federal district court in Arkansas in 1869.²² The facts of the case were straightforward. In March 1861 the defendant A.G. Nicholson signed over a promissory note and a bill of sale to Henry Osborn. The bill of sale read:

For the consideration of \$1,300 I hereby transfer all the right, title, and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life; and I also warrant the title to said boy clear and perfect. ²³

The note was due on December 26, 1861, at an annual interest rate of 10%. Before Osborn could collect, three important intervening events took place. First, Albert was liberated by the US Army in January, 1862. Second the thirteenth amendment was adopted in 1865. Third, the Arkansas state constitution, in a period when the legislature

¹⁹ For detailed accounts of the operation of contractual slave sales in the antebellum era, see Jenny Bourne Wahl, *The Bondsmen's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998); Thomas D. Russell, "Slave Auctions on the Courthouse Steps: Court Sales of Slaves in Antebellum South Carolina," in *Slavery and the Law*, ed. Paul Finkelman, (Madison: Madison House Press, 1997), 329-364.

²⁰ *Osborn v. Nicholson*, 80 U.S. (13 Wall.), 654 (1872) (Chase, CJ dissenting).

²¹ *White v. Hart*, 80 U.S. (13 Wall.), 646 (1872).

²² *Osborn v. Nicholson*, 18 Federal Cases 846 (C.C.E.D. Ark. 1870).

²³ Osborn, US

was under Republican control, was amended in 1868 to bar the enforcement of slave contracts, or contracts in which slaves formed the consideration.²⁴

Article 15 of the amended Arkansas Constitution provided: “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 be collected on any such judgment.”²⁵ Arkansas was not alone in amending their constitution in this way, and there were similar constitutional provisions enacted in Reconstruction legislature in Georgia and Louisiana.²⁶

Nicholson, claiming protection under the Arkansas and U.S. constitutions, refused to pay and Osborn sued, demanding payment for the sale of Albert. Osborn’s claim was straightforward: as of the date of the contract Albert was property recognized by the U.S. constitution and the state of Arkansas, and the thirteenth amendment did not strip him of this vested contract right. Any attempt to strip him of this right in Article 15 of the Arkansas constitution, he claimed, was a violation of the contracts clause of the U.S. constitution, and any state constitutional provision that undermined the contracts clause must be declared null.²⁷

At the district court, Judge Henry Clay Caldwell, appointed by Abraham Lincoln in 1864, denied the plaintiff’s claim on several grounds. Caldwell first asserted that the 13th Amendment had acted as a broad repealing statute, one issued in the U.S. Constitution, or “the highest power known in our form of government.” The thirteenth amendment had “effected the repeal to annihilate slavery and all its incidents, and all

²⁴ Arkansas const. of 1868, art 15, sec. 14.

²⁵ *Ibid.*

²⁶ Georgia const. of 1868, art. 5, sec. 17; Louisiana const. of 1868.

²⁷ U.S. Const. art 1, sec. 10 (the “contracts clause), provides: no state shall . . . pass any . . . law impairing the obligation of contracts.”

rights and obligations growing out of it.”²⁸ After destroying slavery, Caldwell asked, “would it not be a strange anomaly if there existed in the constitution a principle that would coerce the states to open their courts to the slave-dealer and let him recover the fruits of his barbarous traffic.”²⁹

The court here is making a constitutional argument on the breadth of the constitution’s destruction of slave property. Albert’s status as property, and more radically the claim that he ever had been property, was utterly destroyed by the thirteenth amendment. For the court, the 13th Amendment established was “based on the broad principle that there shall be no further recognition by the national government or the states of the idea that there could lawfully be property in man.” This principle, said Caldwell, “cuts its way through all vested rights and obligation of contracts based on slave codes.” Ranging outside of contract law, the court held that the Amendment “operates with full force on claims and demands of every character originating in the idea that human beings were property.”³⁰

Caldwell here was asserting a conception of the 13th Amendment that stripped slavery, and the legal recognition of human property, root and branch out of the American constitutional order. Osborn’s contract claim was unconstitutional in that it undermined this interpretation. The court declared, “The fundamental ground on which emancipation preceded was that the right of the slave to his freedom was paramount to the claim of his master to treat him as property.” As a consequence, “no vested right of property could arise out of a relation thus created.”³¹

²⁸ *Ibid.*, at 851

²⁹ *Ibid.*, at 854.

