Constitutional Rights in a Common Law World
The Reconstruction of North Carolina Legal Culture, 1865 - 1874

Linda A. Tvrdy

Submitted in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy
in the Graduate School of Arts and Sciences

COLUMBIA UNIVERSITY

2013

©2013
Linda A. Tvrdy
All rights reserved

ABSTRACT

Constitutional Rights in a Common Law World
The Reconstruction of North Carolina Legal Culture, 1865 - 1874

Linda A. Tvrdy

The Thirteenth and Fourteenth Amendments to the United States Constitution, which were ratified in the aftermath of the Civil War, abolished slavery, established national citizenship and made equality before the law a constitutional requirement. These national constitutional amendments brought revolutionary change to America's foundational law, but it was up to state and local legal actors to incorporate this change into the law that governed the everyday lives of Americans.

The literature of Reconstruction legal history tends to place federal law, federal courts and federal legal actors at the center of the story. But in the nineteenth century, the federal judicial system was limited in its institutional capacity and its jurisdictional authority. State courts, on the other hand, were ubiquitous and possessed of expansive jurisdictional authority to hear cases arising under both state and federal law. Before the end of the nineteenth century, most Americans could spend their entire lives without encountering the federal legal system. On the other hand, county courts and the common law legal culture in which they existed were an integral part of their daily lives.

This dissertation focuses on the state of North Carolina, examining how the state's legal actors articulated the meaning of freedom and incorporated it into their common law legal culture during Reconstruction. Engaging with recent literature that reconsiders the importance of the common as an ideology and mode of governance, this dissertation argues that the common

law conceptualization of rights stood in contrast to the abstract, individual rights embodied in the U.S. Constitution. Common law rights were contextual, relational, and hierarchical. Further, common law principles centered around creating and maintaining good social order rather than protecting individual rights. Because the common law dominated nineteenth century legal culture, North Carolina legal actors could not simply impose the principles of the newly amended U.S. Constitution onto the existing legal order. Rather, to ensure their lasting legitimacy they had to integrate those principles into the existing common law legal culture.

The process of integration began even before North Carolina ratified the Thirteenth Amendment. At the end of the war, Union army General John M. Schofield oversaw the administration of justice and the implementation of freedom in North Carolina through military commission proceedings over civilians. Even in these military tribunals the common law provided a common language and ideology through which northern military officials, North Carolinian citizens and North Carolina lawyers could contest the precise meaning of freedom. Once civilian courts resumed their authority, North Carolinians continued throughout Reconstruction to refine the meaning of freedom and to incorporate the new constitutional values in the language of the common law.

By focusing on the local implementation of constitutional change, this dissertation sheds light on how Americans experienced emancipation and freedom in their everyday lives. However, uncovering the common law context in which it developed aids our understanding of nineteenth century constitutional doctrine as well.

TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER ONE
We Live in the Midst of the Common Law 17

CHAPTER TWO
The Union Army and the Common Law 57

CHAPTER THREE
Children and Apprentices in Reconstruction North Carolina 88

CHAPTER FOUR
The Liberty to Be Unfree 126

CONCLUSION 163

BIBLIOGRAPHY 172

ACKNOWLEDGEMENTS

In the course of researching and writing this dissertation I have accumulated many debts. My committee offered insight and support for which I am humbled and grateful. This dissertation simply would not exist without the consistent encouragement and confidence my adviser, Eric Foner, provided me throughout. Elizabeth Blackmar instituted a prospectus writing group at just the time I needed it most. Alice Kessler-Harris took me into the fold at a moment of intellectual crisis and taught me to look for fish in different waters. Christina Duffy Ponsa and Ariela Dubler provided sharp insight and excellent feedback.

The librarians and archivists at the National Archives provided invaluable assistance sorting through the extensive records of the Bureau of Freedmen and Abandoned Lands and the Union Army military commission case files. I would also like to thank the librarians and archivists at the University of North Carolina at Chapel Hill. The North Carolina Collection and the Southern Historical Collection house an abundance of riches. The librarians at the North Carolina Division of Archives and History were both kind and knowledgable. The Willis Library at the University of North Texas provided me the opportunity to review the papers of Albion Winegar Tourgee while enjoying the hospitality of my dear friends Jill and Jim Cochran in Dallas, Texas.

Columbia University has provided me with both financial and practical support throughout this journey. Summer fellowships and Brebner travel grants made it possible for me to attend conferences and exchange ideas with other legal historians. When non-academic concerns threatened to overwhelm, Columbia allowed me the opportunity to pause and then resume without missing a step. The American Historical Association provided support through a Littleton-Griswold research grant for which I am grateful.

The Institute for Constitutional Studies provided an intellectual home for two weeks in the Summer of 2005 through its seminar on Slavery and the Constitution. Those two weeks were transformative and I cannot thank Maeva Marcus enough for giving me the opportunity to attend. I would like to thank both Mark Tushnet and Paul Finkelman for their excellent leadership and generous contributions. I have the Institute for Constitutional Studies to thank for introducing me to Christopher Curtis and Kathleen Sullivan. Both have been careful readers of this project at various stages, but more than that they are friends.

Jan Rosenberg introduced me to college teaching by inviting me to apply to teach a course at Long Island University. I have her to thank for planting the graduate school seed. I have her husband, Fred Siegel, to thank for encouraging it to grow. They have both been tireless cheerleaders and friends.

Finally I come to my children, Savannah and Jessica Pees. Savannah and Jessica were toddlers when this project began and now raid my closet. I would like to say that their help and support propelled me to complete my work, but the truth is they were my favorite distractions. This dissertation is dedicated to them with all my love and, as a result of their importuning, to the dog as well.

Introduction

The American Civil War and Reconstruction brought dramatic political, social and economic change to the entire nation. They also produced revolutionary legal and constitutional change, especially with respect to the rights of individuals. Before the Civil War, the federal government played almost no role in defining or protecting individual rights.[1] Instead, states regulated the rights of individuals - their legal relationships to one another, their relationships to the polity, and their status within the political community - through a common law system of judicial rulings, statutes, municipal regulations, and local custom.[2] State law determined who was a citizen as well as how the rights of citizens would be delineated. In addition, state common law governed the creation and enforcement of contracts, the definition of property, the transfer of rights in property, criminal law, and court procedure such as who could serve as jurors and witnesses.[3]

Reconstruction constitutional change interjected federal authority into the legal culture of the states in unprecedented ways. In the antebellum period, states and state law regulated slavery. The Thirteenth Amendment not only abolished slavery and involuntary servitude, but also authorized the federal government to enforce the terms of emancipation. As one of its first enforcement measures Congress passed the Civil Rights Act of 1866, which made all persons born in the United States citizens and designated a set of positive rights that all citizens were to

---

[1] Eric Foner, *Reconstruction: American Unfinished Revolution 1863-1877,* The New American Nation Series (New York: Harper and Row, 1988) 23. Harold M. Hyman, *A More Perfect Union: The Impact of Civil War and Reconstruction on the Constitution*, Sentry ed., (Boston: Houghton & Mifflin, 1975) 8.

[2] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Studies in Legal History (Chapel Hill: The University of North Carolina Press, 1996),

[3] William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History*, ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press 2003), 85-119.

enjoy equally. These rights included the ability to enter into contracts, to hold and transfer property and to give evidence in court. They also included the right to equal "security of person and property" and to be free from discriminatory legal penalties or punishments for crime. With the Fourteenth and Fifteenth Amendments, the national government further expanded its constitutional authority to regulate the conditions of freedom, to define and protect the fundamental rights of national citizenship, and to guarantee legal equality.[4]

Despite this expansion of federal power, states retained much of their traditional, common law authority to regulate the rights of individuals for the common good throughout Reconstruction and until the beginning of the twentieth century. The Emancipation Proclamation had "transformed a war of armies into a conflict of societies, ensuring that Union victory would produce a social revolution in the south."[5] But, the Thirteenth Amendment did not become a part of the formal constitutional law of the nation until nearly a year after the end of the war and the Fourteenth and Fifteenth Amendments came even later. Meanwhile, Union victory required the existing legal order to eliminate slavery and to incorporate emancipation in a way that would result in lasting legitimacy. With the obvious exception of the law of slavery, the common law that had defined the legal culture of the states since the colonial era provided a shared language and ideology among the local legal actors who contended on an intimate, case-by-case basis with what it meant that the formerly enslaved were forever free.

This dissertation engages with recent scholarship that takes the common law seriously as a legitimate mode of governance. Supreme Court Justice and late nineteenth century legal luminary, Oliver Wendell Holmes, Jr., taught modern Americans to see the common law as a

---

[4] Foner, *Reconstruction*, 243-280.

[5] Foner, 7.

form of politics, with common law judges "*illegitimately* usurping the realm of democratic politics" (emphasis in original).[6] Accordingly to Holmes, the common law was based on nothing but history and precedent. Its foundations were "temporal, . . .contingent, and revisable," making the common law collapse into politics.[7] Progressive era reformers picked up Holmes' mantle arguing that the common law's dependence on precedent and tradition gave it a conservative cast, and that its backward-looking perspective made the common law ill-equipped to address the rapid societal changes that had accumulated by the beginning of the twentieth century. Legislation - grounded in scientism and expertise - produced democratic justice. The common law - grounded in tradition and the personal predilections of unelected judges did not.

Legal and intellectual historian Kunal Parker has recently argued that Holmes's modernist critique of the common law grew out of the fact that state and federal courts were indeed using common law principles of contract, tort, and property to block necessary reform during the Progressive era. However, the modernist understanding that the common law was founded on nothing but historical contingency was not the nineteenth century understanding of the common law. Nineteenth century legal thinkers understood the common law to have a temporal component but, to them, the foundations of the common law lay in natural rights and reason, custom observed as law, and the ancient rights and traditions of Englishmen. While modernists and Progressives placed their faith in legislation as a source of democratic reform, nineteenth century legal thinkers believed the common law's incremental adaptability ensured that reform was guided by time-tested principles of law and reason. Democracy was suspect in

---

[6] The explanation of Holmes' and the Progressives' critique of the common law as politics depends heavily on Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism,* Cambridge Historical Studies in American Law and Society (New York: Cambridge University Press, 2011), 5.

[7] Parker, 7-8.

the early nineteenth century. But to the extent that democratic governance was a goal, the common law accomplished that goal because it was administered locally with the consent of the community.[8]

According to Parker the modernist view of the common law as collapsing into politics continues to hold sway in the literature of legal history. The traditional view, that nineteenth century judges applied the common law in a consciously instrumental fashion intended to promote some favored aspect of public policy, implies that common law "judges. . . were doing something deeply political, that democracy was being subverted by law."[9] Parker presents a nineteenth century understanding of the common law as a legitimate form of governance that many nineteenth century Americans regarded as consistent with, if not superior to, governance based on transient legislative majorities.

Individual rights under nineteenth century common law were conceptually different from our modern conception of abstract, individual rights. William J. Novak in *The People's Welfare* describes a common law conception of rights "very much at odds with modern conceptions of the sovereign state and the rights-bearing individual. . . "[10] Novak's project is to challenge the myth of nineteenth century statelessness and the predominance of liberal individualism. However, in the process of doing so he recovers a tradition of common law governance which he describes as the "well-regulated society."[11] The well-regulated society has four features that distinguish it from the "stateless individualism," which he argues has never existed in the United

---

[8] Parker, 12-17.

[9] Parker, 9-10.

[10] Novak, *The People's Welfare*, 9.

[11] Novak, *The People's Welfare,* 19-50.

States. These features are "public spirit, local self-government, civil liberty and law." The well-regulated society distributed and regulated rights in a contextual, relational and hierarchical fashion using the common law principles and methods that many Americans believed to be the source of their greatest freedom.[12]

By taking into account the common law legal culture that pre-existed federal constitutional change, this study will provide insight into how existing legal structures affected the Republican effort during Reconstruction toward social, political and economic reform. In addition, a close look at how freedom, citizenship, and equality were defined at the local level after the end of slavery will provide a new perspective for understanding how those concepts developed within the federal legal system, most especially within the jurisprudence of the Supreme Court.

North Carolina, like the other states, derived authority over its residents from the sovereignty it retained within the federal system of the United States. Common law legal culture, of course, was not unique to North Carolina. In fact, all the former British American colonies formally adopted the English common law (with modifications appropriate to local conditions) as the basis of their jurisprudence, either during the colonial era (like North Carolina) or immediately after the American Revolution.[13] Within the federal system of the United States, each state has its own legal system. The common law rules developed by the legislature and courts of one state had no direct authority in another. On the other hand, the legal materials on which lawyers, judges, and lawmakers frequently relied described general common law

---

[12] *Ibid.*

[13] James R. Stoner, *Common Law Liberty: Rethinking American Constitutionalism* (Lawrence: University of Kansas Press 2003), 14.

principles of universal application. Lawyers, judges and lawmakers freely borrowed the logic and reasoning of the judicial decisions of sister states and England so long as they were sufficiently persuasive and conditions were at least arguably similar. In this way, common law practitioners created a shared language and a body of common assumptions. Yet, because each state had an independent legal system, each state developed its own common law dialect and a legal culture distinct in its particulars from its sister states.

The common law method of decision-making produced not only a set of legal rules used in the courtroom, but a discourse about the nature of the general welfare and good order in society. Even though common law practitioners drew on tradition, custom, and precedent for legal authority, the common law was not static. Lawyers, judges and litigants pushed the common law in new directions by applying old principles in novel ways, contending through the language of the common law for his or her version of the good society.[14]

The common law provided a number of tools through which North Carolina, like other common law states, could exercise authority to regulate individual rights. The police power was one such important and elastic tool. The police power encompassed all the power of a sovereign to regulate for the safety, morals, health, economic growth and general welfare of its citizens. State police power before the Civil War was limited only by the power expressly delegated in the U.S. constitution to the federal government.[15]

While the police power belonged to the states as sovereigns, in the nineteenth century state legislatures delegated that power to county and town governments where local officials

---

[14] Novak, *The People's Welfare*.

[15] *Ibid.* See also, Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875,* New American Nation Series (New York: Harper and Row, 1982) and Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

exercised it in locally specific ways. State level governments were relatively weak, but local governments exerted regulatory authority over almost all aspects of everyday life.

Each county in North Carolina had a county court manned by several justices of the peace. The North Carolina General Assembly appointed justices of the peace from among their local elites on the recommendation of the county's delegation to the General Assembly. In addition to their judicial duties, justices of the peace issued licenses and permits for local businesses, oversaw the construction and maintenance of roads, undertook responsibility for the poor, regulated weights and measures along with countless other everyday regulatory and administrative duties.[16] Towns also had governments that regulated every aspect of town life from what activities could take place on the Sabbath to imposing curfews on free blacks. Towns established themselves by applying to the General Assembly for incorporation. The Articles of Incorporation for each town specified in detail the areas and extent of the authority town officials wanted the General Assembly to delegate to them. Statewide laws of universal application were relatively rare and limited to areas of the law that elite lawyers had managed to formalize such as commercial law and the law of property.[17]

In addition to the police power, the federal system left the regulation of domestic institutions in the hands of the states. The common law of domestic relations, as described by William Blackstone in his chapter on the "Rights of Persons" in the *Commentaries on the Laws of England*, provided the general principles of the American law of domestic relations, with one overwhelmingly significant exception – slavery. In the United States, Chancellor James Kent

---

[16] Guion Griffis Johnson, *Ante-bellum North Carolina: A Social History* (Chapel Hill: University of North Carolina Press, 1937).

[17] *Ibid.*, 114-135, Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009).

supplemented Blackstone and included the law of slavery in the section on domestic relations in his treatise, *Commentaries on American Law*. Common law domestic status categories such as husband and wife, master and servant, guardian and ward, master and slave, created and defined individual rights and obligations that were relational and hierarchical rather than absolute and equal.[18]

For example, while North Carolina law considered marriage to be based in contract, which implies a kind of mutuality, it created a status relationship in which wives were obligated to submit to their husbands' authority even where the husband exercised that authority with violent force. Husbands were obligated to provide their wives with bed and board, but wives had no corresponding right to use violent force to extract compliance from their husbands.[19] A husband's authority to use violence to force his wife to submit was not without limit. It depended to a degree on the personal characteristics of his wife. An unruly wife could be beaten to the point of bruising. A dutiful wife could not. The right of husbands to use physical force to gain their wives' submission was contextual as well as relational and hierarchical.[20]

North Carolina's experience is particularly apt for this study for several reasons. First, by the mid-nineteenth century North Carolina's legal system had acquired a reputation for intellectual independence and sophisticated development, giving North Carolina's law and legal culture influence beyond the borders of the state. Thomas J. Ruffin, who became the chief justice of the North Carolina Supreme Court in 1829, deserves much credit for the state's stature in antebellum legal culture. Roscoe Pound, the prominent legal thinker of the early twentieth

---

[18] Kathleen S. Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America*, The Johns Hopkins Series in Constitutional Thought (Baltimore: The Johns Hopkins University Press, 2007).

[19] *Howard v. Howard*, 51 N.C. 235 (1858).

[20] *Joyner v. Joyner*, 59 N.C. 322 (1862).

century and dean of Harvard Law School, ranked Ruffin among the ten greatest jurists in American history.[21] Ruffin was famous, among other things, for his 1830 decision in *State v. Mann*, in which he ruled that masters could not be prosecuted for assaults against their own slaves. He explained that if the system of slavery were to function properly the "power of the master must be absolute to render the submission of the slave perfect." Ruffin's decision set the baseline for the degree of humanity the common law afforded the slave.[22]

Second, while Conservative Democrats controlled the legislature after 1870, Unionists and Republicans dominated the judiciary from the summer of 1865 - when Unionist Governor William Woods Holden repopulated county offices pursuant to President Johnson's instructions - until 1876 - when the first term of elected judges in North Carolina expired. The Reconstruction Act of 1867 gave black men in the former Confederate states the right to vote. The North Carolina constitutional convention of 1868 proposed to change judgeships and justices of the peace from appointive to elected. In 1868 the biracial North Carolina electorate approved the change and because of a quirk in the enabling law, the first slate of popularly elected judges were to hold office for eight years instead of the six years for subsequent elections. After 1870, Conservative legislators were in a position to pass laws, but Republican judges interpreted them.[23]

---

[21] Mark V. Tushnet, *Slave Law in the American South: State v. Mann in History and Literature*, Landmark Law Cases in American Society (Lawrence: University Press of Kansas, 2003), 74.

[22] Tushnet, 1.

[23] Otto H. Olsen, *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée*, (Baltimore: The Johns Hopkins Press, 1965) 77-92.

Finally, if the "twin Reconstruction ideals of racial and economic justice"[24] could have been achieved in the south, North Carolina was a likely place for it to happen. In the antebellum period, North Carolina's laws governing slaves and free blacks were reputedly the most liberal in the South, although John Hope Franklin attributes that liberality to benign neglect rather than to any humanitarian impulse on the part of whites.[25] While North Carolina had a powerful, slaveholding, landed elite that influenced most functions of government, elite control was not complete. Most North Carolina families, as many as three-quarters, owned no slaves. The state had a politically significant class of yeoman farmers who had begun to push for democratic reform before the Civil War. Throughout the antebellum period, the General Assembly gradually reduced, though did not eliminate, the property qualifications for both officeholding and voting. Class tensions only increased during the Civil War as non-slaveholding whites came to see the war as one to protect their rich neighbors' slaves.[26] North Carolina also had a significant pro-Union movement that included both elites and yeoman. Finally, North Carolina's black population was large enough to decide many elections, but not so large as to dominate the electoral process.[27]

This combination of constituencies with conflicting interests permitted no one group to dominate the legal or political process, and it allowed no one viewpoint to dominate the state's

---

[24] William E. Forbath, "Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution," *Stanford Law Review* 46, no. 6 (July 1994): 1771-1085. Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham: Duke University Press, 1985), 118, describes the Reconstruction North Carolina Supreme Court as being composed of men who "were among the state's most distinguished members of the bar [who] had a profound respect for the law."

[25] Roberta Sue Alexander, *North Carolina Faces the Freedmen*, John Hope Franklin, *The Free Negro in North Carolina 1790-1860* (1943; repr., Chapel Hill: University of North Carolina Press, 1995), 1-10.

[26] Paul D. Escott, *Many Excellent People: Power and Privilege in North Carolina, 1850-1900*, The Fred W. Morrison Series in Southern Studies (Chapel Hill: The University of North Carolina Press, 1985), 44-47.

[27] Olsen, *Carpetbagger's Crusade,* 77-92, discusses the impact of black voters in 1867.

vision for a new legal, social, and political order based on freedom and equality. While violence and intimidation were certainly a problem in the state, those willing to wield that illegitimate power, could not permanently impose their vision of social order because too many possibilities existed for alliances across the lines of class and race. Indeed, North Carolina's political history was unique in that a coalition of white and black populists revived Republican power in the late nineteenth century. The resurgence did not last, but the fact that it could occur at all demonstrates the latent potential for such alliances.[28] Thus, North Carolina's social history opened the door to vigorous debate over the new legal order of Reconstruction.

The first chapter of this dissertation examines in detail the respective roles of the state and federal judicial systems and their respective legal cultures. During the antebellum period, state courts exercised vastly more authority over the lives of individuals than federal courts. Federal authority increased during the Civil War and Reconstruction, but the increase was modest. State judiciaries remained the primary site for adjudication, and the common law provided the discourse, ideology, principles, and method. Nineteenth century common law rights were not the abstract, individual, decontextualized rights that are familiar to us today. In the nineteenth century common law rights were intricately connected to a person's role and reputation within his or her community, relationship to members of his or her household, offices a man might hold, and membership in voluntary associations, such as churches, benevolent societies and political organizations.[29]

---

[28] Robert C. Kenzer, *Enterprising Southerners: Black Economic Success in North Carolina 1865-1915* (Charlottesville: University Press of Virginia, 1997) 1-8.

[29] Novak, *The People's Welfare*, Sullivan, *Constitutional Context* and Edwards, *The People and Their Peace*.

American common law in the nineteenth century was not simply a set of legal principles. It was a form of governance that arose from an ideology that promoted good social order and the general welfare. The common law in the colonies and later the states predated the U.S. Constitution by more than a century and it survived the American Revolution largely unchanged. For nineteenth century Americans, the common law was a source of liberty. The administration of justice was diffuse and highly sensitive to local knowledge and customs. Obedience to the law was by consent, not compulsion. While the source of great liberty, the common law also reinforced social hierarchy with the force of law. However, the adaptability of the common law allowed for incremental reform where societal will existed.[30]

In direct contrast to the expansive authority of the state judicial systems, federal administration of justice was starkly limited in institutional capacity, jurisdictional authority, and by a lack of its own jurisprudence. The Constitution established only the Supreme Court, leaving Congress the authority to create all other federal courts. The first Congress established a minimal system of federal courts. Federal court authority to hear cases was strictly limited. In 1875, Congress first established "federal question" jurisdiction - the general power of federal courts to hear cases that raised questions of federal or constitutional law. Federal question jurisdiction is utterly normative today, but for the most of the nineteenth century it simply did not exist. State courts heard cases arising under federal law and the Constitution except where Congress expressly provided in substantive legislation for federal courts to hear cases arising under the specific statute.[31]

---

[30] Parker, 15, refers to the adaptability of the common law as its "insensibility" because ideally the adapation took place over a long enough period of time so as to be imperceptible except in hindsight.

[31] Richard A. Posner, *The Federal Courts: Challenge and Reform*, 2nd ed. (Cambridge: Harvard University Press, 1996) 41-48.

Though the federal judiciary was separate and independent of the state judiciaries, it also operated within the culture of the common law. During the antebellum period, in cases where a federal statute or the Constitution authorized federal jurisdiction, federal courts applied the common law rules of decision, of evidence, of procedure and occasionally of substance. Because of their limited institutional and jurisdictional capacity, however, federal courts could not develop a separate, cohesive federal jurisprudence.

Notwithstanding the limited power of the federal judiciary as a whole, the Supreme Court was relatively powerful because it was the final interpreter in cases that came before it. In cases where the Supreme Court asserted authority to adjudicate the rights of individuals, the nature of those rights were transformed from the contextual and textured rights of the common law to something more abstract, more rigid, and more hierarchical. State courts did not always acknowledge the Supreme Court's claim to being the authoritative interpreter of constitutional principles. The power struggle between state courts and the Supreme Court was joined over the issue of fugitive slaves and slavery in federal territory. Only the Civil War and the Reconstruction constitutional amendments resolved the dispute.

Chapter two examines how the Union army administered justice in North Carolina during early Reconstruction. During Presidential Reconstruction, which lasted from the end of the war until Congress passed the Reconstruction Act of 1867, the Union army retained jurisdiction in cases involving blacks because the state refused to allow them to testify on equal terms with whites in state courts. Union military commissions tried civilians accused of serious crimes and applied the law of the state as modified by emancipation and the Civil Rights Act of 1866. Even though slavery had been deeply embedded in southern legal culture, it was possible for North

Carolinians and northern Union army officials to begin to work out the meaning of freedom in the language of the common law. The abundance of character evidence that military commissions agreed to hear and consider demonstrates that the localized, contextual justice that existed in the antebellum period persisted in North Carolina during reconstruction even under martial law. While Union army officers and North Carolina lawyers may have shared the language and ideology of common law governance, the military commission cases demonstrate that they possessed different understandings of the meaning of freedom and where the formerly enslaved fit within the new social order. The Union army's administration of justice after the war presaged the difficulties to come in defining freedom and the status in southern society of the former enslaved.

Chapter Three examines how whites exploited the apprentice system to recapture both the labor of formerly enslaved children, and to reassert aspects of mastery that emancipation destroyed. During the antebellum period, the household was a foundational social, political and legal structure in the South. In *The People and Their Peace* Laura Edwards locates two separate common law systems in North Carolina, which she identifies as local law and state law. State law defined the relationship of the head of household to the state, the nation and to other patriarchs. The subject matters of state law included property and commercial transactions. Local law - locally administered and grounded in older common traditions - governed the daily lives of individuals. The purpose of local law was to maintain the people's peace. Courts endeavored to restore the peace, not to protect or vindicate individual rights. The contextualized rights of individuals had bearing on whether the peace had been breached, by whom, and how

the peace could be restored. But courts did not seek to vindicate the rights of individuals for their own sake.[32]

The household was an important structural institution within the people's peace. The law defined only property-owning white males as capable of maintaining the status of head of household. The law attempted to place everyone else somewhere within a household and under the sovereign authority of its head. Slaves were members of their master's household. Except in extreme circumstances requiring state intervention, their masters governed their daily lives. They could not maintain their own legally sanctioned family structures. Even free blacks' ability to do so was limited by antebellum law.

Understanding that determining the status of the formerly enslaved would be one of the most important tasks of reconstruction in North Carolina, Union General John M. Schofield, commander of the Department of North Carolina, issued an order describing the rules that would govern the freedmen until civil government could be restored in the state. Schofield acknowledged the common law rights of black parents over their families on an equal basis with whites for the first time. Schofield, perhaps unwittingly, destablized one of North Carolina's important institutions.

The very existence of families headed by black men, or women in some cases, was an affront to former slave owners' sense of mastery. In an effort to regain some of their lost mastery, whites began to apprentice formerly enslaved children. Apprenticeship for poor children had existed in North Carolina common law from the early colonial period. But during

---

[32] Edwards, *The People and Their Peace.*

Reconstruction, whites used the existing legal structure to virtually re-enslave large numbers of children and young adults.[33]

The North Carolina Supreme Court recognized that whites were exploiting the previously useful system of apprenticeship in ways that were inconsistent with the freedom of the formerly enslaved. The antebellum apprenticeship legal scheme had not included any consideration for the rights of parents or the children about to be apprenticed. But the Court incorporated the right to notice to persons about to be apprenticed, so that they might have the ability to present evidence of their own best interests. The basis for the decision remained grounded in social order, but by adding the individual right to notice, the Court adapted the old system to the new social reality created by the end of slavery.[34]

One of the most important aspects of reconstructing the South after the Civil War was reconstructing the South's system of labor. Republicans intended that the South replace its slave labor system with a free labor system. However, the law that governed the system of free labor contained internal inconsistencies that were exacerbated in the transition from slave to free labor in North Carolina. Chapter four is a case study of *Haskins v. Royster*, an 1873 North Carolina Supreme Court case that addressed many of the issues and internal inconsistencies of free labor law and ideology.[35]

The Court that decided *Haskins v. Royster* was composed of Justices who possessed a sincere intent to articulate legal rules that supported free labor in the state. Yet, the divergent views of the justices in the majority and the justices in dissent demonstrated that the future terms

---

[33] Foner, 201, cites example of North Carolina sixteen-year-old working at a turpentine mill to support his wife and child.

[34] *In Re Ambrose* 61 N.C. 91 (1867).

[35] 70 N.C. 601 (1874).

of free labor law would be subject to intense debate, one that would take place at both the state and federal level. At the same time that the U.S. Constitution constrained the states in developing their free labor law, such law informed the discussion over what rights were fundamental and deserving of federal protection under the new Constitutional regime.

Twenty-five years ago in an essay entitled "The Constitution of Aspiration and the 'Rights that Belong to Us All,'" which introduced a *Journal of American History* symposium celebrating the bicentennial of the United States Constitution, Hendrik Hartog called on historians to take a new approach to constitutional history; one that did not privilege the Supreme Court as the authoritative interpreter of the constitution.[36] According to Hartog "Supreme Court cases should be only one portion of the descriptive detail of American constitutional history. As important would be the small, everyday contests, arguments, negotiations, and understandings in which legal rights and constitutional assumptions have been constructed and exercised."[37] The Thirteenth and Fourteenth Amendments caused abrupt change in constitutional law, change that eventually resulted in the federal government and federal judiciary assuming the primary role in defining and protecting individual rights. However that transition took place over half a century, during which time the common law provided the dominant legal discourse.

---

[36] Hendrik Hartog, "The Constitution of Aspiration and 'The Rights that Belong to Us All,'" *Journal of American History* 74, no. 3 (December 1987): 1013. In November 2012, the American Society for Legal History hosted a panel entitled The Constitution of Aspiration: Twenty-five years After. The panelists included legal historians Risa Golubuff, Steven Wilf and Professor Hartog himself. These accomplished historians agreed that the effort to develop methods for doing constitutional history from "the bottom up" remains ongoing.

[37] Hartog, 1033.

Chapter One

We Live in the Midst of The Common Law[1]

The Civil War and Reconstruction revolutionized the American legal system, especially with respect to the law governing individual rights. Before the Civil War states, through the exercise of sovereign police power authority, regulated the lives of their citizens almost without federal involvement. Beginning with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution and the federal legislation passed under their authority the federal government assumed direct legal authority over the status and rights of individuals as national citizens. Because the lion's share of the changes to formal, written, law occurred at the federal level, it is perhaps unsurprising that historians have regarded the federal arena as the source of the most significant legal change and development during Reconstruction.[2]

During Reconstruction state law and legal culture also changed and adapted to integrate the requirements of freedom and the new constitutional order. However, that change was much more subtle, though no less significant, than that taking place at the federal level. The change was subtle because the structures of state judicial administration remained relatively unchanged. To be sure, the former confederate states had to amend their constitutions to conform to the

---

[1] Quotation by James Kent, cited in Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism,* Cambridge Historical Studies in American Law and Society (New York: Cambridge University Press, 2011) 2.

[2] The Fourteenth Amendment in particular has received a great deal attention from scholars because it has been the most litigated. The focus of these studies tends toward an examination of what was the original meaning or intent of the Fourteenth Amendment. Examples include, Michael Kent Curtis, *No State Shall Abridge : The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986), Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* (Lawrence, Kan.: University Press of Kansas, 1990), Raoul Berger, *Government by Judiciary : The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977). More recent works have focused on the possibility of reviving the Thirteenth Amendment as a source of individual rights, especially economic rights. Examples include, Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York: New York University Press, 2004), Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, Cambridge Historical Studies in American Law and Society (2001; repr., New York: Cambridge University Press, 2004).

newly amended United States Constitution. And some states, North Carolina among them, used the opportunity to reform aspects of their systems of justice. North Carolina, for example, made justices of the peace and judgeships elective rather than appointive and codified much of its previously unwritten criminal law.[3] Nevertheless, state courts continued to operate as common law courts. It is easy to assume that, except where state courts specifically applied new federal law, that they applied an unchanged common law. But that assumption misunderstands how the common law worked within the federal system during the nineteenth century.

Looking at the problem of Reconstruction legal change from a state and local perspective is important, not only because it remains something of an untold tale, but also for reasons that go to the very heart of understanding nineteenth-century law. State courts exercised far more authority than federal courts over the legal issues affecting nineteenth-century Americans, including the regulation of individual rights. This was especially true in the antebellum period, but continued to be the case throughout Reconstruction and beyond. In the nineteenth century, federal courts had neither the jurisdictional authority nor the institutional capacity to hear the bulk of legal cases that arose in the lives of Americans. Even in cases involving federal law, it was far more likely that they would travel through several layers of state judicial administration before, if ever, reaching a federal court. The political ideology of federalism placed limits on the kinds of cases federal courts could hear and the law they could apply; limits that did not apply to state courts. Though federal jurisdiction increased during Reconstruction, that increase was modest. During Reconstruction, state judicial institutions implemented and incorporated constitutional change in much the same way they had done before the Civil War, which meant

[3] Otto Olsen, *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée* (Baltimore: The Johns Hopkins Press, 1965) 97-102.

that Reconstruction constitutional change entered the American legal culture through a common law medium.

State courts were common law courts. The common law they applied was an Americanized version of the English common law that British North American colonists brought with them to the New World. After the Revolutionary War, every state in the Union "received" the portions of the English common law that were useful and applicable to their local circumstances. The common law legal culture of the states predated their existence as states by more than a century and established deep roots.[4]

The common law has a somewhat undeserved reputation as an institutional impediment to the progressive development of individual freedom and right. But, the relationship between the common law and individual freedom is more complex than one of simple opposition. The common law created a conceptually distinct system of individual rights and obligations that was relational and contextual.[5] The ideological goal of the common law was the well-being of the community. Individual rights were always subordinate to the general welfare. In fact, individual rights, as such, did not exist outside the context of the community in which a person lived. This concept of rights is quite different from constitutionalized conception of the "inherent, natural, and absolute rights of individuals" embodied in the Reconstruction amendments and the federal

---

[4] William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Athens: The University of Georgia Press, 1994), 13-68; James R. Stoner, *Common-Law Liberty: Rethinking American Constitutionalism*, (Lawrence: University Press of Kansas, 2003), 10-16; Morton J. Horwitz, *The Transformation of American Law 1780-1860*, Studies in Legal History (Cambridge: Harvard University Press, 1977), 4-9; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 12-14.

[5] Kathleen S. Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America*, The Johns Hopkins Series in Constitutional Thought (Baltimore: The Johns Hopkins University Press, 2007); Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Studies in Legal History (Chapel Hill: The University of North Carolina Press, 1996)

legislation enacted under their authority.[6] Neither the situated rights of the common law, nor the abstract rights of the postwar U.S. Constitution inherently produced greater individual freedom. In fact they both sought to maximize liberty. But, they differed on both the definition of liberty and how best to achieve it. The common law defined liberty in positive terms. The greatest freedom occurred when self-policing communities organized and regulated themselves for stability, safety and the general welfare. Constitutional liberty was negative liberty. Negative liberty was best achieved by preventing government interference, not by encouraging government action. Indeed, in the antebellum period, the Bill of Rights to the U.S. Constitution functioned as a list of rights with which the federal government could not interfere. It was not a list of positive rights that the federal government actively protected.[7] The common law emphasized peace and good order. Constitutional liberty emphasized abstract, individual right.

To understand what it meant that state courts were common law courts, it is important to understand exactly what the term "common law" means. The common law, as it developed over centuries in England, was not simply a body of legal principles or a collection of court decisions. It was a form of governance. Laura F. Edwards describes governance to the "the institutional mechanisms, formal and informal, including but not limited to, the legal system, through which decisions were made about legal cases and public issues." English common law principles developed out of widely divergent sources, methods, and types of judicial tribunals from ecclesiastical courts applying principles of equity, to local tribunals applying customary laws and overseen by feudal lords, to royal courts that applied the King's law. By around the seventeenth

---

[6] Novak, *The People's Welfare*, 244.

[7] For the argument that neither the abstract individual rights of the U.S. Constitution, nor the situated rights of the common law is inherently more progressive, see Sullivan, *Constitutional Context*. *Barron v. Baltimore*, 32 U.S. 243 (1833) settled the issue that the Bill of Rights was not a positive grant of individual rights and served only as a restraint on the federal government.

century, legal thinkers began to view these diverse sources as components of a cohesive whole. They formulated an ideology around the common law as a mode of governance that promoted liberty and good social order.[8]

Kunal Parker describes the intellectual consolidation of the laws of England into an ideology as a means of resisting encroachments of both the monarchy and Parliament. Englishmen had to obey the laws of the sovereign. But common law judges, in the name of the rights of the people, could shape and limit those sovereign proclamations through the interpretive methods of the common law. Any particular sovereign or currently constituted Parliament could act in a way that was contrary to natural law and reason. The ancient wisdom of the common law operated as a protection against the bad intent, incompetence, or expediency of whomever served as the sovereign at a particular point in history.

The common law, on the other hand, stood outside history. The ahistorical nature or "immemoriality" of the common law, coupled with its ability to evolve almost imperceptibly alongside changing conditions in society, gave it an authority that neither acts of Parliament nor decrees of the monarch possessed. The common law acquired its authority through the consent of generation after generation to the best principles of law articulated by courts, whether those principles reflected universally applicable natural law and reason or the idiomatic customary practices of a particular location. In this way, the ancient common law had greater legitimacy

---

[8] Edwards, *The People and Their Peace,* 3. Christopher L. Tomlins, *Law, Labor, and Ideology in the Early Republic* (New York: Cambridge University Press, 1993), 19-59, describes law as the "modality of rule" in nineteenth-century America and the common law concept of "police" as an "institutionally inchoate ideology of collective responsibility for the reproduction of the well-ordered community, an ideology expressible in a political language giving pride of place to an ideal of public good or happiness." In other words, "police" was the ideological common law goal and common law methods were the way to achieve it. Parker, *Common Law, History, and Democracy in America*, 25-66, describes the intellectual links between English Enlightenment legal thinkers who first began to organize the common law into an ideology of governance and nineteenth-century American lawyers who enthusiastically adopted their ideas, especially those of William Blackstone. For the common law as a form of governance, see generally Novak, *The People's Welfare.*

than acts of Parliament - which could represent simple expediency - or the will of the monarch - which could be mere whim.[9]

In resisting the encroachments of Parliament and the monarch, common law courts did not contest the legitimacy of properly enacted positive law. Rather, courts blended statutes, regulations and decrees into the logic and assumptions of the common law. Lawmakers could replace common law rules with legislation, but they had to do so with abundant clarity of purpose. If a statute were inconsistent with the common law, common law rules required courts to interpret the statute as narrowly as possible consistent with its language. If a statute were consistent with common law principles, it easily assimilated into the fabric of the common law and eventually became part of it. After sufficient passage of time, courts could simply cite the ancient principle without necessarily referring to the statute that first embodied the rule.[10]

Royal common law courts dealt with issues involving landed estates and crimes against the peace and dignity of the sovereign. They used an extremely complex, highly technical system of pleading that only trained, experienced lawyers could navigate. Local courts decided most of the issues that concerned the non-landed population. They operated on a less formal basis and relied a great deal on custom and long-standing local practice.[11] But the royal courts and local courts were part of the same legal system and shared one legal culture. Legal scholar H. Patrick Glenn describes the English common law to be a relational law. The "common" part of the common law consisted of general principles or legal rules of virtually universal

[9] Kunal Parker, *Common Law, History, and Democracy in America, 1790-1900*, artfully explains the seeming paradox of common law legitimacy being grounded simultaneously in its immemorial existence and its ability to change with social circumstances. See also, Sullivan, *Constitutional Context,* 25-26.

[10] Stoner, *Common-Law Liberty*, 11.

[11] *Ibid.*

application. This aspect of the law existed in relation to the "particular," local, or customary. Common law and local law and custom operated in dialogue with one another, exerting mutual evolutionary pressure, without either threatening the integrity or existence of the other.[12]

The earliest British North American colonists were most familiar with the customary laws and practices of local courts. They practiced a form of English common law that consisted of specific, local iterations of the general common law stripped of technical pleading requirements down to essential principles.[13]

In the eighteenth century, the legal system of the British North American colonies became more Anglicized, in part because Parliament began to incorporate the colonies more fully into the English mercantilist economic system, and in part because increasing numbers of American lawyers received training at the English Inns of Court in London. The legal systems of the colonies did not begin to reach the level of complexity of English common law courts, but they did become complex enough to make lawyers necessary.[14] During most of the colonial period, courts operated relatively independently of royal control. But, as the Crown began to exercise greater oversight, colonists bristled at the interference.[15]

By the time of the American Revolution, the common law had been the law of the colonies for more than a hundred years. The Revolutionary generation overthrew the English political system that had governed them during that time period, but they did not overthrow the English legal system as it had grown and developed there. Each of the states that had once been

---

[12] H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005).

[13] For local courts applying custom as well as law, Nelson, *Americanization of the Common Law*, 3-4 and Hall, *The Magic Mirror*, 10-17;

[14] Hall, *The Magic Mirror,* 19.

[15] Edwards, *The People and Their Peace*, 41.

British colonies “received” the English common law into its legal system. Some states did this explicitly by statute, some through judicial decisions. But each, without exception, made the common law the foundation of its legal culture. Each state retained for itself the option to include in its reception of the common law only those portions of it that were appropriate to their local circumstances.[16]

Though many of the principles and practices of the English common law survived the transformation, Americanized common law contained a critically important distinction compared to its English predecessor. The English common law drew its legitimacy from the peoples' obligation to obey the sovereign, *i.e.*, the Crown and Parliament. While the common law in England in the seventeenth century might have operated to limit the overreach of a *particular* sovereign or a *specific* act of Parliament, its ultimate legitimacy came from an obedience to sovereign authority across the generations.[17]

In the United States, the common law also derived its legitimacy from obedience to the sovereign, but in the states the people were sovereign. They consented rather than submitted to the common law. Courts transformed from being the instruments of a single, distant, authoritative voice, into institutions belonging to the people, and operating by their consent. Americans, more than the English, understood the common law to be the product of natural law and reason. In the hands of the people it was no threat to liberty. On the contrary, the common law was a source of liberty. While the change in the source of the common law's legitimacy did

---

[16] Hall, *The Magic Mirror*. Whereas the technical term for the acts of states in adopting portions of the English common law is called “reception,” Hall prefers to describe the colonists as having “carried” with them portions of the English common. This is a more accurate notion of what actually occurred. See also, Stoner, *Common-Law Liberty*, 14-15 and Nelson, *The Americanization of the Common Law*, 67.

[17] Parker, *Common Law, History, and Democracy in America 1790-1900* especially in Chapter 3, “Time As Consent,” explains the concept of obedience to the sovereign across generations allowed Englishmen to resist the actions of a particular sovereign.

not perceptibly alter the institutions of the common law, it radically changed their role in society and government.[18]

The common law in the colonies and later the United States was not simply a set of laws and procedures. It was a system of governance, with the county court as its structural edifice. Legal authority in the states was diffuse and local. Rather than enacting abstract laws with statewide application, states delegated a great deal of governing authority to local municipalities.[19] In North Carolina, for example, each county had several justices of the peace, appointed by the governor upon recommendation from the legislative delegation from his county. A justice of the peace served for good behavior or until he chose to resign. These men were not necessarily trained in law, but they did typically come from the ranks of local elites.[20] Each county had a magistrates court, a county court, and a Superior Court. The judges who comprised each of these different courts were the same men who served as justices of the peace for the county, but in different combinations at each level of administration.

County courts, including magistrates courts, had both judicial and administrative duties. The county court was responsible for matters as wide-ranging as deciding where and when to build roads, deciding who should receive a license to operate a mill or a tavern, and establishing the approved weights and measures for use in county court-approved businesses. County courts

---

[18] Horowitz, *The Transformation of American Law*, 16-30 and Parker, Chapter 3, discuss the shift in the legitimacy of law from obedience to the sovereign to the consent of the governed. Edwards, *The People and Their Peace,* 41-53 describes this shift in North Carolina specifically. Sullivan, *Constitutional Context,* 39-42 for the common law growing out of the experience of the community. For American view of common law as the source of liberty see Stoner, 13-15. Nelson, *The Americanization of the Common Law* explains that juries were more powerful and influential in the early national period because they decided both the law and the facts in cases they heard. The juries applied local iterations of the common law and customs the community observed as law.

[19] The county court structure with magistrates or justices of the peace officiating in judicial, legislative and administrative capacities was pervasive. Nelson, *The Americanization of the Common Law*, 15-16 and Hall, *The Magic Mirror.* 17-21 describe a county court structure similar to North Carolina's for Massachusetts and New York.

[20] For a discussion of the antebellum court system in North Carolina, Guion Griffis Johnson, *Ante-bellum North Carolina: A Social History* (Chapel Hill: The University of North Carolina Press, 1937), 611-644.

supervised indenture agreements between masters and servants. They probated wills and appointed guardians for orphaned minors, or bound them out as apprentices if they had insufficient means to pay for their own subsistence.[21]

The list of everyday activities over which justices of the peace had judicial authority is exhaustive. It included everything from using profanity in public to appearing drunk in public; from working unnecessarily or engaging in sport on a Sunday to killing a deer out of season. But, they performed their duties with and within the communities in which they lived, often with the participation of residents. For example, if a person wanted to pay a debt in commodities and the creditor thought the commodities were of objectionable quality, the creditor could have the county court conduct an inquiry into the fair value. The justice of the peace relied on the opinions of local freeholders to make his determination. Freeholders also determined whether a farmer's fence was high enough to keep wandering livestock out of his crops. If the fence were high enough, the farmer could recover damages. If not, the livestock owner could recover for injury to his animals for having been chased.[22]

Justices of the peace were responsible for keeping the peace and good order of the state and had wide-ranging authority to listen to any complaint, however framed, by anyone who could swear an oath that another person had breached that peace. Justices enlisted the entire community to control and punish such criminal behavior. They could call on anyone, even free blacks and slaves who could not give sworn testimony against whites, to give evidence that might help the court learn exactly what had occurred that gave rise to the complaint. Then the

---

[21] Paul M. McCain, "Magistrates Courts in Early North Carolina," *The North Carolina Historical Review*, 43, no. 1 (January 1971) 23.

[22] McCain, 26.

community gathered to hear evidence and decide whether an indictment should issue. A defendant who appealed from a conviction in a magistrate's court appealed to a jury composed of community members rather than to another court.[23]

County courts applied the common law in a manner that was by highly personal, based heavily on local knowledge, and took into account the articulated position in society that the accused, the accuser, and witnesses occupied. Most of the administration of justice never left the county in which the underlying incidents occurred.[24] Historian William Novak describes the goal of nineteenth century local common law governance to be the "well-regulated society."[25] Within the well-regulated society local and state office holders sought to promote what they understood to be the good of the community rather than with the goal of protecting individual rights or interests. The goal to promote the general welfare, according to Novak, was "embedded in the practices of local institutions and common laws."[26] Liberty arose out the "order, comfort, safety, health and well-being" that effective, fair regulation provided. The bundle of rights that any particular person enjoyed were a function of these regulations and his or her specific place in the local social and political order.[27] To be sure, the rights derived under the common law were not simply relational and contextual, they were hierarchical as well. Liberty, as defined in nineteenth century American common law perpetuated and legitimated the subordination of

---

[23] McCain, generally, Edwards, *The People and Their Peace,* describes how community members who could not give sworn testimony (slaves and free blacks) or had no legal personalities (married women) nevertheless participated in maintaining and defining the peace and good order of the community by giving "information" during the investigation of alleged breaches of the peace.

[24] Edwards, *The People and Their Peace,* 3-10.

[25] Novak, *The People's Welfare*.

[26] Novak, *The People's Welfare,*10.

[27] *Ibid.*, 8.

women, free blacks, and slaves. Members of these status categories could claim the protection of law only so long as they observed their proper place within the peace of the state.[28]

The English jurist William Blackstone devised the most widely accepted definition of formal common law status relationships which he conceptualized as belonging within the domestic household. Of all the seventeenth and eighteenth English legal thinkers, Blackstone exerted the most influence in the United States. American courts and legal thinkers adopted Blackstone's categorization of common law domestic relationships into parent and child, husband and wife, master and servant. New York Chancellor James Kent's Americanized version of Blackstone added the category of master and slave.[29]

Beyond even these formal status relationships, historian Laura Edwards describes the local legal system in North Carolina as even more intricately textured. Edwards' iteration of Novak's well-regulated society includes the concept of the people's peace. The peace and dignity of the state required that everyone, including slaves, women, children, free blacks and white male householders, be brought within the peace of the community. Within the localized legal systems of the state, the protection and vindication of individual rights was always subordinate to the goal of repairing disruptions to the peace. Within the peace, a person's property-holdings (in the case of white men), ancestry, reputation or credit in the community further defined his or her status position. People whose rights were limited, such as women or

---

[28] Nelson, *The Americanization of the Common Law,* 4 observes that local communities sought economic and social stability through economic rules that prevented the rapid redistribution of wealth and social rules that clearly defined the status and hierarchy of individuals in the community.

[29] For Blackstone's influence and importance to American law Sullivan, *Constitutional Context*, 22-26 and Parker, *Common Law, Democracy and History in America,* 58-62. William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History,* ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press, 2003) 96, for Kent adding slavery to American common law status categories.

free blacks, and even people with few or no rights at all such as the enslaved, could nevertheless possess sufficient character or credit within the community such that a magistrate might find that violence or theft perpetrated against them had disrupted the peace. For example, the clothing a person wore was treated as his or her personal property even if it "belonged" to someone who had no legal ability to hold property. In a case where that person's property was taken from him or her a magistrate might order it returned. However, the purpose of the order was not to vindicate or protect the individual's right to hold and keep property. Rather, the purpose was to restore the peace.[30]

As Christopher Tomlins observed almost twenty years ago, law was the "modality of rule" in nineteenth century America and courts were the primary institutions of rule.[31] Relocating sovereignty to the people allowed Americans to regard courts to be instruments of liberty not oppression as they perceived them to be under British rule. Common law ideology assumed the sovereign possessed plenary authority to regulate any matter of dispute that might occur between two individuals or between an individual and the state. Within the structure created by the U. S. Constitution, states delegated some of this power to the federal government. However, the Tenth Amendment explicitly reserved to the states and to the people all powers not expressly granted to the federal government or prohibited to the states.[32]

In the early republic state courts articulated the scope of their authority under the Tenth Amendment as the authority to regulate according to the common law maxim "*salus populi*

---

[30] Edwards, *The People and Their Peace*, 133-168.

[31] Tomlins, *Law, Labor, and Ideology in the Early Republic,* 19-59.

[32] Novak, *The People's Welfare*, 13-14, describes both the ancient common law origins of the police power and its incorporation into American constitutionalism via the Tenth Amendment.

suprema lex est (the welfare of the people is the supreme law)."[33] States - and in the context of nineteenth century governance that more often than not meant state *courts* - governed to maximize the health, safety and general well-being of the people. Courts could be creative in their application of existing law to new situations so long as the result was the greater welfare of the community. Local courts staffed with judges who were sensitive to the habits and manners of the people were in the position to assess what principles would promote the general welfare, and could generally be trusted to do so. If they made mistakes, the common law allowed for the correction of those mistakes. The common law also allowed for changing notions of what was the general welfare, although incorporating change came about slowly and incrementally. The common law authority to regulate and adjudicate for the general welfare acquired the legal term "police power" during the nineteenth century. But the ideology had long existed in the common law.[34]

Virtually all matters of daily concern to most individuals fell within state sovereign authority and jurisdiction. Communities policed themselves to an extraordinary level of detail, through a system of county courts. County courts administered the law and distributed individual rights and obligations in a situated, contextual way that depended a great deal on local knowledge to produce a personalized form of justice and good social order.[35] Under the Articles of Confederation, state legal systems were largely independent of national control. By the time the states ratified the U.S. Constitution, they had been developing their respective state common

---

[33] *Ibid.*, 45.

[34] *Supra,* n. 30.