³⁰ *Ibid.*, at 856.

³¹ *Ibid.*, at 855.

To illustrate his point, Caldwell moved from theoretical to concrete arguments. The contract for the sale of Albert had a warranty that the deal was contingent on the condition that Albert was of “sound body and mind.” If this was indeed a valid contract, could the defendant Nicholson claim a defense on the grounds that Albert was not of sound mind or body, that the warranty was not met? If so, could Albert, by now a free man and a U.S. citizen, be summoned into court to have his mental and physical fitness tested? For Caldwell this “would be giving full force and effect to one of the most obnoxious features of the slave code,” and the Constitution in the Thirteenth Amendment destroying slavery by necessary implication prohibited “free citizens to be thus degraded in the interest of slavery and slave traders.”³²

The judge argued also that enforcing a slave contract was unconstitutional on the grounds that it violated section four of the fourteenth amendment. This provision clearly prohibited federal and state government from compensating slave owners for emancipation. But did section four reach private contracts for slave sales entered into before the 14th Amendment was ratified? The district court ruled that they did. It was clear, he wrote, that when it emancipated slaves the Constitution, “takes from A slaves he purchased from B.” At some point, that is, A had purchased his slaves from B. It was acknowledged by all that A could not as a slave buyer demand compensation by the state or federal government for the loss of his slaves, just as no one who had bought slaves could demand compensation for the loss of their slave property under section four of the fourteenth amendment.

³² Ibid., at 854-855.

Yet in this case, Caldwell analogized, “B claims from A the price of these slaves.”³³ That is, here a slave seller was claiming he was owed compensation for the sale of slaves. To find a constitutional obligation under the contracts clause to pay compensation to a slave seller “would do violence to the whole spirit of the constitution.” Such a ruling would effectively provide compensation for slavery based on a nonsensical distinction that the Constitution prohibited compensation to slave buyers who bought slaves before the thirteenth amendment, but guaranteed compensation to slave sellers who sold their slaves before ratification of the amendment in December, 1865.³⁴ Instead, he asserted, section four of the fourteenth amendment should be understood as a general ban on compensation for slaves emancipated by the thirteenth amendment. In these two amendments, “A living force and vitality was imparted to the words of the declaration of independence ‘that all men are created equal’” and also to the due process clause of the fifth amendment.” In this light, the effect of the amendments “cannot be limited to the mere severance of the legal relation of master and slave. They are far reaching in their results.”³⁵

On a more strictly doctrinal level, Caldwell held that once slavery had been stripped from state and federal law by the Constitution, the judge asserted, there was no longer any basis to sue to enforce the contract and no remedy available. Caldwell took the position that slavery was supported only by positive law, with no basis in natural or common law. Thus once a state’s law had been changed to prohibit slavery, as was the case in Arkansas, and banned by the U.S. Constitution, a plaintiff had no remedy in common law or the Constitution. Caldwell quoted the dissent of Justice Curtis in *Dred*

³³ *Ibid.*, at 855.

³⁴ *Ibid.*

³⁵ *Ibid.*

Scott, asserting that “slavery being contrary to natural right is created only by municipal law.”³⁶ For Caldwell, it was only by virtue of the slave law of the state of Arkansas, that the plaintiff ever could have maintained an action in any court on this contract.”³⁷

The court also made customary, but still powerful, doctrinal arguments that did not rest on these broad interpretations of the Reconstruction amendments, but on more traditional legal arguments. First, Caldwell made a federalism based argument that slavery was always primarily subject to state regulation, and the federal courts were bound to recognize the terms of the amended Arkansas constitution on the issue of slavery. He wrote: “this state in the exercise of her undoubted rights over the institution of slavery, and all its incidents, has by its constitution abolished the institution.” Given the state’s plenary power over slavery, “this is the end of the plaintiff’s case.”³⁸ Second, he asserted a version of the contract doctrine of “unclean hands,” holding that he was not bound to enforce a contract “against good moral, or against religion, or against public right, nor contracts opposed to our national policy or national institutions.”³⁹

Importantly, these arguments ultimately lost. *Osborn v. Nicholson* was soon reversed by the Supreme Court.⁴⁰ The Court ruled that the provision of Arkansas constitution barring the enforcement of slave contracts violated the contracts clause of the U.S. Constitution, and was therefore void. Justice Noah Swayne wrote for the majority that the contract was valid when it was made and so could be enforced in every state at any time. For the Supreme Court, the legal issue was clear: “whatever we think of the institution of slavery, viewed in the light of religion, morals, humanity, or a sound

³⁶ *Ibid.*, at 846.