[35] Sullivan, *Constitutional Context*, 3, invokes the venerable Massachusetts jurist, Lemuel Shaw, for the proposition that the U.S. Constitution only pertained to political rights. States regulated all civil rights and social relations through common law governance.

law legal cultures without input, much less supervision, from the federal government for just over a decade. But, because they had kept the institutions of common law governance they developed throughout the colonial period, it is fair to say that the legal culture of the states had been developing for generations. Under the Constitution of 1787, states delegated some of their legal authority but retained almost complete control over the law of property, contract, tort, personal status and crime, as well as the power to regulate creatively for the general welfare of their citizens.[36]

Federal court authority operated in stark contrast to the expansive authority of state courts. Throughout the antebellum period and even during Reconstruction, the federal judiciary was limited in both its institutional and jurisprudential capacity. The Constitution established the federal judiciary in fewer than four hundred words. Article III, Section 1 states that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . ." Thus, the only constitutionally established court is the Supreme Court. All other federal courts are creations of the U.S. Congress.[37]

Congress established a skeletal system of federal courts via the Judiciary Act of 1789. The 1789 Act created thirteen judicial districts, which roughly corresponded to a single district for each state. Each judicial district had a district court and a circuit court. District courts were trial courts with a single judge to hear each case. Circuit courts were also trial courts, but were staffed by one district court judge and two Supreme Court justices sitting on a panel of three. In

---

[36] Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005) 25-29 for state sovereignty under the Articles of Confederation.

[37] U.S Constitution, art. 3, sec. 1, cl. 1.

terms of sheer physical capacity to hear cases, state court systems - with at least one court sitting in each county, and several magistrates serving each county - dwarfed that of the federal judiciary.[38]

In addition to the relative scarcity of federal courts and judges, the Judiciary Act of 1789 severely limited federal jurisdiction. The term "jurisdiction" refers to the nature and extent of a court's authority to hear particular kinds of cases. Jurisdiction can be geographic. For example, two residents of New York contesting ownership of a piece of property in New York could not ask a North Carolina court to settle the dispute. The geographic reach of North Carolina court's jurisdictional authority does not extend to disputes involving parties and matters located entirely outside the state. Jurisdiction can also be defined by subject matter. A modern example might be traffic court. An eighteenth century example might be a municipal court in a large port city whose jurisdiction was limited to disputes involving commercial trade. Jurisdiction can also extend to the status of persons over whom a court has authority. State courts had jurisdiction over their citizens. But they also had jurisdiction over non-citizens who were physically present in the state. Once the non-citizen left the state, jurisdiction became a more complicated matter and might require the consent of the person's home state to extradite him.[39]

Throughout the nineteenth century, state courts, though limited by their geographic boundaries, exercised plenary subject matter jurisdiction. So long as the parties bringing the suit had the appropriate connection to the court, the court had the authority to hear any claims the parties might make, even if those claims were novel. Federal courts have never possessed

---

[38] Richard A. Posner, *The Federal Courts: Challenge and Reform*, 2nd ed. (Cambridge: Harvard University Press, 1996). Judiciary Act of 1789, Stat. 73 (1789).

[39] Posner, *The Federal Courts*, 40. For general definition of jurisdiction *Black's Law Dictionary*, 3rd pocket ed., "Jurisdiction."

plenary jurisdiction. They have always been limited to whatever jurisdiction the U.S. Congress granted by statute. Indeed, though the U.S. Constitution described federal judicial power as extending to all cases and controversies arising under the Constitution, federal laws and international treaties, Congress did not grant federal courts general "federal question" jurisdiction until 1875. Until then, federal courts could only hear cases for which Congress had specifically authorized the exercise of jurisdiction.[40]

Under the 1789 Act, Congress gave district courts subject matter jurisdiction over admiralty cases and some minor crimes. Circuit courts had jurisdiction to try federal crimes and cases initiated by the United States. They had appellate jurisdiction for admiralty cases and other civil suits tried in district courts. The Constitution created federal judicial power to hear cases between citizens of different, or diverse, states. The 1789 Act placed jurisdiction for these cases in the circuit courts. However, Congress limited this diversity jurisdiction by requiring that the amount in controversy be at least $500, a significant sum in 1789. Thus, federal courts had limited physical and jurisdictional capacity to hear cases affecting the lives of most Americans.

The limited capacity of federal courts was not just a question of budgetary constraints or other practical considerations. The U.S. Constitution created a novel political structure that defined a system of dual sovereignty. It divided power among the three branches of the national government, it defined aspects of the states' relationships to each other and to the federal government, and it listed the areas in which Congress was empowered to act and in which states were forbidden to do so. In keeping with its integrity as a sovereign, the Constitution provided that the federal government possess its own court system. But the federal court system was as

---

[40] Posner, *The Federal Courts.* For federal question jurisdiction see William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," *The American Journal of Legal History* 13, no. 4 (October 1969): 333.

novel as the constitution that created it. Further, the text nowhere indicated how or if the Constitution and the laws that would be passed under its authority would fit within the existing common law legal system. In contrast to highly articulated, deeply embedded state common law, federal law was sparse, limited and novel. It had no legal heritage: no inherited jurisprudence and no clear guidelines on what should be the sources of law when deciding cases.

Debate over how the Constitution fit within the existing legal system began immediately. If the Constitution stood outside the common law and could only look to itself as a source of positive law, then the federal government would be greatly restricted in its ability to act, which is precisely what strict constructionists such as Thomas Jefferson advocated. Others, such as Massachusetts Federalist Congressman Harrison Gray Otis, argued that the common law provided the context for the U.S. Constitution just as it did for state constitutions and law. Historian Kunal Parker describes Otis's argument to be that the "foundational, interstitial presence of the common law at the level of the states. . . necessarily extended to the U.S. Constitution. The common law was the background from which the meaning of the constitutional text had to be derived."[41]

The debate over whether the common law informed the Constitution had two aspects. The first was whether Congress could interpret its authority to legislate in the plenary way of the common law within the limits of its enumerated powers; in other words whether the Constitution's express grants of power included implied powers. The second aspect was whether federal courts had common law authority to fill in the gaps left by positive law in the same way that state courts did with their own statutes and constitutional provisions; in other words, was

[41] Parker, *Common Law, History, and Democracy in America,* 93.

there federal common law? To complicate matters further, at the same time Americans debated the relationship of the common law and the U.S. Constitution, they debated whether states should do away with the common law and replace it with positive statutory law.[42]

Americans believed they had both corrected and transformed the common law of England when they received it into their legal system and culture. They corrected it by receiving only those parts of English common law that had not been corrupted by Parliament and the King, and that were appropriate in a republic populated by free men. They transformed it by relocating its source of legitimacy and authority from obedience to a sovereign to the consent of the governed. Some legal thinkers extended this logic to argue that Americans should complete the project by enacting the common law principles each state received into statewide codes. Such codes, if written in plain language instead of the technicalities of the common law, would allow the free men of each state to understand exactly what they were consenting to.[43]

In defense of the common law, other American legal thinkers argued that the act of reception was an act of consent to the natural law and rights embodied in the common law. The consent of generation after generation to the principles of the common law was both prior-to and more forward-looking than the contemporaneous, but ephemeral, consent that legislative enactments represented.[44]

In 1809, in the midst of a debate over abolishing the common law in Pennsylvania, Joseph Hopkinson, a Pennsylvania lawyer and judge, published a pamphlet in its defense. Critics argued that the common law was too intricate for the average man to understand. In

---

[42] For history of the American codification movement, Sullivan, *Constitutional Context,*21-44.

[43] *Ibid*. Parker, 67-78 for American view that the Revolution provided the opportunity to correct the English common law.

[44] Parker, 67-116.

addition, because each state adopted different aspects of English common law, it was impossible for a person going from one state to another to know what laws were in effect. Hopkinson responded that the common law was the "very essence of wisdom and experience" and that its basic principles were common to all states.[45] A lawyer or a knowledgable layman who understood the common law in one state would be familiar with the same common law principles in another, because the common law was based on "common sense and common justice organized into a system."[46]

Critics of the common law argued that its rules and principles were unwritten, making them less knowable and determinate than codes and statutes. Hopkins responded that only the origins of the common law were unwritten. Official public records and the writings of men of "acknowledged authority" explained teachings of the common law in plain terms.[47] In contrast, a citizen reading a statute would have to understand exactly what the drafters of the statute meant when they wrote it and be able to anticipate how a court might interpret the language. The indeterminacy of language would introduce a host of uncertainties into a newly drafted code. Those uncertainties would only dissipate only after several courts applied the language to specific cases, which is essentially what the common law is and does.

Finally, critics of the common law argued that constitutions and codes had already superseded the most important parts of the common law. Each state could easily reduce

---

[45] Joseph Hopkinson, "Considerations on the Abolition of the Common Law in the United States," Philadelphia, 1809. *The Making of Modern Law*. Gale. 2013. http://galenet.galegroup.com.ezproxy.cul.columbia.edu/servlet/MOML?af=RN&ae=F104962877&srchtp=a&ste=14 (accessed January 9, 2013).

[46] Hopkinson, 16, 23.

[47] Parker, 78-9 describes antebellum burst of legal writing. See also Perry Miller, "The Common Law in Jacksonian America," *Proceedings of the American Philosophical Society,* 103, no.3 (June 1959): 463-468, http://www.jstor.org/stable/985477 (accessed April 6, 2008).

whatever was left to a code and then be done with the common law. Hopkins countered that the common law contained not only substantive legal rules, but principles for construing and applying the law to particular cases. The substance and the procedure intertwined to make a cohesive and relatively predictable whole. No statute could possibly anticipate all possible contingencies, so it would be necessary to constantly update and add to the statute law "until it filled unwieldy and incomprehensible volumes."[48] The advocates of the common law ultimately prevailed and continued to ward off similar assaults throughout the nineteenth century.[49]

The relationship of the federal government to the common law was much more difficult to resolve because it contained all the issues that the states decided in favor of the common law, but also the problem of the dual sovereignty created by the American federal system. The most famous and most vocal opponent of the development of federal common law, Thomas Jefferson, argued that if the federal government exercised common law authority through its courts, that authority would swallow up the states.

Morton Horowitz, in his classic study of American legal development, argued that federal common law did not actually present the danger Jefferson and his adherents proclaimed, because federal common law jurisdiction was limited to the subject matters over which the Constitution permitted the federal government to act.[50] But the Supremacy Clause created an unprecedented legal hierarchy where it declared that the Constitution, federal laws, and treaties were the "supreme law of the land."[51] Federal lawmaking jurisdiction may have been limited to

---

[48] *Ibid*., 51

[49] *Ibid.*, 12-26.

[50] Horowitz, *Transformation of American Law,* 10.

[51] U.S. Constitution, art. 6, cl. 2.

enumerated subjects, but where it acted, it prevailed over state law. Americans praised the common law for its ability to fill in gaps state positive law left open. However, the same ability exercised by a federal court interpreting federal law bound each of the states through the Supremacy Clause. If federal courts had the kind of plenary common law jurisdiction state courts had, opponents feared the gaps the federal common law filled would soon overtake the positive law it was purportedly supplementing, thus threatening the sovereignty of the states.

An important hallmark of sovereignty is the ability of the sovereign to keep peace and good order within its sovereign boundaries. Crimes are breaches of that peace, so it is no surprise that the issue of whether federal common law should exist first arose in a case involving federal crimes. In 1798, Federalist Supreme Court Justice Samuel Chase, in his majority opinion in *U.S. v. Worrall*, held that the Pennsylvania federal district court could not prosecute a defendant for attempting to bribe a federal official because Congress had not acted to make it a federal offense.[52] Chase rejected the argument that federal sovereignty implicitly included the common law authority to prosecute crimes committed against it where no federal law existed to create a federal crime. The controversy over the Alien and Sedition Act of 1798 demonstrated how easily the peace and dignity of the sovereign could be confused with the peace and dignity of the political faction in power. As a result, Americans quite quickly settled the issue that there would be no expansive federal common law authority to prosecute crimes.[53]

---

[52] United States v. Worrall, 2 U.S. 384 (1798). See also, Novak, *People and Their Peace*, 13-16, for the ability to maintain good social order as the hallmark of sovereignty.

[53] In United States v. Hudson and Goodwin, 11 U.S. 32 (1812) the Supreme Court confirmed that while the federal government necessarily possessed some implied powers, those implied powers did not extend to federal courts prosecuting common law crimes in the absence of a federal criminal statute. Criminal law posed an especially threatening area for a national government to have any ability to aggrandize its power. See also, Parker 92-104.

At the same time, federal courts operated within the context of a deeply embedded common law legal culture. Even when exercising their express authority under the U.S. Constitution and federal law, federal courts used the common law procedure, the common law rules of construction, and the common law rules of evidence of the state in which the federal court physically sat. In diversity cases, the Judiciary Act of 1789 required federal courts to apply the substantive law as well as the rules of procedure and evidence belonging to the state in which the case arose. Simply put, there was no federal jurisprudence independent of the common law. At the same time, it was not clear how much federal courts could or should resort to the common law to develop a federal jurisprudence.

In 1824, the American legal theorist, Peter S. DuPonceau delivered an address on the "nature and extent of the jurisdiction of the United States."[54] In it he explained that there were two aspects to the question of whether there was or should be federal common law. The first question was whether federal courts could assert common law jurisdiction where no other source of jurisdiction existed, for example in the case of common law crimes for which there was no specific federal statute. The second was whether the common law provided the rules of decision in cases where the federal court had jurisdiction originating from some constitutional source, *i.e.*, the Constitution or a federal statute. According to DuPonceau, federal courts could not use the common law to claim the power to hear a case. However, where federal law or the Constitution expressly provided for federal jurisdiction, federal courts were perfectly free to consult common law principles in deciding cases. In that sense, according to DuPonceau, there was a national

---

[54] Peter Stephen Du Ponceau, "A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States: Being a Valedictory Address Delivered to the Students of the Law Academy of Philadelphia, at the Close of the Academic Year, on the 22d April, 1824." Making of Modern Law (1824). under "American Law: Practice & Procedure," http://galenet.galegroup.com.ezproxy.cul.columbia.edu/servlet/MOML?af=RN&ae=F103356951&srchtp=a&ste=14

common law. This arrangement allowed federal courts some room to develop a separate jurisprudence from state courts. However, federal jurisprudence retained the common law as its native language.

What did it mean that both state and federal courts operated in a common law context? First, it meant that state courts had jurisdiction to hear the vast majority of cases involving the rights of individuals in the new United States, whether those rights involved state or federal law. Second, even where a case turned on the interpretation of a federal statute or constitutional provision, common law principles and practices provided the rules of decision for both state and federal courts to determine their meaning and application. Thirdly, Americans conceptualized individual rights in the way the common law defined and regulated them. Common law rights were not static. They changed and developed as social and economic circumstances changed and developed. However, such change came incrementally. In the meantime, the existing conceptualizations and legal categorizations of the common law shaped and, in many ways, limited Americans' ability to imagine any other way to make legal (as opposed to political) rights claims. Common law pleading rules required parties to describe their claims and defenses so as to fit within an existing common law legal category. Whatever the nuances of the lived experience of the parties to a case, their pleadings had to describe that experience in terms that fit the contours of a pre-existing common law writ or cause of action.[55]

For example, a cause of action for breach of contract required a plaintiff to plead three elements: the existence of an enforceable agreement; actions that constituted a breach of that

---

[55] Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007) for general history of the development of American contract law. Hendrik Hartog, "The Constitution of Aspiration and 'The Rights that Belong to Us All,'" *Journal of American History,* 74, no. 3 (December 1987):1013 discusses how constitutional rights claimants must shape their claims into existing legal forms. The same is true for common law claims and claimants.

agreement, and damage caused by that breach. While this may seem simple, it was not. The common law described a wide variety of agreements - executory contracts, illusory contracts, contracts that were actually gifts - that were not really contracts at all. A plaintiff had to describe the facts in a way that ensured he was describing an enforceable contract. Similarly with damages and causation. The law drew a logically arbitrary line between causes that were close enough and meaningful enough to assign liability to the perpetrator of that causal action, and causes that, from a public policy perspective, were too remote from the resulting damage to impose liability on the perpetrator. It was not enough for a party to tell his story to the court, even a local court. Parties had to shape the facts of their lived experience to fit the legal categories that existed in the common law. Common law was so deeply embedded in the general culture that the problem was not the difficulty in characterizing events in terms of legal categories. Rather, the problem was the difficultly in thinking outside them.

Nevertheless, for the majority of Americans, common law governance, which allowed for local articulation of general principles of governance, produced the greatest liberty within the confines of society and culture as it then existed. The idea that trial by jury was a fundamental right arose out of this definition of freedom. A person should be judged by his peers in his community, because local knowledge applied to local norms will yield the greatest justice. A remote authority applying a one-size-fits-all form of justice produced oppression.

Authority within common law governance was diffuse, local, and intricately textured. In the early nineteenth century the institutions of common law governance were not hierarchical. Lower courts were not bound to follow the precedent set by higher courts. Common law decision-making required only that a court use the better-reasoned decisions of respected judicial

officials or authoritative legal compilers as a guide. Some areas of law were so thoroughly mulled that the rules were exceedingly clear. With respect to such subjects, a court was bound by logic and reason to follow them. But, regarding subject matters undergoing rapid social change, courts could search through legal materials to see how other jurisdictions approached the problem. A court was then free to apply the best-reasoned and most apt approach to the new circumstances as those new circumstances manifested themselves locally.[56] That is not to say that the lower courts did not have to follow the decisions of appellate courts in a particular case. In other words, if the Supreme Court of North Carolina ordered a Superior Court to hold a new trial in a particular case, the Superior Court would have to hold the new trial. But if a lower court believed the reasoning of the Supreme Court was faulty, the lower court could simply ignore it in future cases that raised the same issue.

DuPonceau's description of the federal government's relationship to the common law was accurate in the abstract. In practice, however, the dual sovereignty the Constitution established created a tug-of-war between the federal government and the states in the areas where their respective powers overlapped. The federal government could expand its reach through the powers implied to it by the Necessary and Proper clause of the Constitution, and could trump a state's assertion of authority through the Supremacy Clause. States expanded their sovereign reach under their common law police power and asserted their reserved powers under the Tenth Amendment against federal overreach. While both state and federal legal systems existed in a common law context, because of the nature of federal sovereignty, rights located in the

---

[56] Edwards, *The People and Their Peace*, and Novak, *The People's Welfare* for common law is diffuse and non-hierarchical. Glenn, *On Common Laws*, for *stare decisis*, the principle that required a "lower court" to follow the reasoning as well as the ruling of a "higher" court, did not develop in the United States until the mid-nineteenth century.

Constitution acquired a different texture than rights whose source was chiefly the common law. Rights whose origins may have come from the common law, but that came to be enforced as constitutional requirements, tended to operate as trumps over other overlapping or competing rights claims. In addition, they tended to ossify once they acquired constitutional status.[57]

Cases involving the rights of individuals most frequently came before a federal court in one of three ways. The first was when a person committed a federal crime. In the antebellum period, federal crimes were limited to those things included in the Crimes Act of 1790. The Crimes Act included piracy and other crimes on the high seas, treason, murder, manslaughter or mayhem committed on federal grounds, and falsifying or counterfeiting federal documents. The vast majority of common law crimes did not fall under this statute.[58]

The second way cases came to federal court was through diversity jurisdiction. Diversity jurisdiction protected the citizen of one state who sued the citizen of another state from the potential prejudice he might experience if he sued in his opponent's home state. Diversity jurisdiction allowed a party to raise essentially any common law or federal claim that he could bring in state court, so long as the claim met the $500 minimum amount in controversy. The Judiciary Act of 1789 required federal courts sitting in diversity to apply the common law of the state in which the federal court was physically situated.

The 1842 U.S. Supreme Court case *Swift v. Tyson*, which came to the Court under diversity jurisdiction, demonstrates how the common law operated in the antebellum federal

---

[57] Novak, *The People's Welfare*, 13-16 on the Tenth Amendment as the source of the constitutionalization of the common law police power.

[58] *An Act for the Punishment of Certain Crimes Against the United States*, 1 *Statutes at Large of the United States of America* (1790).

system.[59] In that case, a man named Tyson bought land from two men, Norton and Keith. Tyson signed a bill of endorsement - a kind of promise to pay in the future - to Norton and Keith. Commercial paper like this served as a kind of currency in the antebellum economy. Swift, who had no connection to the original transaction or to Tyson, Norton or Keith, accepted the bill of endorsement in satisfaction of a debt, that also had no connection to the original transaction.

On the due date, Swift presented the bill of exchange to Tyson. In the meantime, Tyson discovered that Keith and Norton had defrauded him in the original transaction (they sold him land they did not own). There was no question that if either Keith or Norton had presented the bill to Tyson, he would not have been obligated to pay it because of their fraud. But Swift had no part in the transaction and was completely innocent of any wrongdoing. In fact, he had no way of knowing there had been any wrongdoing in the original transaction. In legal terms he was a holder in due course. The question was if Swift could recover payment fromTyson on his bill of endorsement.[60]

In the nineteenth century commercial paper made commercial transactions of all kinds much quicker and more easily accomplished. Rather than conducting commercial transactions in gold or silver, businesspeople could accept the promise to pay evidenced by a bill or other form of commercial paper. If the original issuer could avoid paying all or part of the debt reflected in the commercial paper to an innocent holder because someone in the chain of custody had committed a wrongful act, the commercial paper would be worthless to anyone outside the original transaction. In other words it could not be used like currency. This was a threat not only

---

[59] Swift v. Tyson, 41 U.S. 1 (1842).

[60] 41 U.S. 1 (1842). See also, Parker, 148-158.

to the smooth conduct of future commercial activity, but would cast doubt on any commercial paper in circulation at the time of the decision in *Swift v. Tyson*.[61]

The case came to the Supreme Court because Swift was a resident of Maine and Tyson a resident of New York, giving the federal Circuit Court for the Southern District of New York diversity jurisdiction to hear the case. The judges of the Circuit Court divided over a point of law and certified the issue to the Supreme Court. The issue was whether or not Tyson was entitled to assert the fraud defense he would have had against Norton and Keith against the innocent Swift.

Justice Joseph Story issued the Court's ruling. Story was one of America's most highly regarded and influential legal thinkers. He was keenly interested in the smooth operation of commerce in and among the several states. He was also a tireless advocate of a nationalistic federal common law.[62] To Justice Story, there simply was no question that an innocent holder of a negotiable instrument could collect on the underlying debt no matter whether the original debtor could have legally refused to pay the original creditor. Story asserted that "[t]his was so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support."[63]

The problem was New York court decisions were not at all clear about whether New York law recognized this "well-established" principle that needed no authority to support it. In fact,

---

[61] Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: Hill and Wang, 1990) for a general discussion of the market revolution and its impact on society and politics.

[62] Paul Finkelman, "Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism," *The Supreme Court Review* 1994 (1994): 247 and Barbara Holden-Smith, "Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania,*" *Cornell Law Review* 78 (1992-1993): 1086.

[63] Swift v. Tyson, 15.

some lower level decisions directly contradicted this principle. The question, according to Story, was what was the nature of the "local law" federal courts were required to follow? The answer, according to Story, was that "local law" meant statutes and regulations particular to the locality as interpreted by local courts, and decisions dealing with real estate or other immoveable matters local to the state. The "general principles and doctrines of commercial jurisprudence" were not subject to the vagaries of local particularities. Thus, federal courts deciding commercial matters could apply a federal commercial common law.[64]

Story emphasized that the smooth operation of commerce required this type of negotiable instrument to be payable to a holder in due course. In support of what he claimed federal common law to be he referred to cases decided by the English promoter of the merchant class, Lord Mansfield, along with other English jurists and legal writers before turning to decisions in American courts. He pointed out that both Connecticut and Massachusetts specifically endorsed the right of a holder in due course to collect on a negotiable instrument. He also cited the absence of any cases in other states as evidence that such transactions were so common and accepted that they did not give rise to litigation.[65]

In *Swift v. Tyson*, Story engaged in a process of decision-making that closely resembled how a state court might make the same decision. He followed precedent, but in a selective manner. He consulted many sources, contrary New York decisions, the decisions of neighboring states, English decisions and even gave consideration to the meaning of the lack of litigation on the issue in other states. Story used the best principles articulated by other common law thinkers to decide the case before him. *Swift v. Tyson* allowed the Supreme Court to operate in diversity

---

[64] Swift v. Tyson, 19.

[65] *Ibid.*, 22.

cases on the same footing as the highest courts in the various states. The Supreme Court, just like the highest court of a state, could canvass the common law for the best principles and apply the best-reasoned and most apt.

The second way a case involving individual rights might come before a federal court was on appeal from a decision of a state's highest court to the Supreme Court, but only in cases that raised issues of federal law. Though these cases might involve the rights of individuals they were usually resolved in terms of sovereignty. In other words, by the time the matter reached the Supreme Court, the question would not be the extent of the right at issue, but rather which sovereign entity had the power to make that determination -- the federal or state government. These cases pitted federal enumerated powers against the states' common law police powers.

The Supreme Court has the last word on cases that come to it on appeal from the highest court of a state. But having the last word should not be confused with the concept of judicial supremacy. Judicial supremacy suggests that the Supreme Court is the ultimate authoritative interpreter of the U.S. Constitution and federal law, and is a convention the Supreme Court acquired for itself in the mid-twentieth century. The Supreme Court of the nineteenth century had no such authority. The U.S. Supreme Court made the final decision in a particular case, but state courts and legislatures, as well as the President of the United States and the U.S. Congress frequently asserted their own authority as interpreters of the Constitution.[66] In the tug-of-war between federal enumerated powers and state reserved police powers, the U.S. Supreme Court generally showed little reluctance to acknowledge the authority of state police power, especially as it related to the status and rights of individuals.

---

[66] Larry D. Kramer, *The People Themselves, Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

In *New York v. Miln*, the Supreme Court described state police power over the status and rights of individuals in the broadest terms:

> That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.[67]

In *Miln,* New York City required all ships entering its ports to provide a list of passengers and specific information about each of them. The purpose of the requirement was to prevent poor and contagious people from entering the city and becoming a burden on its resources. The captain of a ship, the *Emily*, refused to provide the required information and the Corporation of the City of New York fined him. The city later sued the consignee of the ship in a New York City court in a debt action on the unpaid fine. The defendant removed the case to federal court, which he was able to do because he was a foreign national. The New York circuit court divided over the case and certified it to the U.S. Supreme Court.[68]

The issue before the U.S. Supreme Court was whether the federal commerce clause, an enumerated power, preempted New York's regulatory authority over its ports. The court decided that New York was not engaged in regulating commerce in this instance. It was simply exercising its pre-constitutional sovereign authority to govern its own borders. This exercise of

---

[67] New York v. Miln, 36 U.S. 102, 103 (1837).

[68] New York v. Miln, 102.

authority fell squarely within the state's police power to regulate for the health and safety of its people.

The Supreme Court showed an equal willingness to defer to state court authority in the 1833 case *Barron v. Baltimore*. In that case a corporation owned by a man named Barron had been operating a wharf in Baltimore, Maryland. The city of Baltimore, in the process of paving its streets and performing other infrastructure improvements, diverted some of the water courses in the city's harbor. The changes in the water courses made Barron's wharf unusable. He sued the city in state court for depriving him of his property without due process of law. Barron lost at Maryland's highest appellate court and appealed to the U.S. Supreme Court. At the Supreme Court, Barron argued that the due process clause of the Fifth Amendment to the U.S. Constitution should apply to actions taken by states against its citizens as well as to actions taken by the federal government.[69]

The U.S. Supreme Court decided that the due process clause of the Fifth Amendment to the U.S. Constitution, and by implication the entire Bill of Rights, was solely a "limitation on the exercise of federal power" and not a positive grant of regulatory authority that could reach into the states to protect individuals. Each of the states had its own bill of rights for the protection of its citizens, and that is where a citizen of a state had to look for redress. The Supreme Court dismissed the appeal for lack of jurisdiction, because the case did not raise a federal question.

In *Miln* and *Barron v. Baltimore*, the Supreme Court deferred to the authority of states, so the full potential effect of the Supremacy Clause was not evident. While *Swift v. Tyson* overrode

[69] Barron v. Baltimore, 32 U.S. 243 (1833). For a concise description of the impact of Barron v. Baltimore on citizenship and rights see William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History,* ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press, 2003): 85, 106-107.

state authority by creating and applying a federal common law of commercial transactions, unless parties to such transactions lived in diverse states, state courts would decide cases arising out of them.

The Supreme Court's deference to state authority did not extend to controversies over fugitive slaves. Although the Supreme Court still turned to the common law in deciding these cases, the operation of the supremacy clause changed the situation-specific, relational, rights embedded in the common law into something quite different.

Article IV, Section 2 of the U.S. Constitution states that:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[70]

Article IV describes the states' relationships to each other, the admission of new states to the Union and guarantees the existence of a republican government in each state. Article IV does not appear from its structure and location in the text of the Constitution to be a source of enumerated federal power. It made sense that the Fugitive Slave Clause appeared in Article IV of the Constitution because even before the Constitution existed states managed the problem of fugitives, whether from justice or slavery, through the process of extradition, as a matter of comity among themselves.

After northern states began to abolish slavery, southerners wanted reassurance that their slaves would not become free upon reaching a jurisdiction that outlawed slavery. The Fugitive Slave Clause purported to solve that problem by declaring it to be national law that slaves would not become free if they escaped to free states. That language could have been limited to

---

[70] U.S. Constitution, art. 4, sec. 2, cl. 3 (repealed).

confirming the pre-1787 practice of extradition, but in 1788 Pennsylvania and Maryland clashed over Pennsylvania's request that Maryland extradite three fugitives from justice whom a Pennsylvania court had indicted for kidnapping free blacks. Maryland refused. The two states appealed to President George Washington, who turned to Congress. In response, Congress enacted the Fugitive Slave Act of 1793. Though it was in no way clear that the act fell within the enumerated powers of Congress, its passage was uncontroversial at the time.[71]

Free blacks in the North faced a constant threat of being kidnapped and sold into slavery in the south. The Fugitive Slave Act of 1793 increased that threat. The Act required that a slave catcher obtain a certificate of removal to transport an alleged runaway slave from a free state to a slave state. Any justice of the peace or city official could issue such a certificate. The law, however, provided no procedural protections for the alleged fugitive to demonstrate that he or she was free. Thus, it was rather easy for a slave catcher to find an obscure local official to collude in kidnapping free blacks. In the 1820's free states began enacting personal liberty laws that erected procedural protections to individuals accused of being fugitives. These states intended to prevent kidnapping, but they also necessarily provided procedural protection to people who were, in fact, fugitives. [72]

Personal liberty laws were a quintessential exercise of state police power. They sought to prevent the commission of a common law crime - kidnapping. They did so by giving a local resident the opportunity to establish his or her status as a free person. The most common way to prove one's free status was by one's reputation in the community for being free. Indeed, a manumitted slave might have court orders proving his freedom, but someone born free might

---

[71] *Fugitive Slave Act of 1793*, 1 *Statutes at Large of the United States of American, 1789-1793* (1793).

[72] Holden-Smith, "Lords of the Lash, Loom, and Law," 1116-1122.

have no way prove it except to demonstrate his free status by his own reputation and personal history or the personal history of his parents. Local courts relying on local knowledge were uniquely suited to hear and evaluate evidence of personal status in no small part because the local community *constituted* the personal status of its members.

Pennsylvania had an especially difficult time protecting its free black citizens from kidnapping. The state shared its borders with three slave states. Increased cotton production in the south increased the demand for slave labor at the same time that the 1808 national ban on slave importation eliminated an important source of supply. In 1820, Pennsylvania passed "An Act to Prevent Kidnapping" which increased the penalty for kidnapping free blacks. It also placed authority to issue certificates of removal in the hands of state judges and removed it from justices of the peace and town alderman. This made it somewhat more difficult for slave catchers to obtain certificates of removal. But under the common law no rights were absolute. Pennsylvania did not deny the right of slave owners to reclaim their slaves. Rather, the state first reasonably offered people accused of being fugitives, the opportunity to prove his or her free status.[73]

In response to Maryland's complaints, Pennsylvania changed its law in 1826 to expand the cohort of state officials who could issue certificates of removal, but required claimants or their agents to provide more than just their own assertion that the person to be seized was a slave. The 1826 revision also gave the person accused of being a runaway time to gather evidence to prove that he or she was either not the person claimed or was free.

---

[73] Holden-Smith, 1118-9 and Finkelman, 51-64.

In 1837, Edward Prigg and two others came to the Pennsylvania home of Margaret Morgan in the middle of the night while her husband was away and forced her and her six children to travel to Maryland. Prigg had been unsuccessful in acquiring a certificate of removal for Margaret Morgan and her children, so he took matters into his own hands. Pennsylvania indicted Prigg and the two others and requested Maryland to extradite them for trial. Maryland refused. Instead the governor sent a representative to Pennsylvania to negotiate the return of the three indicted kidnappers. The two states reached an impasse, but agreed to present the conflict to the U.S. Supreme Court for resolution.[74]

Margaret Morgan was at least arguably free. She had been a slave to a Maryland resident named Ashmore, who had permitted her to live as a free person nearly her entire life. Margaret married a free black Pennsylvanian named Jerry Morgan and moved to the state with him about five years before Prigg came to retrieve her. So long as Ashmore lived, he never claimed Margaret as his slave. After he died, however, his niece sought to claim Margaret as her inherited property.

Most free northern states followed the English common law rule that one's physical presence in free territory conferred free status on a person formerly held as a slave. However, as a matter of comity, free states in America acknowledged an exception to this rule, allowing slave owners to "sojourn" with their slaves without risking their emancipation.[75] Margaret's long residence in a free state with the consent of her putative owner took her out of the category of "sojourner" and in all likelihood would have resulted in Pennsylvania finding her to be free. But

---

[74] Holden-Smith, 1123-1124.

[75] Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875.* New American Nation Series (New York: Harper and Row, 1982), 86-114 for law of sojourning in the context of the fugitive slave issue.

whatever a court might have ruled with respect to Margaret's status, Jerry and Margaret had six children together, at least one of whom was born in Pennsylvania. Any of her children born in Pennsylvania were inarguably free.

Margaret Morgan's fate is lost to history, but we do know that she and her children were never reunited with their husband and father. In all likelihood they lived out the rest of their lives enslaved. Pennsylvania law, which sought to avoid these tragic consequences would seem to balance the equities quite reasonably. The risk to Ashmore's heir was that she would have to wait for her inheritance of slave property, if she were due such property. This, weighed against the utter destruction of the Morgan family and at least one free child being sold into slavery, would not seem to have made for a difficult case.[76]

Prigg's fate, on the other hand, is part of Supreme Court history. Justice Story used the case as an opportunity to promote his preference for strong national power and a federal common law. In *Prigg v. Pennsylvania*, Story essentially argued that the Fugitive Slave Clause constitutionalized the common law of recaption. Recaption allowed the owner of property that was capable of wandering the right to self-help to reclaim the property so long as it could be done without breaching the peace.[77] Story could have decided the case leaving the state procedural protections in place. Instead, he wielded the Supremacy Clause and declared the subject matter of fugitive slaves to be within the sole authority of the federal government. The decision in *Prigg* attempted to convert the common law right of recaption into an absolute,

---

[76] Holden-Smith, 1122-24.

[77] Prigg v. Pennsylvania, 41 U.S. 539 (1842). Robert J. Kaczorowski, "The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century," in *Constitutionalism and American Culture: Writing the New Constitutional History,* ed., Sandra F. Vanburkleo, Kermit L. Hall, and Robert Kaczorowski (Lawrence: University Press of Kansas, 2002), 29-63 explains that wandering property included not only livestock and other animals, but wayward children and absconding wives.

individual, constitutional right that trumped other rights claims, even the fundamental right to freedom. Northern states continued to resist what they considered unwarranted federal encroachments over state sovereign authority to regulate and protect the individuals within their borders. Wisconsin and the Supreme Court held a stand-off over the state's authority to release a federal prisoner, Sherman Booth, who had been accused of unlawfully freeing a runaway slave in violation of the Fugitive Slave Clause of 1850. Only the Civil War and emancipation resolved the conflict.[78]

Slavery was a constitutional impossibility. The Constitution protected both the liberty and property of persons. But it also indirectly acknowledged that persons could *be* property. No portion of the text of the document indicates which value - liberty of person or liberty of property - prevailed when they conflicted. Nowhere was the conflict between liberty of persons and liberty of property more stark than in federal territories.

The Constitution limited federal sovereignty and jurisdiction where it overlapped with the states.[79] In federal territories, however, the federal government was the only sovereign. In the Northwest Ordinance of 1787, the U.S. Congress banned slavery in federal territory known as the Northwest Territory, without controversy. Equally uncontroversial was Congress's 1790 Ordinance permitting slavery in the American Southwest. Throughout the antebellum period, Americans tried to solve the unsolvable problem of slavery in the territories through one tenuous political compromise after another. The Supreme Court attempted to accomplish through law what the American political system could not. In *Dred Scott v. Sanford* Chief Justice Roger

---

[78] Ableman v. Booth 62 U.S. 506 (1859).

[79] DuPonceau, who described the limits of common law jurisdiction and sovereignty in the federal judicial system, explained that such limits obviously did not apply in lands held as federal rather than state territory. Constitutional limitations on federal jurisdiction did not apply where the federal government was only sovereign, as was the case in the territories. DuPonceau, 65-66.

Taney, writing in what was generally deemed the majority opinion, first declared that blacks had no rights white men were bound to respect; meaning there was no conflict between liberty of persons and liberty of property at issue in the federal territories. Secondly, Taney declared that federal sovereign authority was no more expansive in federal territory than it was where states existed; meaning that the federal government had no power to abolish slavery in the territories. The Supreme Court's efforts to end the controversy arguably had the opposite effect, driving the nation closer to Civil War.[80]

The constitutional revolution that followed the Civil War fundamentally changed the balance of federalism by creating a national citizenship where previously there had only been state citizenship and by attaching federal protection to the rights of citizenship. Despite the change in fundamental law, however, the institutions that would iterate the precise meaning of the change remained embedded in a common law context. As William Novak has argued:

> In many ways, the postwar amendments only started an elaborate and still ongoing process of drawing constitutional lines, determining which rights in particluar were rights of citizens of the United States guaranteed by the national government and which were still susceptible to local, state, and associtional regulation and discrimination.[81]

The Civil War ended in the spring of 1865. Though the United States did not ratify the Thirteenth Amendment until December of that year and did not ratify the Fourteenth Amendment until the summer of 1868, it was clear that slavery had been defeated along with the Confederacy. In the meantime, southerners and the Union military that provided temporary governance in the former confederate states began the contest to define freedom in terms of their shared common law culture.

---

[80] Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981).

[81] Novak, "Transformation of Citizenship," 111.

Chapter Two

The Union Army and the Common Law

The Civil War reversed the balance of federalism with respect to the protection and regulation of individual rights. Federally mandated, uncompensated emancipation injected the national government into the lives of individual Americans in an unprecedented way. The Thirteenth, Fourteenth and Fifteenth Amendments extended and further defined the new role the federal government assumed over the status and rights of individuals.[1] But as with the War of Independence, Americans overthrew their political system without necessarily overthrowing their existing legal culture. During the earliest years of Reconstruction, the Union army administered justice in parts of the former Confederacy, including all of North Carolina. Without specific orders or positive law to define freedom, Union army officers charged with administering justice in the state looked to the common law for direction.

The Union army operated its own system of judicial administration in areas of the Confederacy it occupied during the war. The army had direct jurisdiction over its soldiers and employees, of course. However, it also had jurisdiction over civilians in occupied areas. The Union army's jurisdiction over civilians arose out of the common law of nations, to which both the Confederacy and Union adhered.

At President Lincoln's request, Francis Lieber, an important nineteenth century legal scholar and public figure, drafted a code for military justice, which Lincoln issued as General

---

[1] Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*. Sentry ed. (Boston: Houghton & Mifflin 1975). Eric Foner, *Reconstruction: American Unfinished Revolution 1863-1877,* The New American Nation Series (New York: Harper and Row, 1988)

Orders No. 100 on April 24, 1863.[2] Lieber canvassed the international common law of war for what he considered its most advanced and humane principles. The first thirty articles of Lieber's code describe martial law and military jurisdiction. According to Article VI of the code, martial law and jurisdiction existed by virtue of military occupation or conquest. However, martial law did not mean military oppression. In the conduct of Lieber's humane war, the law of war required an occupying army to apply local law to civilian matters to the extent it was consistent with military objectives.[3]

The Union army occupied parts of North Carolina's eastern seaboard as early as 1862. In North Carolina, Union army commanders assigned provost officers to make arrests, conduct investigations, and enforce local laws. The provost officers also functioned as a supervisory police force supplementing the efforts of local law enforcement officers. Provost courts tried less serious cases involving civilians and even performed mundane legal tasks such as recording the transfer of property.[4] They functioned much like sheriffs, constables and other county officers who served under civilian North Carolina justices of the peace. The wartime administration of justice served as the model for the immediate post war period.[5]

Near the end of March, 1865, the armies of Confederate General Joseph E. Johnston and Union General William T. Sherman fought the last major battle of the Civil War at Bentonville, North Carolina. On April 26, Sherman's men marched into the state capitol of Raleigh where

---

[2] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field: Revised by a Board of Officers*, (New York, 1863), digitally reprinted in *Making of Modern Law*, Doc. F102425901 (Gale 2007).

[3] John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press 2012).

[4] Kenneth St. Clair, "Judicial Machinery in North Carolina in 1865," *North Carolina Historical Review* 30 (1953): 415.

[5] William C. Harris, "Lincoln and Wartime Reconstruction in North Carolina, 1861-1863," *North Carolina Historical Review*. 63, no. 2 (April, 1986): 149.

General Johnston surrendered his army. The Civil War in North Carolina was over, and the process of Reconstruction began.[6]

North Carolina's economy and civil institutions lay in ruins at the end of the Civil War. A significant number of North Carolinians had remained loyal to the Union, which created an internal civil war between Confederates and Union loyalists. Their enmity persisted long after official hostilities ceased and continued to wreak havoc throughout the state. More North Carolinians served the Confederacy than any other state, and they suffered more deaths from battle and disease than any other state. Soldiers from both the Confederate and Union armies provisioned themselves by foraging among the civilian population both during and after the end of the war.[7] They so thoroughly stripped the state of tools, stock animals, and agricultural products that economic recovery was to be long and difficult.[8] After Johnston's surrender, state and local officials left their offices and waited for instructions from the Union army or federal officials.[9]

General Sherman placed General John M. Schofield, who had been the head of the Department of North Carolina during the war, in command of the state. President Lincoln had been assassinated just two weeks before Schofield assumed command. Lincoln's death threw

---

[6] Mark L. Bradley, *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina* (Kentucky: The University Press of Kentucky, 2009), 11-24 recounts in detail the final days of the Civil War in North Carolina.

[7] Kenneth Edson St. Clair, "The Administration of Justice in North Carolina Reconstruction, 1865-1876" (PhD diss., Ohio State University, 1939), 9. Otto H. Olsen, *The Carpetbagger's Crusade: The Life of Albion Winegar Tourgée*, (Baltimore: The Johns Hopkins Press, 1965), 39-41 describes the peace movement in North Carolina. Prominent advocates included many prominent future North Carolina Republicans including Thomas Settle, Jr., Robert P. Dick, and William W. Holden. Foner, 14-18 describes the general devastation at war's end. William McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* (Athens: The University of Georgia Press, 1995), 26-32 provides a dramatic example of the inner civil war in North Carolina.

[8] William C. Harris, *William Woods Holden: Firebrand of North Carolina Politics* (Baton Rouge: Louisiana State University Press, 1987), 165-8.

[9] Mark L. Bradley, *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina* (Kentucky: The University Press of Kentucky, 2009), 34.

open the question of how the former confederate states would be reconstructed and readmitted to the Union.[10] In April 1865, federal officials in Washington were preoccupied with apprehending and trying Lincoln's assassins and had not given any instructions to department commanders regarding reconstruction. Schofield held his command for only one month, but he met the enormous challenge of restoring order with great energy.[11]

Schofield had very clear ideas about how reconstruction should proceed. He believed that the federal government should leave the internal affairs of the states, including determining the status of the newly freed slaves, to the states. To do otherwise, would require a large military presence for an indefinite term, which he believed the North would not support. He further believed the President should appoint a military governor to oversee the transition to civilian government, and he hoped to be that official.[12]

In the absence of specific orders, Schofield was able to act with remarkable autonomy implementing his ideas for reconstruction in North Carolina. Schofield issued his first set of orders on April 27, 1865 placing the entire state under martial law. He next declared that the war was over and slavery no longer existed.[13] He organized a civilian police system in each county, requiring members of the county police to swear a loyalty oath to the United States. He furnished them with captured arms and ammunition, but they remained under military supervision. The civilian police could make arrests, but had to bring the individuals to the nearest military post for trial by military commission. Schofield permitted justices of the peace

---

[10] Foner, *Reconstruction,* 70-76.

[11] Bradley, *Bluecoats and Tarheels,* 33-40

[12] *Ibid.*

[13] *Ibid.,* 27-28. St. Clair, 8-9.

of known Union sympathies to maintain their offices and perform some of their antebellum functions, but only after they swore their allegiance to the Union.[14]

Until civilian government was restored, however, the Union army retained responsibility for maintaining the social order of the state, including the administration of justice. The Union army's command structure grouped states into varying command and military units throughout the Civil War and Reconstruction, but at all times respected each of the states' geographic boundaries and political integrity. Because the geographic and political boundaries stood, so did the legal system of each state. The army could and did follow North Carolina's system of judicial organization in its own administration of justice both during and after the war.

On May 29, 1865, a month after Schofield assumed command of the Department of North Carolina, President Johnson issued two proclamations setting forth his plan for Reconstruction.[15] Johnson believed that North Carolina would be an easy case for reconstruction, in part because of its history of pro-Unionism, and in part because its civilian leaders had expressed their eagerness to do what was necessary to rejoin the Union. Thus Johnson addressed his second proclamation specifically to North Carolina with the expectation it would be a model for the remaining unreconstructed former confederate states.[16]

---

[14] St. Clair, 8-9.

[15] Johnson's first proclamation granted amnesty and restored all rights of property except as to slaves to all who participated in the late rebellion, so long as they took an oath to defend the Constitution and to "obey all laws and proclamations which have been made during the rebellion with reference to the emancipation of slaves." There were a few important exceptions to this general amnesty. Those who resigned judicial, Congressional, or military positions in the Union to support the rebellion; high ranking Confederate officers; and supporters of the rebellion whose wealth exceeded $20,000. Foner, *Reconstruction*, 183-184.

[16] Johnson was surprised and disappointed at the results of the election for constitutional convention delegates in North Carolina because it contained so many unreconstructed Confederates. Eric L. McKitrick, *Andrew Johnson and Reconstruction* (New York: Oxford University Press, 1960), 168-169.

Johnson's North Carolina proclamation appointed William W. Holden provisional governor of the state and directed him to develop a plan for holding a convention to amend North Carolina's constitution so as "to restore said State to its constitutional relations to the Federal Government and to present such a republican form of State government as will entitle the State to the guaranty of the United States therefor and its people to protection by the United States against invasion, insurrection, and domestic violence."[17] Johnson's proclamation left the details of reconstruction almost entirely to the white men of North Carolina.

Schofield, disappointed that Johnson had appointed a civilian military governor, asked for a transfer of command. Meanwhile, Holden was eager to reconstruct the state as quickly as possible. He appointed civil officers at a furious pace beginning in June 1865. Schofield was not particularly concerned with the fate of the freedmen or how the courts of North Carolina would treat them. In his remaining weeks in North Carolina he supported Holden's appointment efforts and assured the Governor that once the state's judicial offices had been filled, he would turn over all civil cases to state courts.[18]

As Schofield prepared to transfer out of North Carolina in late June, Eliphalet Whittlesey arrived in North Carolina to serve as the Assistant Commander for the Bureau of Freedmen Refugees and Abandoned Lands, known more commonly as the Freedmen's Bureau. Congress created the Freedmen's Bureau in March 1865, as a department within the Union army. Whittlesey was an army officer who had been a college professor before the war. He had served under the Freedman's Bureau Commissioner Oliver O. Howard before he came to North

---

[17] Johnson's Proclamation reprinted in Walter L. Fleming, ed., *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time* (1906; repr., Whitefish, Montana: Kessinger Publishing 2006), 1:171-173.

[18] St. Clair, 31.

Carolina. Upon his arrival he announced that the Bureau would have four responsibilities: aiding the destitute of both races, assisting freedmen in obtaining employment, encouraging education and protecting freedmen from injustice.[19]

The Freedmen's Bureau assisted the regular army in the administration of justice. The Bureau had jurisdiction over petty crimes and minor civil disputes. Though the Bureau's legal jurisdiction was limited, it served a crucial role in resolving disputes over labor arrangements and perceived assaults on the social order before they escalated into violence. While Bureau agents could arrest civilians accused of more serious crimes, they did not have jurisdiction to try them. That responsibility belonged to the military commissions of the regular army.[20]

General Thomas Ruger replaced Schofield on June 25, 1865, at about the same time Whittlesey arrived. By that time, Holden had reconstituted most county governments and state courts had begun to hear cases, although martial law remained in effect. Ruger was not as willing to turn jurisdiction over to civilian courts as Schofield had been. Ruger was concerned over the level of white violence toward blacks and the unwillingness of state courts to investigate these crimes and bring the perpetrators to justice. Their overlapping claims to jurisdiction eventually provoked a clash between Holden and Ruger over the administration of justice in the state.[21]

In late July 1865, Holden began asking Ruger to turn over several white men the army had arrested for violence against former slaves. Holden pointed out to Ruger that the trials would be held in counties where civil law was in force and where competent judges would

---

[19] Bradley, *Bluecoats and Tarheels*, 84-85

[20] *Ibid*, and Donald G. Nieman, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks 1865-1868*, KTO Studies in American History (Millwood, New York: KTO Press, 1979), 9.

[21] St. Clair, 54-58.

preside over the cases. Ruger refused, asserting his authority under martial law. He reminded Holden military tribunals still had jurisdiction over all matters that involved the preservation of order, including the arrest and trial of those accused of violent crimes. While the military was available to assist Holden and the state in maintaining order, Ruger did not have to wait for civil authorities to request assistance. Ruger described for Holden several incidents in which blacks were mistreated by whites, yet civil authorities did nothing to investigate or punish the crimes.[22]

Holden asked President Johnson to intervene on his behalf, but Johnson ignored him. In September 1865, Ruger and Holden met to reach an understanding on their respective claims to jurisdiction. Ruger pointed out that North Carolina would not allow blacks or other people of color to testify against whites in their courts. Without that right, they could not expect justice. Until North Carolina began to admit black testimony on an equal basis with that of whites, the army would retain jurisdiction over all cases involving black persons. Holden eventually agreed to those terms. The North Carolina General Assembly stubbornly refused to admit black testimony until Congress enfranchised black men in the Reconstruction Act of 1867.[23] As a result, military commissions retained jurisdiction over all cases involving black persons throughout 1865 and early 1866, even as the civilian courts began to hear cases involving white North Carolinians. [24]

Though some North Carolinians complained about the oppressive rule of military courts, many more accepted the necessity of the Union army administration of justice at least until the

---

[22] Bradley, 75-76.

[23] The description of the procedure in the military commissions is based on the trial transcripts. Records of the Office of the Judge Advocate General (Army) 1792-1981; Court Martial Case Files, 12/1800 – 10/1894; Record Group 153; National Archives Building, Washington, D.C.

[24] Bradley, 76.

state achieved social, political, and legal stability. Although North Carolinians and Union army judicial officials did not always agree on which principles should apply and what outcome they should produce in any given case, the shared language of the common law allowed the Union army to administer justice that North Carolina civilians considered legitimate amidst the chaos that existed at the end of the Civil War.

Military commissions were composed of about six officers who heard testimony as a panel. One officer served as the judge advocate to prosecute the case. Civilians frequently hired North Carolina lawyers to represent them before these commissions. While there were important differences between military commissions and civilian trials – the most significant of which was the lack of a jury in the military commissions – the presentation of the law and evidence was roughly the same as in a civilian proceeding.