³⁷ *Ibid.*, at 850

³⁸ *Ibid.*, at 853.

³⁹ *Ibid.*, at 850.

⁴⁰ *Osborn v. Nicholson*, 80 U.S. (13 Wall.), 654 (1872) (Chase, CJ dissenting).

political economy, - as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect.” Swayne went to lengths to deplore the institution of slavery but nevertheless “that when the 13th amendment was adopted the right of the plaintiff in this action had become legally and completely vested.”⁴¹ For Swayne this vested right was identical to any other, whether acquired by contract, deed, will, or marriage. Its basis in slave property was identical to a contract based on any other kind of property, and was binding even if the basis of the contract was subsequently repealed.

Here Swayne was making an argument that the 13th Amendment should operate as an ordinary statute, and be applied only prospectively. This was “a principle of universal jurisprudence” and was “necessary to the repose and welfare of all communities.” The idea of retroactively voiding contracts – contracts legal when made -- was for Swayne a ruling that “would shake the social fabric to its foundations and let in a flood-tide of intolerable evils” and would constitute a deprivation of due process. There was “nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be the effect.”⁴²

The majority opinion promoted a strong dissent by Chief Justice Salmon Chase, both in this case and in the companion case of *White v. Hart*.⁴³ Chase in his dissent supported most of the claims advanced by the district court. In particular Chase endorsed the argument that slavery is supported only by positive law, with no basis in natural or common law, and that “if not perpetuated it dies” and “the common law is restored to

⁴¹ *Ibid.*, at 662.

⁴² *Ibid.*

⁴³ *White v. Hart*, 80 U.S. (13 Wall.), 646 (1872).

original principles of liberty.”⁴⁴ For Chase, as for Judge Caldwell, slave contracts, whenever entered into, were void in that they were no longer supported by positive law. These contracts were “annulled by the thirteenth amendment which abolished slavery” and in abolishing slavery had destroyed all positive law that supported slavery, including contracts with slaves as consideration. Chase similarly endorsed the district court’s claim that the 14th amendment prohibited compensation for the loss of slave property, whether in public or private law.”⁴⁵

Chase was of course writing in dissent. What divided the district court and the Supreme Court was a fundamentally different interpretation of the meaning of the thirteenth and fourteenth amendments. For the district court, the thirteenth amendment stood for “the broad principle that there shall be no further recognition by the national government or the states of the idea that there could lawfully be property in man.” Application of this broad principle meant that upholding slave contracts, whenever formed, would be equivalent to upholding the idea of human property. The court did not argue that the slave contract was invalid when it was formed. Instead it took the position that a slave contract, however valid when made, was made invalid by a new constitutional ideal that made enforcement of the contract unconstitutional and which subordinated any claim for enforcement to this new ideal.

The Supreme Court took a much less expansive view of the scope of the thirteenth amendment. The timing was all and the timing was clear: the amendment banned the enforcement of slave contracts the day after ratification, while leaving untouched those signed the day before. Property was simply property, whether slave or otherwise, in the

⁴⁴ *Osborn v. Nicholson*, 80 U.S. at 663.