The Union Army initiated cases against civilians by issuing special orders from the commanding general's office. The special orders called a military commission to sit and hear either a particular case or all cases brought before it during a specified time period, much like a session of a North Carolina county court. The special orders contained a charge that stated the crime the defendant allegedly committed, and a specification that described the events supporting the charge. The charge and specification functioned much like an indictment in a civilian court. This shared understanding of legal rules and procedure not only allowed North Carolinians and Union officials to understand one another, it also enabled them to begin to reconstruct the state's legal order in the absence of federal guidance.

States in both north and south shared the "common" aspect of the common law, so many of the general tenets of North Carolina law were already a part of the legal culture Union officers

carried with them to the state. Where North Carolina law was distinct, the local lawyers who appeared before military tribunals diligently pointed out those distinctions. Where possible, the Union Army enforced those distinctive aspects of North Carolina law.

The military commission specifications contained an array of common law descriptions of crimes such as larceny, embezzlement, burglary, assault, rape, murder. Further, crimes were described as offenses against the peace and dignity of the state of both North Carolina and the United States. The common law defines a crime as a breach of the peace and dignity of the sovereign. Using this language suggests that the Union army sought to legitimate its judicial actions through associations with the common law at the same time that it derived the power to act through military authority.

The military commission trial transcripts are steeped in common law language and assumptions. When either civilian lawyers or Union judge advocates cited specific sources of law, they almost invariably cited English or American casebooks or general common law treatises. To be sure, North Carolina law contained both common law and statutes, but during the antebellum period statutory law did not predominate over common law the way it does today. Most statutes dealt with specific, frequently local, issues rather than providing universal principles or regulations for the entire state.[25]

Even where a North Carolina statute did exist, the common law provided a more familiar common language for both North Carolina lawyers and Union army officials. Thus, in a case for embezzlement, the defendant's attorney cited the North Carolina Revised Code provision for the elements of the crime. The judge advocate referred to the common law instead, but said it didn't

---

[25] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009).

really matter which one he referred to because the North Carolina code provision merely reiterated common law principles.[26]

The military commissions also suggest that knowledge of the common law and legal procedure was diffuse among commissioners, North Carolina lawyers, and lay people alike. Witnesses as well as lawyers exhibited knowledge of common law terms and ideas. For example, a woman testifying in her own rape case stated that "another boy" who "had a spite against her" "instigated" the defendant's attack, "or in other words [he was] an accessory before the fact."[27] Lawyers, judge advocates and witnesses often referred to the law without citing any source for it, as though the terms of "the law" were generally known and its source and legitimacy understood.

One might expect to find that the Union army attempted to reconstruct North Carolina's legal order by enforcing the individual rights of the newly free. Although in the immediate aftermath of the war, emancipation was a fact not yet expressed in law, abolitionists and adherents to free labor ideology had been describing freedom in terms of abstract individual rights for decades.[28] But the Union Army, like antebellum North Carolina state courts, sought to restore order rather than to enforce individual rights, although northern Union army personnel had a very different understanding of where free blacks fit within the new social order. Where social order is the goal, justice is not so much blind as detail-oriented. Restoring local social

---

[26] Record Group 153, Case File OO-1441.

[27] Record Group 153, Case File MM-2468. Edwards, *The People and Their Peace*, 87 discusses for the antebellum period in North Carolina how ordinary people were so familiar with legal procedure that they knew exactly what to do when a breach of the peace had occurred.

[28] Kathleen S. Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America*, The Johns Hopkins Series in Constitutional Thought (Baltimore: The Johns Hopkins University Press, 2007), 45-66. William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History,* ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press, 2003), 85-119.

order required military commissions to examine the particular circumstances of each of the participants, which in turn, determined the kind of evidence the commission deemed relevant to deciding a case.[29] The military commission case files demonstrate that local knowledge, especially character evidence, had a significance in resolving cases in the nineteenth century that has no contemporary parallel. Nearly every trial in the military commission case files has at least one witness who testified to the character of the defendant or to the character of one of the prosecutions witnesses. Many trials had far more character witnesses than fact witnesses. The sheer volume of character evidence suggests that it had a significance then that it does not now.

As Laura Edwards has established, a person's character or "credit" played an important role in antebellum legal proceedings. A person's character affected his or her credibility, of course. But it also partly determined how much personal protection one could expect from the law. A person legally proved his or her character through the testimony of his or her neighbors and acquaintances based on their long observation. Character evidence did not just provide a court with general background information. It was sufficiently important to the outcome of case that the North Carolina Supreme Court readily reversed decisions in cases where character evidence was either admitted or refused improperly.[30]

Generally, a party or witness could not introduce evidence of his good character unless his character was challenged. However, there were many exceptions. For example, any criminal defendant could introduce character evidence in support of his innocence.[31] In a slander case, a

---

[29] Edwards, *The People and Their Peace*, demonstrates this for the antebellum period.

[30] Edwards, *The People and Their Peace,* 7. For cases on character evidence see State v. Jefferson, A Slave 28 N.C. 305 (1846), State v. Tilly 25 N.C. 424 (1843), State v. March 46 N.C. 526 (1854), Bottoms v. Kent 48 N.C. 154 (1855), State v. Speight 69 N.C. 72 (1873).

[31] State v. Henry 50 N.C. 65, 1857 (1857), State v. Johnson 60 N.C. 151 (1863).

plaintiff could introduce evidence of his good general character even though the defendant offered no evidence challenging the plaintiff's good character.[32] Even where a party's memory rather than character was challenged, the court allowed him to present witnesses to testify about his impeccable character for truth to rehabilitate himself before the jury.[33] And in cases where a party's character *was* challenged directly or by implication that party was assured the chance to offer evidence of his or her good character.[34]

Character was not simply about status, although that was certainly one aspect of character. People of all statuses had a general character, which could be either "good" or "bad." One could also have a character for truth, for being peaceable and law-abiding, for high temper or fussiness, for kindness to servants or faithfulness to masters. Coming from a "good" or respectable family gave one "high" character. One could even be too young (at age seventeen) to have formed a character.[35]

Witnesses didn't always offer character evidence to prove positive character traits. For example, an R. Baugus was charged in Lexington County with stealing a government mule in August of 1865. He claimed he intended to buy the mule but became too drunk to remember whether he paid for it before he took it from the corral. He offered the testimony of a childhood friend that he had a good general character, but was a "wild, reckless and dissipated young man" to support that he was drunk on the occasion in question.[36]

---

[32] Sample v. Wynn 44 N.C. 319 (1853).

[33] Isler v. Dewey.

[34] Examples include, Sample v. Wynn and Isler v. Dewey.

[35] Every case file involving a civilian is filled with testimony from witnesses whose sole evidentiary purpose is to described the detailed features of the character of the accused or one of the witnesses to the events. Record Group 153.

[36] Record Group 153, Case File MM-3116.

Character evidence most strongly affected cases where intent was a central element. For example, when one person kills another the killer's intent determines what crime, if any, occurred. Murder is an intentional killing without legal justification. Manslaughter is a killing with some sort of mitigating circumstances that the law recognizes. Justifiable homicide is a killing that the law completely excuses, for example in self-defense. Likewise with attempted murder, versus assault with intent to do great bodily harm, versus simple assault. All these crimes depend on the intent of the accused. Military commissions heard an extraordinary amount of character evidence, especially in cases where intent mattered. Character evidence provided the context and local knowledge necessary to the situated form of common law justice that both northerners and southerners understood. The murder trial of Temperance Neely in July 1865 provides an example.[37]

Providence Neely was a white widow who had run Davie County plantation on her own since her husband died in about 1842. Her 28-year-old daughter, Temperance, lived with her on the plantation. Temperance had a close relationship with a woman named Galina, who had been a slave on the plantation her entire life. Galina had five living children including a 9-year-old daughter, Ellen.

The day Temperance shot and killed Galina, Ellen had been harvesting wheat in the field with the other hands. They finished about four in the afternoon, after which Ellen came to the plantation house. Providence repeatedly called for Ellen, but she did not answer. Providence sent another child to retrieve Ellen. When Ellen approached, Providence asked her why she had not answered and why she had not come directly to the house from the field. Ellen grumbled and

---

[37] Record Group 153, Case File MM-2968. St. Clair, 42-44 also discusses the Neely case.

Providence kicked her and threatened to withhold Ellen's supper. She then ordered Ellen to "fetch" a bucket of water. Ellen picked up a bucket and headed for the spring, but called back that she would have her supper and Providence wouldn't stop her. Providence promised to whip Ellen and Ellen replied "no you won't whip me." While Ellen was gone, Providence left the house for the garden where she cut a switch from a peach tree and sat in a chair outside the house waiting for Ellen to return.

Upon Ellen's return, Providence began beating her with the switch. Galina, who was outside heard the commotion and ran into the house. Temperance, who was in the house, told Galina to stay out or she would shoot her. Galina pushed Providence away from Ellen and took her outside. Temperance fired a shot in the air as Galina was leaving with Ellen. Providence followed Galina and Ellen out of the house and continued to try to whip Ellen's legs. In response, Galina wheeled around to face Providence. Temperance ran between the two of them and shot Galina in the breast. Galina died within a few minutes.

There was no question that Temperance shot Galina. The only question was intent. Temperance's attorneys cited an English common law treatise that the intent necessary for murder was a "heart regardless of social duty and fatally bent on mischief."[38] They introduced one relative and neighbor after another to testify to Temperance's gentle, feminine nature to show that "there is no plausible ground for the charge of murder – as the criminal and malicious intent – that characterizes this heinous crime, never did and never can find a lodgement in a shrine so pure, and nothing but the strongest array of proof could establish so improbably a proposition as

---

[38] Case File MM-2698.

that a lady such as the Prisoner is proven to be - could be guilty of so awful and atrocious a crime of deliberate, malicious murder."[39]

At the same time, the defense also tried to paint the only other eye witness to the events as having a bad character for truth even "among her own color." Sallie, a former slave who continued to work on Providence Neely's plantation after she became free testified that Galina had not threatened Providence. Temperance simply ran up to Galina and shot her. The defense suggested that perhaps Sallie's jealousy that Temperance held Galina in such favor "warp[ed] her and caused her to testify in the extraordinary manner she has done."[40]

The defense used character evidence not only to establish Temperance's subjective intent at the moment she fired the gun, but also to describe a context and a community of actors that made a *finding* of intent untenable, whatever the objective facts seemed to be. The judge advocate simply argued that when one person kills another, malice is presumed unless there is some evidence of provocation. In Temperance's case there was none. He attempted to rehabilitate Sallie's character explaining that there was no support to the claim made by Temperance's brother-in-law that Sallie's reputation for truth was bad. The commission found Temperance guilty of manslaughter, not murder, and imposed a sentence limited to a fine of $1000. It is unclear how the commission reached its decision because the commissions did not issue written opinions. However, Sallie offered eyewitness testimony of an intentional shooting against Temperance's evidence of her gentle character. The fact that the commission found her

---

[39] *Ibid.*

[40] *Ibid.*

guilty of the much less serious offense of manslaughter suggests character evidence was persuasive.[41]

Character evidence clearly affected the outcome in the murder case of Wesley Moore. On October 16, 1865 Willis P. Moore, a Robeson county planter, shot and killed a black man, Wesley Moore, on the defendant's plantation. The day of the murder, the defendant had hired a number of men to shuck his corn. In the evening, they had all gone to dinner. After dinner, the defendant left the kitchen and went outside. He later claimed to have seen a man carrying a basket of corn toward the road. He shot the man in the back claiming he did not know whether the victim was black or white. The victim turned out to be one of the men he had employed to help shuck his corn. Wesley Moore died the next day.

The facts were largely undisputed. The defendant clearly killed a man. The question was whether any aspect of the law excused that killing. The defendant's lawyer introduced a number of witnesses, both black and white, to testify about different aspects of Willis Moore's character. One aspect was how he treated his slaves and his "servants" now that they were no longer his slaves. Most of the testimony suggested that he fed and clothed them rather well. One of his former slaves, Patrick Barnes, said that he had done more for the freedmen than anyone else. Other testimony suggested that Willis Moore's character "as a citizen" was law-abiding. The defendant made some effort to discredit Wesley Moore, but most witnesses said he was a good worker whose character had never been called into question. Finally, the defendant offered testimony to show that there had been much lawlessness in the area since the end of the war, with robbers and murderers patrolling the highways.

---

[41] Bradley, 77 says that a citizens' group took up a collection to pay Temperance Neely's fine.

Defendant's counsel argued in closing that the law (the "law" to defendant's counsel consisted of the English treatises *Hawkins Pleas of the Crown* and *Foster's Reports*, the laws of ancient Rome and Athens and "our constitutions") excused a homicide committed to prevent a felony. The judge advocate agreed that the law excused a homicide to prevent a felony, but the defendant's belief that a felony was being committed could not be subjective. It had to be reasonable. Killing someone in the mistaken belief that they were committing a felony would be manslaughter.

To decide this case, the commission would have had to determine not only whether the defendant was truthful in testifying that he believed the victim was stealing his corn, but whether his honest belief was objectively reasonable. This required the commission to determine the character of both killer and victim. Wesley Moore was carrying a basket of corn toward the road. But does that mean it was reasonable to believe he was stealing it? The case turned entirely on whether the commission believed the defendant was a law-abiding, peaceable man who treated blacks fairly, and who wouldn't have shot a man without justification, and whether Wesley Moore was, in all likelihood, stealing the corn. The only evidence that Wesley Moore was stealing the corn was that he was carrying it in the direction of the road. The commission could not decide the case without making implicit assumptions about the victim's propensity to steal. The commission decided in favor of Willis Moore and found him without criminal responsibility.

The importance of restoring order and the significance of character evidence in nineteenth century litigation are not simply historical curiosities. Emancipation required southerners to incorporate freedom into their new social order. It is not possible to understand freedom as an abstract constitutional value without understanding how Americans defined

freedom at the local level. Historian William Wiecek has described the divergent understandings of freedom that developed in northern versus southern law in the antebellum period.

Prior to 1820, northern and southern states followed the English case *Somerset v. Stewart,* which stood for the principle that slavery was so contrary to nature and law that it could only be supported by positive law, and could not be supported by the general principles of the common law, which were consistent with natural law. According to Wiecek, "[i]t would logically follow from the first point that if a human being's natural state was freedom, and slavery an unnatural condition imposed by positive law, then when the unnatural condition was removed, the person became not only free but capable of claiming rights like those enjoyed by freeborn people."[42] The *Somerset* case became part of the common law of the colonies and later the United States because it was decided before American Independence. However, after the Missouri Compromise of 1820, southerners became deeply fearful of slave insurrection and started to rethink *Somerset*. Because it was a more frequent problem for them, southern courts gave a great deal more thought about what should be the civic and political status of freed slaves.

Southern states began to develop a theory of manumission that diverged from the principle of *Somerset*. They envisioned a racialized status for freed slaves in which manumission conferred no rights, capacities, or privileges except possibly the limited right to locomotion – limited in most cases to leaving the state. States could and did legislate to provide a limited set of rights and privileges that free blacks could exercise, but any such rights or privileges were absolutely subject to regulation even to the point of abolishing them. The common law that governed the status of individuals was contextual, relational, and subject to reasonable regulation

---

[42] "Emancipation and Civic Status: The American Experience, 1965-1915", in Alexander Tsesis, ed., The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment, New York, Columbia University Press, 2010), 78-99

to be sure. But for white people, especially white men, natural law provided them with certain rights and privileges that the common law could not regulate away.[43]

According to Wiecek, northerners had less experience with manumission than southerners. They simply assumed, without considering exactly what those rights would be, that once free the formerly enslaved would possess the natural rights and obligations of all free people. While northerners may have believed all free people regardless of race were entitled to certain basic rights - to life and liberty, due process, and the ability to sue and be sued, perhaps - they still considered many other rights of blacks subject to regulation in ways that the rights of whites were not. Northerners may have believed natural law principles contained in the common law set some limits on how much the rights of blacks could be regulated. But race – like gender and immaturity – was a legal category that could be regulated even in the North.[44] Union military commissions brought the northern and southern understandings of freedom into direct contention.

For example, on October 8, 1865, a Caswell County, North Carolina planter named Archibald Baynes shot and killed a freedman named "Manuel." Manuel had been Baynes' slave for ten years. After the war he agreed to work for Baynes for wages. Manuel worked for several months without receiving any pay. When he asked Baynes to pay him, Baynes ordered Manuel off the property, warning him not to return or Baynes would kill him.[45]

---

[43] In North Carolina allowed free black the privilege to own property, marry, bring actions in court - although they could not testify - and even to vote until 1835. But these were not rights. They were privileges permitted to blacks by whites. John Hope Franklin, *The Free Negro in North Carolina 1790-1860* (1943; repr., Chapel Hill: University of North Carolina Press, 1995).

[44] Leon F. Litwak, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago: University of Chicago Press, 1961). Foner, *Reconstruction*, 470-472.

[45] Record Group 153, Case File OO-1433.

Manuel went to the local Freedmen's Bureau agent, Captain William C. Mills, to complain. Mills gave Manuel written orders directed toward Baynes. Manuel returned to Baynes' plantation where he stayed the night with a former co-worker. In the morning, Baynes found Manuel sitting in the workers' cabin and asked him what he was doing there. Manuel answered that he was "there for his rights." Baynes started a scuffle with Manuel. Manuel ran off toward the road away from the property before anyone was hurt. Baynes followed Manuel with a gun provided to him by his wife who had heard the trouble outside. Baynes caught up with Manuel and killed him.

At Baynes' military commission trial in November 1865, his attorney presented his view of how emancipation affected North Carolina's common law.[46] Baynes' attorney first argued that Section 34 of the Judiciary Act of 1789, which required federal courts exercising diversity jurisdiction to apply the law of the state in which the court sat, also required the military commission sitting in North Carolina to apply North Carolina law. This was an uncontroversial position given that the Lieber Code also required the commission to apply local law where possible. Presumably, Baynes' attorney emphasized the Judiciary Act because its emphasis was on faithful adherence to the host state's law, while the Lieber Code explicitly excepted local law that did not comport with the military goals.

After ensuring the commission understood its obligation to follow North Carolina law, Baynes' attorney explained why both North Carolina law and the U. S. Constitution legally excused Baynes' killing. Baynes' attorney cited two antebellum North Carolina Supreme Court

---

[46] The North Carolina constitutional convention that met pursuant to Johnson's May 29, 1865 proclamation passed an ordinance abolishing slavery in the state. North Carolina did not, however, ratify the Thirteenth Amendment until December, 1865. This was significant because the Thirteenth Amendment had an enforcement provision that authorized Congress to legislate to enforce the prohibition on slavery and involuntary servitude.

decisions to explain the applicable North Carolina common law provisions. The first case held that evidence of a slave's insolence and impertinence towards whites excused the murder of that slave. The second case held that insolence in a free black toward a white man excused a battery against the free black. He then argued "surely it cannot be contended that a freedman made so by proclamation has more rights and privileges than a negro born free of free parentage. The effect of the [emancipation] proclamation is nothing more than to release the negro from slavery and confer on him the rights of a negro born free."[47]

Slaves were so degraded in North Carolina law that they could be killed for insolence, but even antebellum free blacks could be assaulted for their impertinence. In the attorney's opinion, North Carolina law permitted whites to use violence against free blacks for their impertinence. Now that the slaves were free their place in the social order was no better than a black person born free. When a black man and a white man engaged in a scuffle, the black man was guilty of an assault against which the white man was legally permitted to defend himself with violence. Further, the Article IV privileges and immunities clause of the U.S. Constitution permitted this obvious double standard. Northern states had discriminatory laws, which the Constitution apparently did not prohibit. He concluded "[i]n short, our American institutions both north and south have drawn the distinction between the African and Caucasian race. . ." In other words, if the free North could continue to order itself in a racially discriminatory way under its own antebellum common law, so could North Carolina.

The judge advocate representing North Carolina and the United States argued that the common law of North Carolina had been changed by emancipation. He said the "law [excusing

---

[47] Case File, OO-1433.

violence against blacks for their insolence] was created to keep the Free colored population in a state of subjection and it was deemed necessary for the safety of the institution of slavery. . ." With emancipation, the reason for the law no longer existed. "[It] is admitted on all hands that where the reason of a law has ceased to exist – the Law itself ceases." The judge advocate couched his response not in terms of the freedom rights of the formerly enslaved. Instead, he argued that the previous law supported an institution that no longer existed. With the demise of the institution, the law supporting it ceased to exist as well.[48]

The military commission convicted Baynes of murdering his former slave, and sentenced him to death. General Ruger, recommended a reduced sentence of 10 years hard labor. But Baynes was a highly respected member of his community and his many prestigious supporters petitioned President Johnson for a pardon or clemency.

Pardon petitions served as a kind of appellate proceeding within the military system of justice. Laura Edwards describes pardon petitions serving the same purpose in the early national period in North Carolina civilian courts.[49] The pardon petitions contained in the military commission case files show that both defendants and the Union army were concerned with the restoration of good order, but the Union Army and North Carolina elites (who typically signed the petitions, because their status lent them greater weight) had a very different understanding of what the good order should look like and where the formerly enslaved fit within that order.

Baynes' pardon petition stated the defendant "lived a long life in a social system and under a code of laws, which would not tolerate insolence in a slave to his master."[50] Some

---

[48] Case file, OO-1433.

[49] Edwards, *The People and Their Peace*, 57-61.

[50] Case File, OO-1433.

allowances should be made by the United States government under such circumstances. People could not be expected to immediately accommodate themselves to "the new order."[51] Baynes' execution for killing a negro would shock the community so horribly they "would not soon recover." In other words, executing Baynes for something that would have been excusable his whole life would be more disruptive to the social order than the crime of murder when committed against a former slave.

In his report to President Johnson, Judge Advocate General Joseph Holt argued strenuously that the original sentence should be carried out. "It is painful to think of the state of society, in a community like that of North Carolina where such crimes as have recently been reported by the [Freedmen's] Bureau can not only be regarded by the people with indifference, but can bring out hundreds of its educated and influential classes to sue at the feet of the executive for the release and pardon of their blood-stained perpetrators."[52] To Judge Advocate General Holt, the murder was the greater injury to society and the community's indifference was appalling. Restoring good order meant teaching North Carolinians to treat violence toward blacks as the crime it was.[53] President Johnson eventually approved Ruger's reduction of Baynes' sentence from death to 10 years hard labor.[54]

Similarly, after a military commission convicted Elizabeth Ball in November of 1865 for killing a black man, she filed a petition for pardon with President Johnson. Ball had employed the victim, James Thomas, for a short while before they had a disagreement and she ordered him

---

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] Mark L. Bradley, *Bluecoats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina*, (Lexington: The University Press of Kentucky, 2009), 77.

off the property. Thomas left behind some belongings and wanted them back. He obtained a letter from the local Freedmen's Bureau agent ordering Ball to allow Thomas to retrieve his belongings. Ball greeted Thomas at her gate with shotgun in hand and refused to allow Thomas on the property. A scuffle ensued. Ball shot and killed Thomas. Though charged with murder, the commission convicted Ball of the lesser included offense of manslaughter. The commission sentenced her to three years, but the Department Commander reduced it to one year imprisonment.[55]

Several prominent Raleigh area citizens signed a pardon petition on Ball's behalf. They argued, among other things, that Elizabeth Ball was a woman of good character who supported several children and her bedridden husband. On the other hand, "the freedmen Thomas, who was killed, was a depraved character . . . and further that your petitioners believe that the course of good will and kindly relations between the colored and white races will be materially [improved] by the pardon of the said Elizabeth Ball by your executive clemency."[56] A reporter for the *North Carolina Standard*, who had recorded the trial proceedings for his newspaper, wrote to President Johnson "whatever the technicalities of the law . . . the animus of the evidence clearly showed that she really believed she was acting in self-defense in shooting the deceased. And this opinion is entertained as the writer of this has opportunity for knowing universally in the neighborhood where the event occurred. This opinion is concurred in by the colored as well as the white population."[57] Finally, both former and future Governor Holden, and recently elected Governor Jonathan Worth submitted pardon petitions for Elizabeth Ball. They reassured

---

[55] Record Group 153, Case File MM-3616.

[56] *Ibid.* The pardon petition also claimed the evidence did not support the conviction because the killing was justified. The petitioners claimed Elizabeth Ball genuinely believed she was defending herself.

[57] *Ibid.*

President Johnson that all citizens, both black and white, would agree that Mrs. Ball should be pardoned.

The Ball petitions demonstrate two things. The first is that North Carolinians considered local knowledge and reputation to be at least as relevant as the "technicalities of the law." The second is that the petitioners understood that the "colored" population had to be at least nominally included in the community's opinion on the case. However small - and no doubt disingenuous - this effort to include blacks within the peace of the state, if the Union army did not consider their inclusion an essential aspect of freedom, it is very unlikely prominent white North Carolinians would have considered the opinions of local blacks to be at all relevant in a case where a white woman killed a black man who came onto her property against her wishes.

During the Fall and Winter of 1865-1866, a number of former Confederate states, including North Carolina, enacted codes defining the status and rights of freedmen. These "Black Codes" attempted to create a legal status for the freedmen that replicated the authority and control whites had over the freedmen that they had possessed over slaves.[58] In April 1866, Congress passed the Civil Rights Act of 1866 under the authority of the Thirteenth Amendment in response to the Black Codes. The Civil Rights Act made the freedmen citizens and prohibited the states from discriminating against blacks with regard to certain fundamental rights, such as the right to contract, to sue and be sued, to inherit property, and to be secure in their persons and property.[59] According to Eric Foner, the Act represented "continuity and change." "[I]t honored

---

[58] Foner, *Reconstruction*, 195-227. Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham: Duke University Press, 1985), 39-51 for North Carolina Black Codes.

[59] Foner, *Reconstruction*, 243.

the traditional presumption that the primary responsibility for law enforcement law with the states, while creating a latent federal presence, to be triggered by discriminatory state laws."[60]

Despite the opportunity to apply this new and potentially radical federal law, the Union army continued to decide cases in terms of common law governance and social order. In an 1868 case, a military commission tried a planter for assault and battery for beating a mother and her son. The planter beat the young boy for allowing a cow into the planter's orchard. Finding the planter beating her son, the mother pushed aside the planter telling him "no white man could whip her boy." The defendant was accused of violating the "peace and dignity of the State and of the United States of America," not of violating the rights of either the son or the mother. The military commission conceptualized the case as a disturbance of the peace and social order rather than a violation of individual right.[61]

The federal government and constitutional rights simply did not dominate the operation of military judicial administration during reconstruction. Other principles and values stemming from the states' shared common law legal culture were at least as important as the constitution and abstract rights enforcement. Common law concepts of the general welfare and the people's peace contained a different way to understand rights than that contained within the abstract individual rights embedded in the U.S. Constitution. Neither the common law nor the Constitution produced better quality or quantity of rights, but they did produce different outcomes.

Common law rights are different from the abstract, individual rights the Constitution would come to embody after the ratification of the Fourteenth Amendment. The following case

---

[60] Foner, 245.

[61] Record Group 153, Case File OO-3295.

provides an example of the common law concept of social order giving the Union army the ability to provide protection to blacks as a group - something that would be conceptually difficult under the constitutional conception of rights as belonging to individuals standing alone.

On September 21, 1865, a large number of blacks gathered around a well in the town center of Concord in Cabarrus County, North Carolina. The town well was typically a place of public gathering in North Carolina towns.[62] The white voters of Cabarrus County were in town to vote for delegates to the state constitutional convention that would reconstruct the state according to President Johnson's plan for Reconstruction. The black people of Cabarrus could not vote in the election, but they came to town to hear an agent of the Freedmen's Bureau speak.

A man referred to as "Yankee Smith," a former Union soldier who had settled in Cabarrus County after mustering out of the Army, and a local former Confederate soldier named Williford decided the freedmen had had possession of the well long enough. Williford pushed his way through the crowd, filled a bucket with water and threw it at one of the freedmen. Smith shot his pistol into the crowd and, with a stick, struck a black man named Henry Phiffer over the head, seriously injuring him.

Nicholas Cook, an acting justice of the peace under the provisional government, was in a local general store administering the amnesty oath to voters when he heard a commotion. He went outside to discover a group of angry whites chasing the black people of Concord with sticks, rocks and at least one firearm. He tried to order the people to keep the peace. Someone said if Cook tried to stop them he was no better than a negro. When he ordered them to keep the peace the crowd closed in further. Cook thought better of it and went into the Sherriff's office

---

[62] Record Group 153, Case File OO-1514. Guion Griffis Johnson, *Ante-bellum North Carolina: A Social History* (Chapel Hill: The University of North Carolina Press, 1937), 119, for discussion of importance of town well.

where he stayed the rest of the day. That evening he made an application for a military force to preserve the peace. Another justice of the peace, upon hearing Williford threaten to "clean out" the freedmen, deemed it was not safe for him and left town.

It would be easy to fashion claims of individual rights on behalf of the freed people of Concord, North Carolina; for example, their right to assemble in a public space to hear a political speech, their right to liberty, their right to security in their person, the right to the equal protection of the law enforcement officials who made themselves scarce in the face of white violence. Instead, the Judge Advocate brought charges against the leaders of this melee for assault and common law riot "to the great terror of all good citizens and the damage of the public peace."

In their closing arguments, defendants' counsel and the Judge Advocate each painted a picture of the law as it should exist under the new conditions of freedom. Each relied on the common law governing riots. The defendants cited an English treatise, *Archbold's Civil Pleading*, for the elements of the crime. The Judge Advocate merely referenced the common law generally stating "we have no doctrine of riot in North Carolina on the subject which is not common to all the states and to England." According to the Judge Advocate, common law riot requires an unlawful assembly and terror and violence with the object to redress a private wrong. The defendants' lawyer argued that there was no riot because the election day assembly was lawful. He also argued that the white men acted individually, not in concert. If they did act in concert it was because they perceived the black crowd as menacing and acted on their duty to preserve the peace by dispersing it.

The Judge Advocate answered that the original assembly of both blacks and whites may have been lawful as defendants claimed. But later the prisoners "formed themselves into a party as white men with the intent to stand by each other, and in that party character, they made an affray with the freedmen and violently attacked them." He compared the partisanship of whites and blacks to the violence raised by one of England's famous rivalries stating "no disturbance between Orange men and Catholics is more distinctly marked with this characteristic of a riot, than that which occurred in Concord." If the Orange men and Catholic rivalries constituted riots, then the violence by the white people against the black people of Concord fit just as well within the definition of the crime.

Both the defense attorney and the Judge Advocate deployed the common law method of knitting new ideas into old doctrine through the use of analogy, though the defense counsel's move was more subtle. Before the Civil War, whites possessed the right and duty to control blacks. Non-slaveholders were socialized into this order through racially discriminatory laws such as those excusing a white man's assault if provoked by a black man's "insolence." Whites who didn't own slaves also manned slave patrols to protect white society from black insurrections and any lesser crimes wandering black persons might commit.[63] In this case, the white defendants were accused of a crime for doing what they previously had the responsibility to do. The defendants' attorneys attempted to weave this responsibility into the new legal order by claiming the white men of the town had the duty to disperse a large crowd of blacks, which was a potential menace almost by definition.

---

[63] Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas*, Harvard Historical Studies (Cambridge: Harvard University Press, 2001).

The Judge Advocate attempted to accomplish the same thing; that is, weaving new legal principles into the old cloth of the common law. By comparing the white and black factions with the Orangemen and Catholics, he moved everyone onto an equal plane in the civic sphere. In fact, in terms of "loyal obedience to the laws . . . decent respect to civil authority and regard to the peace of society," the black people of Concord surpassed the whites. Six of the eight accused ringleaders of the riot were found guilty. They received relatively light sentences, ranging from a fine of $30 to a prison sentence of four months. However, civilian courts would most likely have punished the black participants if they had done anything at all because the black participants would not have been able to testify.[64]

Perhaps it is unsurprising that defendants' counsel would rely on antebellum principles that gave whites control over blacks, but the judge advocate mined English history and common law to support his case as well. He did not argue, even though he was before a Union Army tribunal, that the Union won the war, the slaves are now free, and freedom implies the right to assemble in the town center on an equal basis with whites. Rather, the Judge Advocate argued that the white defendants were guilty of disturbing the peace and order of Concord, while the blacks worked to preserve it.

None of this is to suggest that the United States Constitution was not a source of legal authority or rules of decision, or that the language of rights was not used by the people of North Carolina or the Union army. But, it is to say that even where the language of equality and rights was spoken, it was not the language used to decide legal cases. Instead, the Union army and

---

[64] Bradley, 79-80.

North Carolinians began the reconstruction of the state's legal order using its existing common law legal culture, most of which northern Union officers understood and even shared.

Chapter Three

Children and Apprentices in Reconstruction North Carolina

During General John M. Schofield's short-lived, but important command of the post-war Department of North Carolina, he regarded the problem of the status of the newly free as one of the thorniest problems North Carolina would face during Reconstruction. When he felt he could no longer wait for the instructions he thought federal government officials in Washington would provide, he issued orders to reorganize the state under his own authority. To begin the process of integrating free blacks into the North Carolina social, political and legal order, Schofield opted to organize them into households based on kinship, *i.e.*, families.

Thus, on May 15, 1865, General Schofield issued General Orders No. 46 in which he promulgated the rules "for the government of the freedmen in North Carolina until the restoration of civil government in the State." Among other things, General Orders No. 46 gave black parents common law rights and obligations to their children, rights and obligations that had not belonged to the enslaved, and had not fully belonged even to free black parents under

antebellum North Carolina law.[1] While this may seem a rather uncontroversial, conservative first step, it nevertheless radically altered North Carolina's social and political order.[2]

The family in the nineteenth century was North Carolina's foundational political, social, and legal unit, as it was throughout the South. The southern household was not simply a private organization of individuals related by blood, as it increasingly came to be in the North. Southern households consisted of extended kinship networks, dependents, apprentices, laborers and slaves headed by a white, propertied male or patriarch. The head of the household possessed the sole

---

[1] The following rules are published for the government of freedmen in North Carolina until the restoration of civil government in the State:

I. The common laws governing the domestic relations, such as those giving parents authority and control over their children and guardians control over their wards, are in force. The parents' or guardians' authority and obligations take the place of those of the former master.
II. The former masters are constituted the guardians of minors and of the aged and infirm in the absence of parents or other near relatives capable of supporting them.
III. Young men and women, under twenty-one years of age, remain under the control of their parents or guardians until they become of age, thus aiding to support their parents and younger brothers and sisters.
IV. The former masters of freedmen may not turn away the young or the infirm, nor refuse to give them food and shelter, nor may the able-bodied men or women go away from their homes, or live in idleness, and leave their parents, children, or young brothers and sisters to be supported by others.
V. Persons of age who are free from any of the obligations referred to above are at liberty to find new homes wherever they can obtain proper employment; but they will not be supported by the Government, nor by their former masters, unless they work.
VI. It will be left to the employer and servant to agree upon the wages to be paid-but freedmen are advised that for the present season they ought to expect only moderate wages, and where their employers cannot pay them money, they ought to be contented with a fair share in the crops to be raised. They have gained their personal freedom. By industry and good conduct they may rise to independence and even wealth.
VII. All officers, soldiers, and citizens are requested to give publicity to these rules, and to instruct the freed people as to their new rights and obligations.
VIII. All officers of the army, and of the county police companies, are authorized and required to correct any violation of the above rules within their jurisdiction.
IX. Each district commander will appoint a superintendent of freedmen—a commissioned officer—with such number of assistants—officers and non-commissioned officers—as may be necessary, whose duty it will be to take charge of all the freed people in his district, who are without homes or proper employment. The superintendents will send back to their homes all who have left them in violation of the above rules, and will endeavor to find homes and suitable employment for all others. They will provide suitable camps or quarters for such as cannot be otherwise provided for, and attend to their discipline, police, subsistence, &c.
X. The superintendents will hear all complaints of guardians or wards, and report the facts to their district commanders, who are authorized to dissolve the existing relations of guardian and ward in any case which may seem to require it, and to direct the superintendent to otherwise provide for the wards, in accordance with the above rules. United States War Department, GO No. 46, Dept NC, May 15, 1865, *The War of the Rebellion: a Compilation of the Official Records of the Union and Confederate Armies.*

[2] Mark L. Bradley, *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina* (Kentucky: The University Press of Kentucky, 2009), 30-35.

legal authority to interact with the state on behalf of the members of his household and the absolute legal authority to organize its economic, status, and affective components as he saw fit.[3]

According to historian Peter Bardaglio, "the [southern] household, embedded in networks of blood, marriage, and kinship, provided the key source of order and stability in southern society."[4] In addition to extended networks of blood relatives, Southern plantation households included unrelated dependents and even slaves. Bardaglio describes how, in the nineteenth century Northerners moved toward a conception of family based in affection, increasing egalitarianism, and an individualistic notion of contractual consent in marriage. They conceptualized the family unit as more or less limited to the nuclear family with a rather sharp separation between the private domestic sphere and the public commercial sphere.[5]

In contrast, the southern concept of family remained hierarchical and patriarchal despite pressures from the same trend toward affectionate family relationships that was taking place with more success in the North. Southern plantations also remained the site of both domestic and productive activities so that the demarcation of "separate spheres" was less clear than was increasingly the case in the North. Further, the notion that slaves were part of the plantation family was not simply part of a "proslavery propaganda campaign designed to mask the exploitative character of bondage, for these beliefs underscored the southern commitment to organic hierarchy as the basis for social order."[6]

---

[3] Laura F. Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation," *Law and History Review* 14, no. 1 (Spring, 1996): 81, 82-3.

[4] Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, Studies in Legal History (Chapel Hill: The University of North Carolina Press, 1995).

[5] *Ibid.*

[6] *Ibid.*, 25.

The concept of the family as an organizational unit was deeply embedded not only in the social, economic, and political organization of the state, but also within the law and legal culture. In antebellum North Carolina, and in the south generally, the head of household had the sole authority to assert rights claims against the state and against other white, male heads of household on his own behalf and on behalf of the members of his household. Dependent members of the household could seek redress on the grounds that the harm done to them disrupted the peace and good order of the community, but not on the basis of individual right.[7]

As Stephanie McCurry has demonstrated, even yeoman farmers enjoyed and fiercely defended their status (and the rights that came with that status) as heads of household. Though her study focused on the lowcountry of South Carolina, the family structure in North Carolina was similar. Farmers with small landholdings and perhaps a slave or two could claim political, if not social or economic, equality with their plantation-owning brethren because they commanded both land and the dependents that made it possible for them to make a living from that land.[8]

In *The People and Their Peace,* Laura Edwards has identified two separate legal systems operating in antebellum North Carolina, which she calls "state law" and "localized law," respectively. The law Edwards identifies as state law was formal, nominally equalitarian, professionalized, rights-oriented, and primarily applied to real property and commercial transactions. State law roughly corresponded with the activities of the patriarch as the head of his household as he engaged with other patriarchs, his state government, and the federal government. Localized law, on the other hand, was informal, contextual, relational, and dealt

---

[7] Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights," 83.

[8] Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995).

with domestic relations, crimes, and disputes defined as disruptions of the peace and good social order; all matters of local concern.[9]

The head of household sat at the nexus of these two systems of law. Looking outward from the plantation, he stood in equality with other patriarchs. He protected his position vis-a-vis the state, the national government, and other patriarchs in the language of rights and equality. Looking inward onto his plantation household, he protected his position through status, hierarchy and dependence. The state extended its reach onto the plantation only to regulate a deviant (usually excessively violent) patriarch if necessary to the goal of maintaining the peace and good social order, not protecting or vindicating the rights of the patriarch's dependents.[10]

In some ways the state's reach was pervasive and inclusive. Any dispute that constituted a breach of the peace or good social order was appropriate for a county court to adjudicate. Edwards describes how in investigating these disputes, local courts sometimes acted on the statements of women and even slaves, who could not offer sworn testimony in court. In other ways, the state's reach was quite limited. Disputes that did not constitute a breach of the peace were private matters for the patriarch to handle without outside interference.

North Carolina Supreme Court cases dealing with masters accused of using excessive force in disciplining a dependent household member demonstrate how North Carolinians conceptualized the family or household within their legal culture as a kind of sovereign institution that was co-equal to the state, with the authority to maintain its integrity against encroachments by the state. The case of *State v. Mann* is famous, or rather infamous, for the

---

[9] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009)

[10] *Ibid.*

definition of slavery North Carolina Supreme Court Justice Thomas Ruffin offered; "[t]he power of the master must be absolute, to render the submission of the slave perfect."[11] To reach his bleak assessment of the nature of slavery, Ruffin incidentally had to describe the nature of the relationship of the patriarch to the state versus the relationship of slaves and other household dependents to the state.

In claiming that the power of the master must be absolute, Ruffin meant not only the master's power over the slave, but also his power to resist interference by the state. The slave had to submit to the patriarch's judgment and authority, but so did the state. In Ruffin's view, the state had no authority to regulate the relationship of master and slave, but must defer to the master. Ruffin conceded the state's right to regulate against excessive discipline of other domestic dependents - children, pupils, apprentices - because they had a kind of incipient relationship with the state and would eventually take their place as freemen in society. As Ruffin suggests, a subordinate who did not accept his training and his subordinate position was better "[left] . . . to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person."[12] In other words, the state would prevent the patriarch from using excessive force against an insubordinate non-slave dependent, in exchange for the promise of dealing with him through the criminal law once he became of age.

On the other hand, according to Ruffin, slaves had no relationship with the state and never would. The slave's absolute submission and the master's authority were necessary to the institution. "They cannot be disunited, without abrogating at once the rights of the master, and

---

[11] 13 N.C. 263 at 266 (1829).

[12] *Ibid.*

absolving the slave from his subjection."[13] Any acknowledgement that a slave had any relationship to the state impinged on the rights of the master, and was inconsistent with the existence of slavery. Ruffin elided or perhaps chose to ignore the fact that female children and wives did not ever graduate beyond the subordination of the patriarch.

Indeed, the North Carolina Supreme Court wrestled with how complete was the sovereign authority of a husband over his wife on several occasions. In 1862, in the case *Joyner v. Joyner*, the Supreme Court examined the question of how much physical correction a husband could administer to his wife before his behavior became grounds for divorce.[14] The wife in that case alleged that her husband had "manifested great courseness and brutality," for example, striking her with a horse-whip on one occasion and with a switch on another occasion so forcefully that it caused bruises on her body. She also described herself as having been a dutiful, affectionate and faithful wife at all times in the marriage. The trail court in Northampton County granted Mrs. Joyner a divorce with alimony, but the North Carolina Supreme Court reversed.

The Supreme Court said that the pleadings were insufficient because Mrs. Joyner did not describe the circumstances in which Mr. Joyner hit her with the horse-whip and the switch. The Court explained that a "wife must be subject to the husband." The Court speculated that Mrs. Joyner might have deserved the physical punishment she received. If for example, Mr. Joyner hit her in an effort to curb her "unruly tongue" Mr. Joyner would not only have been acting within the law, he would have been performing his duty to govern is household. According to the Court, a man who cannot control his wife loses self-respect, the respect of his family members

---

[13] *Ibid.*

[14] 59 N.C. 322 (1862).

and the respect of his community. Thus, the "law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place."[15]

Stephanie McCurry has argued that to enlist farmers who did not own slaves into the task of protecting the institution of slavery, planters advocated a definition of the household that bound up wives as thoroughly as it did slaves. If a "self-working farmer" could not rest his claims to independence on the ability to command the labor of slaves, he could so so on the ability to command the labor of his wife and other household dependents. Thus, according to McCurry, it was not possible to disentangle domestic laws regarding slaves from domestic laws regarding wives. Householders without slaves had to protect the prerogatives of slave owners if they wished to protect their own prerogatives over their non-slave dependents and their position in civic society as independent and equal men.[16] Both Stephanie McCurry for South Carolina and Victoria Bynum for North Carolina have noted that the laws giving the head of household a kind of sovereign authority over their slaves similarly granted a kind of sovereign authority over their wives, and that both forms of authority were mutually reinforcing.[17]

Ruffin's opinion in *State v. Mann* was so extreme regarding the definition of slavery that it threatened to isolate slavery from other domestic dependencies making it conceptually easier to abolish the institution without disrupting the rest of North Carolina's social order. It is perhaps for that reason that five years later the North Carolina Supreme Court rejected Ruffin's view of slavery in an opinion written by Justice William J. Gaston in the case *State v. Will*.

---

[15] 59 N.C. 324-5.

[16] McCurry, *Masters of Small Worlds*, 91. Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Women in American History (Chicago: University of Illinois Press, 1997) 26.

[17] McCurry, *Masters of Small Worlds.* Victoria E. Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South*, Gender and American Culture (Chapel Hill: The University of North Carolina Press, 1992).

Gaston placed slaves back within the domestic hierarchy, a grade below apprentices. According to Gaston, both apprentice and slave relationships were grounded in service. They differed in degree of dependency and status, but not in the nature of the authority the master had over them. Gaston protected the lives of slaves from abusive masters by bringing them within the domestic hierarchy. However, even in Gaston's view, slaves had no direct relationship with the state. They did have, however, at least the same mediated relationship that other household dependents, including wives, possessed. The state had an interest in preserving good social order. A master or husband who "corrected" a dependent with excessive severity or abused a dependent outside the context of administering discipline breached good social order, which justified the state to step in. Slaves and servants, wives and children, did not possess affirmative rights, but their lives and bodily integrity were of sufficient interest to the state for the state to protect them from outright abuse.[18]

The limited authority of the state to protect the lives and bodily integrity of domestic dependents did not arise out of any rights they might possess. Rights belonged to the head of household, not to the dependent members of that household. In *State v. Hussey*, a woman accused her husband of assault. The husband's lawyer argued that a husband had the right to administer moderate correction to his wife and he was the judge of what was appropriate. The North Carolina Supreme Court was uncomfortable with the husband's characterization of his authority to discipline his wife as a legal right to strike her and explicitly declined to answer the question. The Court decided instead that in this particular case, the injury the wife alleged was slight, and in such a case, the Court would uphold the rule of spousal immunity. Of course, a

---

[18] 18 N.C. 121 (1834)

wife who cannot testify against her husband cannot invoke the law to protect her from his abuse. While the Court declined to extend the rights of a head of household to include the explicit right to violent action, it did not even conceive of the wife having a right to be free from violence visited upon her by her husband. The issue was instead whether the violence that was perpetrated disrupted good order sufficiently for the Court to take cognizance of it.[19]

In the postwar case of *State v. Rhodes* the North Carolina Supreme Court confirmed that the conception of the household as a sovereign political unit survived the changes brought about during the war and early Reconstruction. In *Rhodes,* decided in 1868, a husband had assaulted his wife in a manner the court referred to as a "moderate correction," although it would have constituted an assault and battery if done on someone other than his wife. The Court first pointed out that "the courts have been loath to take cognizance of trivial complaints arising out of the domestic relations - such as master and apprentice, teacher and pupil, parent and child, husband and wife." The Court conceded that the old law allowing a husband the power to control his wife through physical chastisement had been repudiated in England and most of the United States. Because of the changing state of the law in the United States and England, the Supreme Court decided it was important to clearly express its view of the law in North Carolina. According to the Court:

> Our conclusion is that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.
>
> It will be observed that the ground upon which we have put this decision is not that the husband has the right to whip his wife much or little; but that we will not interfere with

---

[19] 44 N.C. 123 (1852)

> family government in trifling cases. . . We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.[20]

The family or household remained "complete in itself" after emancipation as it was in the antebellum period. However, the composition of the family had changed dramatically with Schofield's order recognizing the legal existence of the families of the formerly enslaved.

Slaves had no right to form legally constituted families. There was only one head of household on a farm or plantation with slaves and that was the white male master, husband and father. Thus, while slaves frequently lived together as husband and wife and had children whom they loved and cared for, the affectionate families they formed had no legal status and could claim no legal protection. Masters frequently controlled who their slaves "married" by determining whether or not the couple was allowed separate living arrangements and the resources such as a plot of land, some pieces of furniture, or more rations, that went along.[21] But those marriages were exceedingly vulnerable. Enslaved husbands could not protect their wives from the sexual assault of white men. And the omnipresent threat of sale meant that enslaved families could be torn apart at any time.

The integrity of slave families was further threatened because of the complicated relationship between the masters and parents of enslaved children. When enslaved children were young, masters cultivated their loyalty and affection by offering them treats and attention that their parents could not provide. It was an increasingly important aspect of mastery, as proslavery ideology began to pervade the slave south, that masters be able to command their slaves by

---

[20] 61 N.C. 453 (1868)

[21] Marie Jenkins Schwartz, *Born in Bondage: Growing Up Enslaved in the Antebellum South* (Cambridge: Harvard University Press, 2000), 48-74.

instilling a sense of affection and loyalty in them from a young age, rather than applying undue force or violence. The parents of enslaved children experienced a double bind. The slaveowner's positive interest and attention to their children could help them survive the harsh circumstances of slavery, but encouraging their children to see the masters as the heads of the plantation household undermined not only their parental authority, but divided the affection of their children.[22]

Because their relationships could not exist within the law, they were also not bound by the law governing marriage and bastardy. As a result slaves could constitute their family relationships differently from whites. Slaves acknowledged more gradations of legitimate attachment in their adult sexual relationships than simply married or not married. For example, a couple could "sweetheart" which meant they engaged in a non monogamous sexual relationship. They also "took up" with each other, which was something akin to a trial marriage. Slaves acknowledged committed relationships resembling marriage, but they entered and ended these relationships at will and frequently without any formal ceremony. Community acknowledgment defined the relationship as something more than sweethearts or "taking up." Recognition by the community came with the expectation that the couple would care for each other over a long term. However, the community was also able to acknowledge that the relationship had ended when the couple behaved in ways that demonstrated their relationship was over. Slave communities also apparently tolerating polygyny to some degree.[23]

---

[22] Schwartz, *Born in Bondage*, 77-93.

[23] Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights." Katherine M. Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law & Humanities* 11 (Summer 1999): 251.

In the antebellum period, the legal head of household was a white man. Slave fathers could not claim the rights and privileges of head of household at all. But even free families that were not properly constituted - because they were headed by a woman or a free black - presented a challenge that had to be addressed. One important way North Carolina sought to manage and control these improperly constituted households was by apprenticing the children into properly organized households headed by a white patriarch.

North Carolina elites began forcibly apprenticing both black and white children as early as 1715. Involuntary apprenticeships must be distinguished from voluntary apprenticeships. Voluntary apprenticeship involved an agreement between a child or the child's parents and a master who would provide room, board, and usually training in a specialized field of work. Generally, the child had sufficient means to compensate the master for providing the education and lifestyle that accorded with the child's station in life. Courts supervised these agreements to prevent abuse, but otherwise treated them as contracts between private parties. The involuntary apprenticeship, on the other hand, was a tool for maintaining social order. Orphans - defined as any fatherless child - and children whose parents could not support them were a problem for the community generally. North Carolina law dealt with this problem by forcing these children to be apprenticed into a properly constituted household.

Forced apprenticeship existed to ensure that all orphans or impoverished young persons came under the care of an independent patriarch. County courts could, if they deemed it best for the community and/or best for the orphan, apprentice a child without the consent of, or even notice to, their mothers or the children themselves. Masters signed contracts, but not with the apprentice or with the apprentice's mother. Rather, the rights and duties of the legal relationship

ran between the master and the county court. County courts retained jurisdiction over the apprentices to exercise oversight of the master-apprentice relationship.[24] Because apprenticeships were about maintaining good social order, individual rights did not play a role in the process.

In 1762 the North Carolina colonial assembly formalized the custom of forcible apprenticeships by passing *An Act for the better Care of Orphans, and Security and Management of their Estates*. This law, with modification over time, governed apprenticeships until apprenticeship was abandoned altogether in 1919. The 1762 law required that children be bound out if their estates were so small that no one could afford to maintain them on the profits of that estate. It also required all "free base born children" (children born out of wedlock) be bound in apprenticeships. Further, it required that all female (but not male) children of mixed race be bound until age 21. White female apprentices were released at age 18, while all other apprenticeships lasted until the child was 21.[25]

Apprenticeships certainly involved the labor of children, which could be quite valuable, but the rationale behind the laws involved issues of social order, specifically ensuring that all children lived within a male-headed household. The laws were not primarily about the labor the children could provide. Thus, even children who inherited substantial property were forcibly apprenticed, if no provision for a guardian appeared in his or her father's will, Although the law provided protection for their inherited property and assurance that they would be educated

---

[24] Karin L. Zipf, *Labor of Innocents: Forced Apprenticeship in North Carolina 1715-1919* (Baton Rouge: Louisiana State University Press, 2005), 11-16.