⁴⁵ *Ibid.*, at 664.

eyes of the law and Swayne asserted “we cannot regard it as different in its legal efficacy from any other unexecuted contract to pay money made upon sufficient consideration.” The court rejected the view that a commitment to eradicating human property from American law in the 13th Amendment meant enforcing this broad ideal at the expense of private contracts. For Swayne, the conception of the 13th Amendment advanced by the district courts and the dissent undermined basic constitutional protections and even worse. The prospect of retroactively voiding contracts legal when made, whatever the underlying consideration, was “forbidden by the fundamental principles of the social compact.”⁴⁶

For both courts, as their language makes clear, the stakes were high, though the Supreme Court took pains to minimize the implications of its decision to freed slaves. Justice Swayne asserted in his opinion that “neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached.” At first glance, this seems obvious. That is, these cases turned on disputes between two white litigants, a slave buyer and a slave seller, over who was or was not owed money. The cases attempt to allocate the burden between these a slave buyer and a slave seller, and the rights of African-Americans were not, at least at first glance, immediately implicated. So what was in fact at stake in these opinions?

Potential answers come from renewed historical attention to the arguments made and actions taken by the losing side, or the arguments made by lower federal courts and in constitutional amendments enacted by several state legislatures. This is not to suggest that the losing side was in some absolute sense right on the merits, only that their arguments were a significant part of the ongoing debate over the reach of the 13th and 14th

⁴⁶ *Ibid.*, at 662.

Amendment and the meaning of emancipation. The debate over the meaning of these amendments is of course at the heart of the legal and constitutional history of Reconstruction, and the debate over the enforcement of slave contracts were an important, but still little noticed, part of that debate.

The Supreme Court transformed these disputes into routine contracts cases, rejecting, and in large part ignoring, the central claim of the district courts that upholding these contracts amounted to ongoing legal recognition of slaves as a kind of property for which sellers were due compensation. Once the losing arguments are examined we see in high relief a tension between an expansive of emancipation in the 13th amendment, barring compensation of any kind for a seller of slaves, and a more narrow conception that maintained a kind of vested property right in slaves, even as the Constitution destroyed the institution of slavery.

The Supreme Court was undoubtedly sincere in its assertion that this narrowed application of the 13th Amendment was not meant as a ratification of the idea of human property. Attention to the full debate, however, shows the Supreme Court consciously rejecting another conception of emancipation, in effect stripping from state and federal constitutions the power to create an alternate hierarchy of legal and constitutional rights, one in which the destruction of all vestiges of human property took precedence over strict construction of contracts and vested rights. This losing alternative view is a path not taken, a motif that, as in the *Civil Rights Cases* and the *Slaughterhouse Cases*, drives much of the history of Reconstruction.⁴⁷ Part of this project will be a more fully developed examination of how this alternative interpretation might have translated into other Reconstruction era legal disputes and constitutional battles, in particular exploring

⁴⁷ *The Slaughterhouse Cases*, 83 U.S. 36 (1873); *The Civil Rights Cases*, 109 U.S. 3 (1883).

the way disputes over the meaning and scope of constitutional amendments reach into the common law.⁴⁸

What is clear is that cases like *White v. Hart* and *Osborn v. Nicholson* should be understood as in sync with the *Slaughterhouse Cases* and the *Civil Rights Cases*, even though they are less well-known. Just as the *Slaughterhouse Cases* stripped the privileges and immunities clause of much of its potential power, and the *Civil Rights Cases* restricted congressional attempts to achieve greater equality, so cases like *Osborn v. Nicholson* put in place a narrow conception of emancipation, a conception that had been rejected by several state legislatures and several state and federal courts. Indeed in some respects *Osborn* is the more fundamental case in that it turns, not on the elaboration of legal rights and remedies alone, as in *Slaughterhouse* and the *Civil Rights Cases*, but on the actual status of African-Americans as property, and the question of whether human property itself was or was not still being protected in the Constitution decades after the Civil War.

This debate of course had more immediately concrete importance as well. That state legislatures, with new input from African-American lawmakers, enacted constitutional amendments in Arkansas, Louisiana and Georgia banning the enforcement of slave contracts shows that, contrary to Justice Swayne's assertion in *Osborn*, that the "rights and interests" of African-Americans were affected by the Supreme Court's

⁴⁸ Michael Les Benedict finds in Chase's dissent in *Osborn* "a tantalizing hint" of a kind of powerful constitutional argument that might have been available to the federal judiciary before the Civil War, particularly Chase's assertion that slavery was "without support except in positive law." "Review of Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*," H-Law, H-Net Reviews, March, 2002.