[25] Zipf, *Labor of Innocents.* John Hope Franklin, *The Free Negro in North Carolina 1790-1860* (1943; repr., Chapel Hill: The University of North Carolina Press, 1995).

"according to their Rank & degree."[26] Poor and propertyless children had to earn their keep. They were placed with masters who would feed, clothe and train them for some suitable occupation in exchange for their labor and obedience.

Both black and white children were subject to forced apprenticeships, but as time passed the law regarding apprenticeships became more racialized. Apprenticing black children became an important method for controlling North Carolina's expanding free black population throughout the antebellum period. In 1826 the North Carolina General Assembly expanded apprenticeship laws to include black children whose parents did not "habitually employ his or her time in some honest, industrious occupation" the definition of which was left to the discretion of the court. The 1826 law also reduced the education requirements for black apprentices. North Carolina strengthened the social control aspects of the apprenticeship scheme in 1837. According to the revised statute, the county court was to collect the names of "apprenticeable children" by requiring wardens of the poor to report all fatherless children who applied for poor relief and by requiring justices of the peace to report the names of orphans, free children of color in families "where the parents with whom such children may live, do not habitually employ their time in some honest, industrious occupation," and all illegitimate children.[27]

There is no question that North Carolina deployed apprenticeships for the purpose of social and racial control as both Bynum and Zipf argue. But historian John Hope Franklin convincingly argued that the system offered some benefits to the black children who participated in it. North Carolina's antebellum apprenticeship system created a class of literate free blacks

---

[26] Zipf, *Labor of Innocents*, 12.

[27] Zipf, *Labor of Innocents.* Bynum, *Unruly Women.* Franklin, *The Free Negro in North Carolina*.

because in the first half of the nineteenth century the law required masters to teach apprentices to read and write. Whether the system was benign or malicious, the presumption underpinning the provisions of apprentice law was that blacks were unsuitable parents and could not properly occupy the status of head of household. Black families, even free black families, required supervision by the white community.[28]

General Scofield, acting on the fly and with a northern conceptualization of family likely did not appreciate how deeply embedded within North Carolina's social order was the belief that black parents could not practically, morally or legally possess the status of head of household. Nor did he likely anticipate the impact it would have on North Carolina's social order to allow black families to form legally constituted households with all the common law rights and protections that entailed.

As an initial matter, acknowledging black parents' common law rights and duties toward their children created a pathway through which black parents could make direct rights claims against the state. Secondly, Schofield reversed the legalities in the contest between blacks and whites over the formerly enslaved children of North Carolina. Whereas, prior to emancipation, slaves could only claim an inchoate familial bond in attempting to claim their children as their own, under Union military governance, black parents could invoke the law in contending that their children were dependent members of their own legally established, independent, households subject to the authority of the head of that household. Likewise, prior to emancipation, the master's claim to authority over slave children was fully supported by law as well as culture and custom. While the former masters of enslaved children were loathe to cede

[28] Bynum, *Unruly Women,* Zipf, *Labor of Innocents*, and Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Women in American History (Chicago: University of Illinois Press, 1997).

their authority over them, even to the parents of these children, the former masters' claim of authority depended to a great extent on a pervasive sense of mastery rather than a well-defined legal status category.

Slave owning whites were unaccustomed to having their authority over black children who lived on their property challenged, especially by black adults. The fact that black parents could invoke the authority of the state to back their challenge to white authority raised the stakes even further. Their frustration at having their authority challenged frequently provoked former slave owners to deadly violence, as in the case of a former slave, Minerva Sprewell.[29]

In July, 1865, Minerva Sprewell lived and worked on the same Washington County plantation owned by the Calhoun family where she had been a slave. Minerva's 13-year-old daughter, Annie, was living with the Calhoun's adult daughter and her husband, Benjamin Hassell, where she had been enslaved the previous four years. After emancipation, Minerva began asserting the modest claim that she was entitled to visit her daughter. Mrs. Hassell put Minerva off until one day when Mrs. Hassell was visiting her parents' plantation. Minerva confronted Mrs. Hassell about when Annie would be allowed to visit her. Mrs. Hassell responded by telling Minerva she had never promised that Annie would be allowed to visit her mother and that Annie would be staying with the Hassells always. Minerva allegedly responded by telling Mrs. Hassell that she should go home because Minerva would no longer cook for her and that Mrs. Hassell would no longer have peace in the Calhoun's house. Mrs. Hassell left the house in tears and went to a neighbor's house.

---

[29] Records of the Office of the Judge Advocate General (Army) 1792-1981; Court Martial Case Files, 12/1800 – 10/1894; Record Group 153; National Archives Building, Washington, D.C., Case File OO-1520.

The next day Benjamin Hassell, Mrs. Hassell's husband, came to the Calhoun plantation with another man named Ben Godfrey. Hassell kicked down the door to Minerva's room and threatened to have Godfrey shoot her if she did not comply with their orders. Hassell chased her at gunpoint about a half mile, stripped off her clothes, tied her to a tree, said to her "you damned bitch, I have been owing you a whipping for a long time," and beat her brutally for over an hour. When he was done, he untied her and sent her back to her house. Her employer, Calhoun, saw Minerva about fifteen minutes after she returned, but he made no effort to assist her.

Minerva was bedridden for two days with her injuries. When she recovered sufficiently, she walked four miles - carrying her youngest child - to the nearest Union army post to report the assault. Hassell admitted the beating to the investigating officer. Indeed, he was proud that he had properly handled the matter and asked the officer in charge to "adjust" his case by, presumably, dropping the charges. A military commission found Hassell guilty of assault and sentenced him to a $300 fine and 6 months in prison. The fine was later dropped upon review by the commanding general. Though the legalities all supported Minerva's parental right to at least have access to her child, Benjamin Hassell retained a sense of patriarchal right so surely that he expected a Union military commission to accept his assault on Minerva as an appropriate response to her insolent claims over her daughter. Neither Minerva nor the Hassells seem to have understood their changed relationship to the child, Annie, in terms of specific legal catergories. But Minerva knew enough to understand she had some legally enforceable right to see her child and not to receive a beating for pressing to do so.

Mrs. Hassell seemed to understand that Minerva's requests to see her daughter had a new legitimacy because she became so upset during her visit to her own parents' home that she fled in

tears to a neighbor's house. Mr. Hassell reasserted his authority over Annie and Minerva by beating Minerva with the belief that his actions would receive legal sanction. Though he was given a light punishment, he learned that the law no longer supported his unfettered authority over the child, Annie.[30]

Even under Schofield's General Order No. 46, a black parent's claim over his or her child was not an uncomplicated claim of right, particularly when both parent and child continued to labor for their former master. For example, in the summer of 1865, a man named "Reuben" lost his life in a battle over the right to control the labor of his son. Rueben had been a slave for many years on the Lee plantation in south central North Carolina, and continued to work on the plantation after the war. The male head of the Lee plantation was drafted into the Confederate army leaving his wife and teenaged son behind. Rueben, though a slave, was the head worker. He successfully managed the plantation for Mrs. Lee while Mr. Lee was at war. Reuben had two sons, John and Louis who had lived on the Lee plantation all their lives, but not apparently with their father. Their mother was another slave named Mary, but Reuben lived with a woman named Sallie who referred to herself as Reuben's wife of 12 years.

The white adults living and working on the plantation took turns ordering the young Louis around. They maintained the right to do so because Louis was underage and still living on the plantation. But Rueben also claimed the right to control Louis's labor because Louis was his son. Tension over who had the ultimate authority to control Louis' labor grew over time. The situation was further complicated by Mrs. Lee's young adult son, Stephen Lee, who was beginning to assert his patriarchal authority, so much so that Rueben's wife, Sallie, expressed her

---

[30] Case No. OO-1520.

fear that Stephen Lee would kill her husband. Eventually, Reuben and Mrs Lee made a trip to the Wadesboro to speak to a Union officer "to see what their rights were;" that is to see who had the authority to control the labor of a minor child who lived and worked on the same plantation as his father and on which the child had been a slave.

The day Stephen Lee shot Rueben, Lee tried to order Louis and his brother John to do some work on the plantation. The boys refused and their mother backed them up. Mrs. Lee summoned Stephen Crump, a nearby relative, to settle the dispute. One witness suggested that Stephen Lee was embarrassed at having his authority to order the underage workers challenged by the boys' mother, a woman. In any event, Stephen Lee did as his own mother told him and consulted Stephen Crump.

Stephen Crump sent Stephen Lee to retrieve Louis so that Crump could order Louis back to work. Crump had told Lee to leave Rueben alone because Rueben was of age. When Lee retrieved Louis, Rueben followed after him. Rueben did not have the opportunity to assert his parental authority over his son before Stephen Lee shot and killed him. The testimony conflicted as to who was the aggressor, but Lee was armed and Rueben was not. A military commission tried Stephen Lee and found him guilty of murder.

The very act of Rueben's seeking the intervention of Union officials was an assertion that he had a direct relationship with the state, in this case the federal government, that allowed him to petition for his rights on some sort of parity with Mrs. Lee. Numerous historians have documented the outrage white men felt at having to answer to the charges of black complainants

before the Union army and the Freedmen's Bureau.[31] However, it is important to understand that the source of that outrage was not only that the Union army's administration of justice injected a northern influence into North Carolina political and legal culture. It was that it created the kind of direct relationship to the state for blacks that only patriarchs possessed before the war. Not only were white North Carolinians hauled before what they considered to be a foreign tribunal. They also had to appear there on equal footing with people who had never before had the right to appeal to the state under a claim of right. In June of 1865, David Schenck, a prominent North Carolina planter complained " . . . 'a negro's testimony is as good as a white man's and every complaint he lodges against his employer or former master, subjects such person to the annoyance and disgrace of going before the Yankee commander to answer said negro's charge and there to have no more dignity or respect than is shown the Negro.'"[32]

In Reuben's case, his ability to petition for his rights was unfortunately of little use. Not only did he lose his life in the effort to give effect to his rights, but his killer escaped full responsibility for his crime. In September, 1865, the commanding officer of the Department of North Carolina reduced Stephen Lee's conviction to manslaughter and set him free.[33]

Families and households in the south were not only about who controlled the labor of its members, but also who had the right to command the loyalty and love of its members. Catherine Jones explains how kinship creates what ethicists call "associative obligations;" *i.e.*, "moral

---

[31] Paul A. Cimbala and Randall M. Miller, *The Freedmen's Bureau and Reconstruction: Reconsiderations*, Reconstructing America Series (New York: Fordham University Press, 1999). Donald G. Nieman, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks 1865-1868*, KTO Studies in American History (Millwood, New York: KTO Press, 1979), 41 describes freedmen bringing their complaints to the Freedmen's Bureau. Mark L. Bradley, *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina* (Kentucky: The University Press of Kentucky, 2009).

[32] Quoted in Bradley, *Bluecoats and Tarheels*, 87.

[33] Case No. MM-3195.

duties that do not depend on consent for validity but are instead generated by particular relationships." According to Jones, the moral obligation kinship creates is ideally independent of economic concerns. To be sure, the southern plantation household was an important political and economic unit, but it was also the site of the affective ties that gave rise to ethical obligations to provide economic as well as emotional support. Thus, the southern household had both affective and economic dimensions that could and did sometimes conflict.[34]

Schofield's order anticipated some of that conflict. General Orders No. 46 harnessed the associative obligations of kinship to ensure that dependents came under the care and supervision of a household that could support them and that the labor of able-bodied young people could be harnessed to help, at least until such young people reached the age of majority. Specifically, Schofield's order stated: "the common law of domestic relations, such as those giving parents authority and control over their children and guardians control over their wards, are in force. The parents' or guardians' authority and obligations take the place of those of the former master." Further, "young men and women, under twenty-one years of age, remain under the control of their parents or guardians until they become of age, thus aiding to support their parents and younger brothers and sisters." Only those who were of age and who did not have obligations toward dependent family members were permitted to leave their homes and obtain employment wherever they could.[35]

But Schofield's General Orders No. 46 also harnessed another associative obligation to ensure that dependents were subsumed within a household capable of supporting them; the

---

[34] Catherine Jones, "Ties that Bind, Bonds That Break: Children in the Reorganization of Households in Postemancipation Virginia," *The Journal of Southern History* 76 (February 2010): 71.

[35] See footnote 1, infra.

relationship of former master to former slave. His order required that former masters be "the guardians of minors and of the aged and infirm in the absence of parents or other near relatives capable of supporting them." He further required that "former masters of freedmen may not turn away the young or the infirm, nor refuse to give them food and shelter . . ."[36] While it is more typical and perhaps more comfortable to think of the newly reunited and newly legitimized black families in terms of their affective dimensions and the relationships between the formerly enslaved and their former masters in terms of their economic dimensions, the more complicated view is that both kinds of relationships contained both the affective and economic elements. The justifications of proslavery ideology created associative obligations from masters to slaves that even a Northern Union general could exploit to ensure North Carolina society provided support for as many dependent freedpeople as possible.

In addition, because black families developed the definitions of their kin relationships outside the legal definitions of white society, those relationships did not fit within existing legal categories. White society considered marriage to be a bedrock civic institution that could not be entered into or ended without legal sanction. The institution itself, rather than the happiness of the individuals within a marriage, were more important to good order and the welfare of society. Black communities, on the other hand, "believed that harmonious relationships, not the sanctity of the institution of marriage, promoted the public good."[37]

Rueben's family relationships offer an illustration. When asked who were his parents, Reuben's son, John, responded "Mary is my mother and they say, Rueben, that was killed, is my father." Even though they lived on the same plantation with Rueben all their lives and

---

[36] *Ibid.*

[37] Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights," 111.

understood from their community that Rueben was their father, John and Louis could not answer with a simple "yes." Their mother was not whom whites would recognize as Rueben's wife, which may explain the boys' hesitation. The witness, Sallie, testified to having been "married" to Rueben for about 12 years.[38] The record does not indicate John and Louis' age, but they were children. It is possible that Reuben fathered his sons with Mary at the same time he considered himself married to Sallie, or that he ended his relationship with Mary and took up with Sallie when his sons were young children.

It was by no means self-evident how postwar plantations households should or would be reconstructed. Historian, Catherine Jones explains that households in the Reconstruction South as easily could have been reorganized around optimizing the economic well-being of the household members as around the kind of moral obligation that arises from kinship ties.[39] Organizing around purely economic considerations was too reminiscent of the slave economy, but organizing around kinship obligations was problematic as well. Children complicated the problem of household organization because they represented both a "vulnerable class to protect and a labor source to command." On the one hand, Schofield's order recognized the associative obligations of masters toward their dependent former slaves. On the other hand, allowing blacks to form families and households of their own removed an important aspect of the mastery former slave owners had possessed before emancipation.

---

[38] Slaves could not legally marry as discussed above. But as also discussed, they did form long term relationships that resembled marriage. The record does not indicate whether Sallie and Reuben had their relationship legalized as a marriage after emancipation. The important point is that whatever the legalities, Sallie and Reuben considered their relationship to be a marriage.

[39] Jones, "Ties that Bind, Bonds That Break: Children in the Reorganization of Households in Postemancipation Virginia," 74.

The murder of the former slave Galina, described in Chapter Two provides an example of how intertwined were the economic and affective components of the relationships that existed across the racial and generational divide on southern plantations. This case also aptly demonstrates the destabilizing effect on both the affective and labor components of these relationships Schofield's decision to legitimize black households had on North Carolina's social order.[40]

Before emancipation Galina had been a slave on Providence Neely's plantation in Davie County in the piedmont region of North Carolina her entire life. Providence's 28-year-old daughter, Temperance, had never been married and was childless. Davie County is a relatively remote area bordering on the western mountain region of the state. It is very likely that Temperance's opportunities for socializing off the plantation were limited. Galina was about the same age as Temperance. But Galina had five children ranging in age from an infant to nine years old. The children had different fathers and there is no indication in the record that Galina sustained any kind of relationship with the fathers of her children.

It is impossible from the trial record to know Galina's feelings toward Temperance, but apparently Temperance felt a strong emotional connection with Galina and her children. Temperance reportedly showered Galina and her children with gifts and trinkets, and showed her other kinds of favor over the other slaves on the plantation. When in May of that year Providence ordered Galina and her children to leave the plantation, Temperance intervened. As Galina was preparing to leave, Temperance took Galina's infant into her own lap, gathered up two of Galina's other small children near her and told Galina to continue her work in the garden;

---

[40] Record Group 153, Case File MM-2968.

that she would not be turned out. Temperance importuned her mother not to "turn these poor children away."

The trial record does not show why Providence ordered Galina and her children off the property in May, but given that Schofield issued General Orders No. 46 at just that time, it is not hard to imagine Schofield's order to have played a role. Perhaps Galina began to assert her parental authority over her children with the added expectation that Temperance would shield her from the worst of Providence's wrath.

Providence had been running a large planation on her own for the preceding 20 years. It is unlikely that open defiance by a pre-adolescent slave was something she regularly experienced in that twenty years. Providence was held in esteem in her community for her kindliness toward her slaves and the orderliness of her plantation. Ellen's defiant and even aggressive behavior toward Providence suggests the dynamic of the household had changed.

Temperance tried to talk her mother out of whipping Ellen, saying she would talk to her and "shame" her instead. When Ellen returned Temperance tried to intervene, but as Ellen passed Providence, Providence grabbed her by the hand. Ellen drew Providence's hand to her mouth in an attempt to bite Providence. Providence pinned Ellen's hands behind her back and dragged her into the dining room to whip her. Ellen partly freed herself from Providence's grip and ran out of the house with Providence still holding one hand and continuing to whip her as they both moved out of the house.

When Galina, who was outside the house in the "piazza," saw Providence whipping Ellen she laid down her infant child and went to Ellen's rescue. The testimony differs a bit on whether or not Galina pushed Providence, raised her hand to her, or simply stood in defiance of her, but

there is no question that she retrieved and shielded her child from Providence's whipping hand. At some point during the commotion, Temperance fired a warning shot over the heads of Galina and Providence. When that didn't end the confrontation, Temperance fired again; this time shooting Galina in the chest and killing her. Temperance claimed during the trial that she only meant to frighten Galina into backing down from her mother and was overwrought at what she had done.

Temperance's lawyers argued either that Temperance meant to scare - not kill - Galina or, alternatively, that she was justified in shooting Galina. The lawyers' characterization of the facts has a purposeful bias. However, it nonetheless demonstrates how normative it was for southerners to think about southern households in terms of black and white and love and labor. The defense based the claim that Temperance did not intend to kill Galina in the affective relationships that existed within the extended household. The defense characterized Providence's family as having both white and black members. One lawyer asked Temperance's sister to "state who compose your mothers (sic) white family;" suggesting by implication that her family also contained black members. Another stated that Temperance was "the friend and protector of Galina in the family," and that "this was well known by both white and black in Mrs. Providence Neely's family"[41]

Nathaniel Boyden, one of Temperance's lawyers, emphasized how emotionally attached Temperance was to Galina. In addition to describing Temperance as her known friend and protector he rhapsodized their shared childhood on the plantation, describing the joyful romps they no doubt shared growing up together as young girls. Temperance's lawyers argued that

---

[41] Case File MM-2968.

given the powerful, lifelong, emotional bond that existed between the two women from birth, which remained unbroken even to the day of Galina's death, Temperance could not have formed the malicious intent necessary for murder or even manslaughter. While the defense's argument is certainly self-serving, it is probably not far from the truth of Temperance's experience. She and Galina had lived on the plantation together since birth and were approximately the same age. Temperance was a no-longer-young, unmarried, childless woman living in a remote area on a plantation with her mother. Galina, no doubt, provided Temperance with both companionship and the opportunity to nurture children when she was increasingly unlikely to have any of her own.

On the other hand, and seemingly without any sense of being inconsistent, Temperances' lawyers were very careful to establish the master-servant relationship between both Providence and Ellen and Providence and Galina. The defense sought to establish that Galina and Ellen had lived on Providence's plantation as "servants" from birth and remained servants on the planation even after emancipation. Whatever the legal categorization of their relationship, Providence had a right to chastise the impudent child and did so with an appropriate instrument, i.e., a peach tree switch. Whether the relationship was that of a parent over a child or a guardian over his apprentice or a schoolmaster over his pupil the right to chastise and punish is made without distinction of color. No one, apparently not even the child's parent, had a right to interfere unless Providence carried the chastisement to an unreasonable degree. As someone who had been taught from a child that a servant had no right to raise a hand to a master, it was natural for Temperance to rush to protect her mother after having earlier seen Galina push her to the ground. So long as Temperance only intended to frighten Galina, not kill her, it didn't even

matter whether Providence was right or wrong in punishing Ellen. Given Temperance's affection for Galina, the defense argued, Temperance could not have intended to shoot her.

Temperance's attorneys' arguments contain all the assumptions of the antebellum social order undergirded by the extended family structure. While Providence was a woman she had functioned as the head of household on her plantation with the apparent approval of her community for decades. Temperance's lawyers defended Providence's right and obligation to discipline and control the members of her household without interference from the state so long as she did not exceed the bounds of humane practices. They failed utterly to consider what right Galina might have had as Ellen's mother to prevent Providence from beating her, instead, claiming Galina was interfering with Providence's proper management of her plantation. Temperance's lawyers also assumed that hierarchy and affection could comfortably co-exist within these extended family relationships. Temperance could harbor both intense affection for Galina and horror at the idea she would stand up to Temperance's mother even in defense of her own child.[42]

The legal right for black families to exist destroyed part of the legal underpinnings of white mastery. Elite whites sought to regain some of that mastery and legitimize it by deploying North Carolina's antebellum apprenticeship system to regain legally legitimized control over free black children.

Involuntary apprenticeship may have been a part of North Carolina law and social practice for over a century, but it was not a widespread phenomenon. After the war, however, elite whites sought to re-establish at least some part of their lost labor and mastery by

---

[42] Case File, MM-2968

apprenticing able-bodied young people in great numbers. Laura Edwards explains that emancipation removed whites' ability to compel free black adults to live within a household headed by a white, propertied male. But few could accept that blacks could form legally legitimate households. They believed that "many, if not most, black children belonged within the households of white, propertied men, preferably those of their ex-masters."[43]

The Freedmen's Bureau became involved in apprenticeships because the apprentice relationship was created by an indenture, which was similar to a contract. The Bureau was responsible for overseeing all contracts involving freedmen. The Assistant Commissioner of the Freedman's Bureau for North Carolina, Eliphalet Whittlesey, initially supported apprenticing black children even to their former masters. Whittlesey recognized the potential for abuse, but believed with proper supervision, apprenticeships would provide comfortable homes and education to children who would otherwise have to live in poverty.[44] Freedmen sought to keep black children within their communities to the extent possible. Freedmen's Bureau agents tended to agree, so long as the adult seeking custody of the child was the child's parent, preferably the father or stepfather. However, when an extended family member or "fictive kin" claimed the child should live with him or her, Freedmen's Bureau agents were less sympathetic.[45]

County courts in North Carolina began apprenticing young blacks as soon as they started to operate during the summer of 1865.[46] Elite whites argued that the sustenance and nurturance

---

[43] Edwards, *Gendered Strife and Confusion*, 39.

[44] Edwards, *Gendered Strife and Confusion,* 50 and Alexander, *North Carolina Faces the Freedmen,* 113, for Freedman's Bureau apprenticing children at the beginning of Reconstruction.

[45] Edwards, *Gendered Strife and Confusion*, 50-51. Mary Farmer-Kaiser, *Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation* (New York: Fordham University Press, 2010), 126-127.

[46] Alexander, *North Carolina Faces the Freedmen*, 114. Karin L. Zipf, *Labor of Innocents: Forced Apprenticeship in North Carolina 1715-1919* (Baton Rouge: Louisiana State University Press, 2005).

they invested in the children they formerly held as slaves gave them the right to apprentice them. The blood ties of parents and other relatives alone did not override this claim. They also claimed the right to forcibly apprentice black children because of their deeply embedded assumptions that black parents were incapable of properly maintaining a household or raising children to be contributing members of their communities.[47]

Orphaned and destitute children were a real problem in the black community in post-war North Carolina. Complicating blacks' desire to care for black children within their extended kinship networks as they defined them was the fact that whites' claims to having stronger emotional ties with the children than was not entirely without basis. Slave families were always precariously constituted. Individual members were frequently sold to far-away places. It was not uncommon after the war for parents to go to great lengths to find and reclaim children who had only the barest memory of them. And not every relative had the interests of the child in mind. The Freedmen's Bureau records contain instances of black adults claiming kinship with children for the purpose of hiring them out and keeping their wages. Further, even loving parents frequently had no choice but to hire out or voluntarily apprentice their older children to help support themselves and the family.[48] In such cases, the parents' affective relationship with a particular child had to give way to economic needs of the family. Older children, who could command good wages, were asked to honor their affective obligations at the expense of their economic benefit.

Though the apprentice system could have theoretically provided a humane and sensible solution to the very real problem of impoverished, family-less, formerly enslaved children, in

---

[47] Zipf, *Labor of Innocents.*

[48] Zipf, *Labor of Innocents*, 41-67.

practice the system was fraught with abuse. The apprenticeship system quickly became a thinly-veiled attempt by whites to give legal legitimacy to the virtual re-enslavement of children.[49] Freedmen's Bureau agents began receiving complaints from parents during the summer and fall of 1865. Children were frequently bound out without their own or their parents' consent. Some "children" who were forcibly apprenticed were older teenagers capable of earning good wages and supporting themselves.[50] Eric Foner cites an example of a North Carolina "'orphan' working at a turpentine mill and supporting his wife and child."[51]

From the summer of 1865 to March of 1866, the Freedmen's Bureau policy on apprenticeships was ambivalent, which served to encourage county courts to apprentice black children by the thousands. Local Freedmen's Bureau agents disagree over whether parents should always have the better claim where the children's former masters could better support and educate them.[52] County courts relied on North Carolina's antebellum common law system for forcible apprenticeships, which openly discriminated against blacks. Courts were authorized to apprentice black children if their parents were not engaged in an industrious occupation, but courts frequently ignored that provision of the law, apprenticing children of even relatively well-to-do families.[53]

Black families came to the Freedmen's Bureau for help getting their children returned to them. Bureau agents recognized the discriminatory way county courts were apprenticing black

---

[49] *Ibid.* Edwards, *Gendered Strife and Confusion*, 39. Alexander, *North Carolina Faces the Freedmen*, 113.