URL: <http://www.h-net.org/reviews/showrev.cgi?path=73411015347997>

For a similarly nuanced and persuasive analysis of how the possibilities for legal and constitutional change during Reconstruction was circumscribed by a reliance on traditional common law reasoning, see, Michael Vorenberg, "Imagining a Different Reconstruction Constitution," *Civil War History* 51 (2005) 416, 421.

decision to strike them down, or at least that several state legislatures and district courts thought they were.

It is not difficult to see why. Once these constitutional provisions were struck down, the court was allowing for some measure of compensation for the sale of slaves for decades after the Civil War, even into the 20th century. Whether or not the contracts were valid, a ban on their enforcement meant that no more money would change hands to pay for slaves, and that was clearly of importance at least to these state legislatures. If from one perspective these cases simply shifted the burden between white litigants, from another they amounted to a decisive rejection of the idea that anyone could make a claim for compensation for slave property after emancipation. Absent such a ban, from this perspective, the end of slavery, or at least the end recognition of human property, was less definitive and less fixed in the Constitution.

For the majority in *Osborn*, the ruling was driven by timing. The determination of which slave contracts were valid and which were not was driven almost entirely by precisely when they were made. This attention to the precise moment when vested rights attached and when they did not made for a set of surprising cases in which former slaves asked for the Court to make precise determinations of the end of slavery in order to make demands for compensation for labor taken by their former masters. The effective use of this novel legal argument is especially well illustrated in the Supreme Court case *Worthington v. Mason*.⁴⁹ Martha Mason was born a slave in Arkansas and was the property of Elisha and Edward Worthington. She was also the daughter of Edward Worthington, a claim conceded at trial. The Worthingtons had taken Marsha to Oberlin, Ohio during the Civil War, and there she went to school. At this point, according to the

⁴⁹ 101 U.S. 149 (1879)

District Court, “the Constitution and the laws of Ohio immediately dissolved the relation of master and slave previously existing.” The plaintiff “thereby became a free woman, and could never thereafter lawfully be claimed or held by Colonel Worthington as his slave.” Marsha was however put to labor upon their return to Arkansas, apparently until Elisha Worthington died. At that point, Marsha sued the estate, claiming she was owed compensation for labor done after her legal status as a slave was dissolved. The jury found for Marsha, and rendered a verdict of \$12,000. The case came before the Supreme Court on a narrow factual question on the legality of the charge to the jury, and in 1879, Justice Samuel Miller upheld the verdict without much comment.⁵⁰

Here the ruling in *Dred Scott* is turned on its head. Marsha not only obtained her freedom by moving to free state, she was owed back wages. In these types of cases it fell to the court to pinpoint exactly when freedom conferred, at that point could claim compensation. A consequence of a constitutional regime in which a contract based on slavery was legal so long as slavery was legal, was that legal rights and remedies attached or failed to attach depending on the determination of a precise moment that slavery was abolished. Different courts chose different points for the precise endpoint of slavery, but whatever the endpoint, this allowed former slaves to come into court relying on this bright line as part of a claim that their right to compensation attached at that same instant.

Emancipation is frequently presented as the wholesale triumph at the time of the Civil War of the conception of slaves as people, defined as people because they were no longer defined as property. This constitutional transformation from property to person of four million slaves is too frequently understood as a near inevitable consequence of the war, embodied perhaps in the emancipation proclamation and certainly in the thirteenth

⁵⁰ *Ibid.*, 149-150.

amendment. Emancipation is thus presented as a kind of national epiphany, a decisive legal break. This analysis has advantages. First, it is conceptually clear. Second, the dramatic eradication of human property in a decisive constitutional moment fits within a compelling and popular narrative of the Civil War, one in which the Civil War is understood as a crusade against slavery, a decisive moment when the nation comes to recognize its original sin, and recommits itself to its founding ideals.

This analysis of course is not untrue. It envisions a legal and constitutional scenario, however, in which slaves are still recognized as property in the Constitution the day before ratification of the thirteenth amendment, and people the day after. This conception, while appealing, can too easily blind us to the staying power of a conception of human property that had been a fixture of American law for centuries. The Supreme Court in Reconstruction took a stance that simultaneously recognized emancipation, while leaving the vestiges of human property intact.