[50] Edwards, *Gendered Strife and Confusion,* 47. Donald G. Nieman, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks 1865-1868*, KTO Studies in American History (Millwood, New York: KTO Press, 1979). Alexander, *North Carolina Faces the Freedmen*, 112-119.

[51] Foner, *Reconstruction,* 201.

[52] Alexander, *North Carolina Faces the Freedmen*, 113-114.

[53] *Ibid.*

children. Bureau agent Allan Rutherford complained that "no one presumes to assert that the courts would dare to force a white child away from its parents . . . when the parents were willing and able to support it."[54] However, they were limited to helping black parents challenge the apprentice indentures in county courts. The Bureau succeeded in reducing the number of illegitimate apprenticeships in this way.

In March 1866, the North Carolina General Assembly passed an apprenticeship code as part of their Black Code. The statute had three explicitly discriminatory provisions. Former masters had first preference in apprenticing children. Black, but not white, children could be apprenticed without the consent of their parents if the court determined the parents were not engaged in an industrious occupation - an amorphous and subjective standard. Black girls' term extended to age 21 in contrast to white girls' terms, which extended to age 18.[55] The law essentially codified the discriminatory practices of county courts, which followed antebellum law. By the time the North Carolina General Assembly passed its discriminatory apprentice law, it had become clear that Congress would pass the Civil Rights Act of 1866, which it did in April of that year. The Civil Rights Act gave Whittlesey and his successor, John C. Robinson, the legal backing to cancel apprenticeships made without notice or consent.[56]

In 1867, the North Carolina Supreme Court considered the state's system of apprenticeship in the era of emancipation. The case of *In Re Ambrose* was a particularly egregious example of apprenticeship law being used as a shallow pretext for outright kidnapping. The case prompted the North Carolina Supreme Court to integrate existing state common law

---

[54] Quoted in Nieman, *To Set the Law in Motion*, 138.

[55] Bradley, *Bluecoats and Tarheels*, 125. Alexander, *North Carolina Faces the Freedmen*, 114.

[56] Foner, *Reconstruction*, 243-251 on passage of the Civil Rights Act of 1866.

with the protection for individual rights required by the newly amended United States Constitution and federal law.[57]

In December of 1865, a Robeson County planter named Daniel Russell obtained an indenture from a Robeson county court to apprentice Harriet Ambrose, aged 15 and Eliza Ambrose aged 13. The two girls were living with their mother, Hepsey Saunders, and their stepfather, Wiley Ambrose. The Ambroses had been fending off Russell's efforts to apprentice their children since the end of the war. Russell had apprenticed 20 children in the years 1865 and 1866, sometimes by simply kidnapping them, then asking a court to bind them to him as apprentices. With respect to Harriet and Eliza Ambrose, Russell sent his son and two others to the Ambrose home where they seized the two girls and took them to Russell's plantation.

Harriet and Eliza's parents began a legal battle in state court. In the summer of 1866, they asked the Freedmen's Bureau for help. The local Freedmen's Bureau agent gave the Ambroses an order for Russell to return their children to them, which he did. However, in September, 1866, Russell obtained another set of indentures for the two girls and seized them from the Ambroses once again. This time the Ambroses went to the Russell plantation without an order. Russell threatened to have them arrested for unlawfully seizing the children.

The Ambroses returned to the Freedmen's Bureau where Assistant Commissioner Robinson took up their cause. He obtained permission from Bureau Commissioner Howard to make an example of Russell for his violation of the Civil Rights Act of 1866. Robinson hired local North Carolina legal counsel to help prosecute the Ambrose's case. Robinson first sought the help of Federal District Court Judge, George W. Brooks. In November of 1866, the North

---

[57] 61 N.C. 91 (1867).

Carolina General Assembly had amended the state's apprenticeship laws so that they were facially neutral. Judge Brooks informed Robinson and the Ambrose legal team that because North Carolina apprentice law did not discriminate on its face, there was no violation of the Civil Rights Act and he could do nothing for them.[58]

The Civil Rights Act of 1866 was an extremely important piece of legislation because it guaranteed citizenship to blacks born in the United States. It delineated the basic rights attached to free status, and it introduced the concept of racial equality before the law into both federal and state law as a necessary part of extricating from the common law those aspects that had supported slavery and racial control.

However, as a tool for litigation, the Civil Rights Act was limited by the same federal jurisdictional and institutional incapacities that existed generally within the federal legal system throughout the nineteenth century. The Civil Rights Act of 1866 provided only removal jurisdiction, not original jurisdiction. Federal district courts could only hear cases that had begun in state court where there appeared to be a violation of the substantive rules of the Act. Litigants could not bring their claims to federal court at the outset. Even if the Civil Rights Act of 1866 had given federal courts original jurisdiction to hear cases alleging violations of the Act, there was only one federal district court in the entire state of North Carolina, although it met in three different cities. The Ambroses were fortunate to have caught the attention of the Freedman's Bureau as an attractive test case to address the apprenticeship epidemic and were able to access the federal court, although they were ultimately turned away. But most people would have found traveling to one of the three cities that convened the federal district court to be impossibly

---

[58] Zipf, *Labor of Innocents*, Alexander, *North Carolina Faces the Freedmen* and Farmer-Kaiser, *Freedwomen and The Freedman's Bureau* provide the background of the Ambrose case. Nieman, *To Set the Law in Motion*, 137-138 for Judge Brooks claim that the Civil Rights Act of 1866 did not apply.

burdensome. If a solution to the apprenticeship problem was to be found, it was most likely going to be found in the state court system.

The Ambroses, assisted by the Freedmen's Bureau, sought a writ of *habeas corpus* of the county court in Lumberton county asking for the return of their children. The Lumberton court determined that it had no authority to second guess the validity of the Robeson county apprenticeship papers and remanded the Ambrose children to Russell. The Ambroses appealed to the North Carolina Supreme Court claiming the apprentice papers the Robeson county court issued were invalid because there was no notice to the parents or the children.

The North Carolina Supreme Court agreed. While the Court never relied explicitly or directly on any basis other than its own state law, it imported the U. S. Constitutional requirement that persons who might be deprived of their liberty or property have the right under the Constitution and the laws of the state to notice and an opportunity to be heard. The Court acknowledged that the statute regarding apprentices did not require notice and that previous North Carolina Supreme Court cases held that notice was not necessary. However, the Court acknowledged that emancipation had changed the legal landscape in the state:

> The proceedings of our county courts have been in a summary way in binding out apprentices . . . and have guarded the rights of the apprentices and given satisfaction to society . . . We have had hitherto but few orphans to bind out. Of course, we did not bind out slaves, and there were but few free negroes, and indigent white children usually found friends among their relations to take care of them; and in the few instances where binding was necessary, care was taken by the friends of the children, and by the court itself, that the best that was possible should be done for them; and, besides, apprentices were never looked to as profitable, and were seldom taken except by those who felt some interest in their personal welfare, so that there were no inducements to frauds upon the courts.
>
> But now a very different state of things exists. The war has impoverished the country and made wrecks of the estates of orphans; its casualties have greatly increased their numbers; and one-third of the whole population are indigent colored persons. So that the exceptional cases which we formerly had must be greatly multiplied, and the

> responsibilities and duties of the county courts must be increased in proportion. It is, therefore, of great importance that their duties and the rights of both apprentices and masters, in the proceedings for binding, should be defined and understood. We have no hesitation in saying that in all cases of binding apprentices whether white or colored, it is the right of the persons to be bound to have notice. . . and it is, to say the least, prudent in the court to require that the persons should be present in court.[59]

The court acknowledged that the war and emancipation had dramatically changed the nature of apprenticeships by introducing an explicit economic incentive. Thus, making it necessary to clarify the state's policy and procedure. Though the opinion does not mention the Civil Rights Act of 1866, passed by Congress under the authority of the 13th Amendment, the reach of that act provides the backdrop of the decision. The Freedmen's Bureau was one of the federal institutions with authority to enforce the terms of that Act. North Carolina agent John C. Robinson, cited the portion of the Civil Rights Act that prohibited racial discrimination in custom as well as law to argue that North Carolina custom prohibited binding out white children over the age of 14 without the parents' consent because they could either labor for their parents or their own support by that age.[60] Though the Court did not base its decision on the Civil Rights Act of 1866, the Court did inject the concept of individual rights into a legal scheme that previously had been based entirely on considerations of social order and racial hierarchy, and explicitly acknowledged that black children as well as adults were entitled to assert rights on their own behalf in court.

It had not been the antebellum practice to give notice to a prospective apprentice. The Court in Ambrose imposed a new notice requirement so that a potential apprentice could have "intelligent friends" present to protect his or her interests. The Court purported to rest its opinion

---

[59] 61 N.C. at 94-95.

[60] Zipf, *Labor of Innocents*, 96.

on an 1827 case requiring "that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made a party to the proceedings in which it shall have been obtained."[61] However the status of "freeman" had never previously applied to children, let alone black children, as a basis for making rights claims in court.

At the same time, the Court instructed lower courts on the parameters of the new social order the apprenticeship laws ought to support, parameters that extended the customary practice of not apprenticing white children once they were capable of benefitting from their own labor:

> The petitioners are females, respectively thirteen and fifteen years of age, ages when they stand most in need of the oversight of their parents and friends. They are industrious, well behaved and amply provided for in food and clothing. They live with their mother and step-father, who are of good character and are well to do. What interest had society in having these relations broken up, and themselves put under the care of strangers, with no affection for them nor any other interest, except gain from their service? Now, if these persons or their friends had been present when the application was made for their binding, would any court in the State have bound them out? Of course not. It would have been a gross outrage if they had. A court ought not to, and will not, bind out an orphan unless it appear that its condition will be improved. It is a high duty of the court, and one which they perform with pleasure, to protect these helpless children, and not only to prevent oppression and fraud, but to act as friends and guardians, and improve their condition.

Justice Reade reminded North Carolinians that the purpose of apprenticeships remained the protection of helpless children, and that it would be outrageous to bind them out for the purpose of exploiting their labor. The Court countered the white elite's efforts to re-enslave black children by integrating common law principles based in hierarchy, status and social order with the individual rights concepts of the newly amended Constitution in such a way as to make it appear the principles flowed naturally out of old law applied to new circumstances. Rather than simply applying the newly enacted Civil Rights Act and resting on its authority, the Court

---

[61] 61 N.C. at 93.

opted to knit longstanding local laws with the new federal law - with the strongest emphasis on local law - to fashion a new apprenticeship scheme.

The court's seemingly small move in the direction of protecting the apprentice's right to notice produced a significant effect. Freedmen's Bureau agents across the south interpreted the decision to require parental consent, not simply notice, and used it as authority to cancel indentures where parents had not given consent.[62] The apprenticeship system in the South fell into disuse as a result.[63]

In *Ambrose,* the North Carolina Supreme Court created new law to re-integrate the antebellum system of involuntary apprenticeships into North Carolina's legal culture to make it was consistent with the new constitutional regime. The Court did this by importing the anti-discriminatory intent of the Civil Rights Act of 1866 and imposing due process notice requirements. It took action even where the federal district court in the state claimed to have no legal power to act. The North Carolina Supreme Court continued to assert social order as the primary goal in deciding the case, but the court introduced the individual rights required by the Civil Rights Act as a new component of the good social order. While this change may seem too subtle to be significant, incremental change was one of the hallmarks of common law legal culture. At a time when legislation retained the whiff of factional or class expediency, the North Carolina Supreme Court's use of common law methods and principles allowed it to introduce revolutionary constitutional change in a way that the state's citizens could accept as legitimate.

---

[62] Farmer-Kaiser, *Freedwomen and the Freedman's Bureau*, 124-126.

[63] Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights," 119.

Chapter Four

The Liberty to Be Unfree

In 1868 the state of North Carolina, pursuant to the Reconstruction Act of 1867, held its first set of elections in which black men could vote. Voters selected delegates to a state constitutional convention that, among other things, ratified the Fourteenth Amendment to the U.S. Constitution. The voters of the state also elected a slate of Republican officeholders, which included four of the five Justices of the state Supreme Court who would hold office until 1876. As early as 1869, the state began to experience widespread Ku Klux Klan violence. In 1870, Republicans lost some of the political gains of 1868 to Conservatives running on a white supremacist platform. Republican Governor William Woods Holden was re-elected in 1870, only to be impeached in 1872 for declaring martial law to restore order in portions of the state where the Klan was most active. The dramatic political upheaval and violence that took place during Reconstruction understandably overshadowed a quiet revolution in the law and legal culture of labor organization taking place in the civil courts in the state.

In January, 1871, in the midst of violence and political turmoil, a Granville County, North Carolina, plantation owner named John R. Haskins hired a group of workers to farm a portion of his land. The group of workers consisted of a white man named Thomas Eastwood, a black man named Sam Wilkerson, and a black family headed by a man named Jim Wilkerson. Haskins drafted two sets of agreements setting forth the terms of his employment relationship with the workers. The first agreement Haskins wrote described the relationship between Haskins on one side and Eastwood and Sam Wilkerson on the other. The second was nominally between

Eastwood and Sam Wilkerson and Jim Wilkerson and his family, but its purpose was to establish a chain of command that placed Eastwood and Wilkerson in charge of Jim Wilkerson and his family while they worked for Haskins.

The agreements required the workers to labor for an entire year for shares of the crops they produced. Haskins provided the tools, horses, and equipment necessary to cultivate the land. The workers had to furnish themselves with food and clothing throughout the year even though they were to receive no pay until they harvested the crop and Haskins divided it according to the terms of the two agreements. Haskins agreed to advance the workers the money and provisions they were sure to need throughout the year. He would deduct the value of whatever he advanced to them from their shares.

Haskins' year-long agreement with Eastwood and the Wilkersons, which exchanged agricultural labor for shares of the crop, was by no means an unprecedented arrangement. Similar arrangements had long existed in both North and South. However, the agreement Haskins drafted contained additional provisions that set it apart from its antecedents. Haskins gave himself the sole authority to discharge any of the workers if they did not perform to Haskins' expectations. But Haskins' expectations under the agreements were not limited to how the workers performed their labor. Haskins also required the workers to behave in a respectful manner at all times toward Haskins and each member of Haskins' family. If Haskins decided that a worker had not performed satisfactorily, or had behaved with disrespect or insolence to any member of the Haskins family, Haskins could turn that worker and his or her entire family off the plantation. Further, the workers would forfeit the full value of their labor, with the shares that would have been paid to them being paid to Haskins instead.

Before the agricultural season began in earnest the entire group - Eastwood, Sam Wilkerson, and the Jim Wilkerson family - left the Haskins plantation and began working for Fabian Royster instead. Haskins sued. But he did not sue the workers for breach of their employment contract. Instead, he sued Fabian Royster, claiming Royster had unlawfully "enticed" and "harbored" his "servants" and that he was entitled to damages for his loss. The trial court judge, Albion Tourgée, ruled that the provisions requiring deference and punishing "insolence" with forfeiture were so harsh as to make the agreement unenforceable under North Carolina law and policy. Albion Tourgée was a northerner who moved to North Carolina after the Civil War. He held strong convictions in favor of a free labor ideal and was one of the few white advocates of true equality between blacks and whites.[1] Haskins appealed the decision to the North Carolina Supreme Court in the case captioned *Haskins v. Royster*.[2]

The Thirteenth and Fourteenth Amendments to the U.S. Constitution forced North Carolina to dismantle its existing slave labor system and re-constitute it under the conditions of freedom. *Haskins v. Royster* was a pivotal event in this process. Although the case reached the Supreme Court at the same time Conservatives were ascendant in state politics, this was not a Redeemer court bent on thwarting Reconstruction legal change. Four of the five Justices sitting on the court that heard *Haskins v. Royster* were Republicans. The fifth, Edward G. Reade, had been a Unionist slaveholder who supported the Confederacy, but moved toward the Republican

---

[1] Otto H. Olsen, *The Carpetbagger's Crusade: The Life of Albion Winegar Tourgée*, (Baltimore: The Johns Hopkins Press, 1965) remains the definitive political biography of Tourgée.

[2] 70 N.C. 601 (1874). 1874 N.C. LEXIS 295, LexisNexis *Academic,* www.lexisnexis.com, contains both the opinion in Haskins v. Royster and the argument of counsel. Civil Action Papers, Person County. North Carolina Division of Archives and History, Raleigh, contains the trial court records. Supreme Court Original Cases, 1800-1900, North Carolina Division of Archives and History, Raleigh, contains the record of the case on appeal to the North Carolina Supreme Court.

Party during Reconstruction.[3] Rather, this case represented a sincere effort by the state's highest court to incorporate free labor principles into the state common law.

Haskins v. Royster is a particularly apt case study because it required the North Carolina Supreme Court to consider every aspect of the labor contract: creation, performance, and enforcement. The case also demonstrates that, even though prompted by the requirements of the Reconstruction Amendments to the United States Constitution, state courts continued late into Reconstruction to incorporate change into their legal cultures using the traditional common law method of borrowing and adapting pre-existing common law legal principles to fit the changing circumstances within their own states. The developments taking place at the state level provided the context for the debate over the legal interpretation of the Thirteenth and Fourteenth amendments. At the same time that the U.S. Constitution constrained the states in developing their free labor law, free labor law informed the discussion over what rights were fundamental and deserving of federal protection under the new Constitutional regime.

While *Haskins v. Royster* presented the North Carolina Supreme Court with a case of first impression, the issues in the case did not arise in a vacuum. Indeed, courts in free states had been working out the law of free labor for at least three quarters of a century. To understand the context in which the North Carolina Supreme Court performed its analysis, it is necessary to understand something of the history of free labor contract law in the United States generally.

During the colonial era and into the nineteenth century, labor in the United States was organized almost exclusively around the household headed by a propertied, white, man. The head of a household controlled the labor of his wife, children, servants, apprentices, slaves and

---

[3] Laura F. Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation" *Law and History Review* 14, no. 1 (Spring 1996): 81, 87.

unrelated dependents through various hierarchical status relationships. Most people who found themselves in a dependent domestic status category arrived there involuntarily. Children and slaves obviously had no choice in their status. Apprentices and wards frequently acquired their status through tragedy or hardship. Wives, servants, and voluntary apprentices entered into their domestic relationships by choice, but exercising that choice was the last act of volition the law allowed. No household member could opt to leave the relationship except at the expiration of a term of service or, for male children, when they reached majority age.[4]

The common law of domestic relations constituted and regulated each of these relationships within a single conceptual framework. The head of the household, whether in his capacity as husband, father or master, derived his authority over his dependents from the property interest he possessed in the person of his wife, children, servants and slaves. The property interest the common law created permitted the head of household to keep third parties from interfering with his property interest in persons in essentially the same way all property laws erect a barrier of protection against outsiders.[5]

Highly skilled craftsman and professionals fell outside household organization, and more importantly, outside the law of domestic relations. Contracts, whether oral or written, defined and governed the relationships these workers had with those who hired them. The relationship between the hirer and the hired in these cases was relatively equal and voluntary. The common law still filled in the details of the relationship; how the work should be performed if the parties weren't sufficiently specific, what remedies were available in cases of unsatisfactory or non-

---

[4] See Chapter Two.

[5] Note. "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort. *Harvard Law Review*. 93, no. 7 (May, 1980) http://www.jstor.org/stable/1340608 (accessed March 2012): 1510.

performance, or who was responsible when the activities of either the principal or the independent contractor caused injury to a third party. But neither party to the relationship was subservient to the other, nor did either acquire a property interest in the person or labor of the other.

The circumstances of household servants and independent contractors have a superficial similarity that partially camouflages a crucial difference. Indentured servants and apprentices could sometimes choose their master, even if they had little practical choice about acquiring the status of servant. Even though common law rules constituted and regulated these relationships, indentured servants and apprentices frequently executed a document called an "indenture" that provided a level of specificity the common law could not. For example, the common law required a master to educate a servant or apprentice, but the indenture might specify that the servant or apprentice be trained as a blacksmith. While an indenture might be a type of agreement, it was not a contract.

A contract is an exchange of promises. It requires a "meeting of the minds" between two independent individuals who negotiate their agreement privately. Each party to a contract obligated himself to perform some act or confer some benefit on the other party. But, as a conceptual matter, neither gave up any aspect of his independence, freedom, or personhood to do so. In a status relationship - even one created through a written agreement that may look very much like a contract - one person becomes the property of another. The common law had entirely separate and distinct rules for filling in the details of the relationships and for enforcing

the obligations between an owner and his property versus the relationship between two contracting parties.[6]

One of the rules that applied to status relationships that did not originally apply to contractual relationships was the rule prohibiting a third party from enticing away a dependent member of someone else's household. The common law of both England and the American states erected a zone of privacy and protection around a property owner and his property. A violation of that zone was a trespass. Merely setting an unauthorized foot on privately owned land gave the landowner a claim for trespass. The trespass that occurred when an outsider induced a wife, child, or servant to leave his or her husband or master was "enticement." If the enticer did not know the person belonged to the household of another, but continued to shelter that person after learning of the original relationship, the trespass was called "harboring." The rules against enticement and harboring applied equally to wives, children, servants and slaves.[7]

During the nineteenth century, the nature of work and labor relationships changed dramatically. In the colonial and early national period, northern states began to abolish slavery and long-term indentures so that northerners came to understand servitude as a life-stage for young people on their way to adult independence. Young men would complete their apprenticeships or terms of service to become independent farmers, shop-owners or skilled craftsmen. Women would complete their apprenticeships or terms of service to become the wives of independent householders.

As the nineteenth century progressed, economic independence became increasingly out of reach for many young people in the industrializing north. Rather than achieving independence,

---

[6] *Ibid.*

[7] *Ibid.*

they continued to work for others for wages well into adulthood. As more adults remained wage laborers for longer periods, Americans came to see wage labor as something other than service.[8]

The master and servant relationship remained a part of law and culture in the United States in the nineteenth century North, but increasingly came to be associated with youth. One could justify subservience and hierarchy for young people because they did not possess the legal will of adults.[9] But American society required that adults be free and independent. If they were also wage laborers for long periods of their adulthood, then Americans needed to reconceptualize the social organization of work in a way that granted them that claim to freedom and independence. Free labor ideology offered a way for Americans to do this.

Free labor ideology placed contract at the center of the work relationship. At its most abstract, free labor ideology envisioned two independent men meeting together in the civic sphere and negotiating their private employment relationship on equal terms. Americans experienced the beginnings of a shift from labor performed primarily in the context of status relationships to labor performed pursuant to contract as a move toward greater freedom. Amy Dru Stanley has written about the broad, if not universal, attraction northerners felt toward the concept of contract as an organizing principle for social and civic relationships. Indeed, Stanley argues that Americans developed an ideology of contract as the embodiment of freedom in the civic sphere.[10]

---

[8] James D. Schmidt, *Free to Work: Labor Law, Emancipation, and Reconstruction, 1815-1880,* Studies in the Legal History of the South (Athens: The University of Georgia Press, 1998), 13. Christopher L. Tomlins, *Law, Labor, and Ideology in the Early Republic* (New York: Cambridge University Press, 1993), 229.

[9] *Ibid.*

[10] Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998). Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century,* Cambridge Historical Studies in American Law and Society (NewYork: Cambridge University Press, 2001) for proposition that labor moved from status in common law to contract.

For the free labor system to work, everyone had to adhere faithfully to their contracts. However, an inherent contradiction existed between the idea that the market should govern labor distribution on the one hand, and the requirement that contracts be inviolable on the other. In theory, market forces regulated the terms under which workers sold and employers purchased labor. In practice, the law frequently placed a thumb on the scale in favor of employers to coerce laborers to perform where market forces were not enough.[11]

Free labor law, as it originated in England, contained a host of coercive tools for employers to force workers to honor the sanctity of their contracts. English employers could physically coerce their employees to finish out their contracts or go to prison. They could also ask for economic remedies that could be almost as coercive as physical compulsion. The American colonies and later the states looked to the laws of England as instructive, but not binding. Still, American courts developed the new legal discourse of employer and employee contract law in a context in which almost all social and labor relationships had previously been authoritarian and hierarchical in both custom and law.[12]

In creating employment contracts, Americans could envision themselves as free and independent individuals organizing their economic lives without compulsion or interference from the state. However, when things went wrong they had to resort to the state courts to compel performance or recover damages. As Robert Steinfeld explains:

> A regime of free contract only receives its content from a detailed set of contract rules, and these rules cannot be deduced from any abstract idea of contract. In most cases, the state develops contract rules as courts, legislatures, and other governmental bodies go about answering a series of difficult but unavoidable 'policy' questions: What kinds of contracts will we enforce? What kinds of contracts will we prohibit or refuse to enforce?

---

[11] Schmidt, *Free To Work*, 19.

[12] Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century,* 9-10.

> How will duress or fraud be defined in determining whether to enforce a contract, or to prohibit certain species of contract?'. . . A range of quite different regimes of free contract can be constructed, depending on how the political entity answers these questions.[13]

Certain aspects of American culture in the North imposed constraints on what coercive measures employers could use to force employees to perform their employment contracts. For example, the language of the Northwest Ordinance prohibited involuntary servitude. At what point did an employer's remedies for breach - which involved some form of coercion - render service involuntary? In other words, how much and what kinds of coercion, as a matter of policy and ideology, did the law allow in a free society?[14]

Steinfeld identified two strands within antebellum American free labor law that developed competing definitions of what constituted involuntary versus voluntary servitude. The first tradition, coming out of an Illinois Supreme Court decision interpreting the Northwest Ordinance's prohibition against involuntary servitude, held that so long as there was no fraud or coercion when the worker entered the employment agreement, an agreement was enforceable even if it required specific performance of personal services for decades. The Indiana Supreme Court articulated the second, dominant, strand of free labor law. This held that even when an agreement began as voluntary, the moment a worker wanted out of the employment relationship it became involuntary. An employer could not enforce the agreement through specific performance and had to be compensated with money damages alone. These two strands of free

---

[13] Steinfeld, 39.

[14] Steinfeld, 255-264 demonstrates that it was not free labor ideology itself that imposed such constraints. In England coercive measures such as physical compulsion and imprisonment were acceptable remedies available to employers under the English version of free labor. Other aspects of culture limited the extent to which employers could force their employees to perform. In the United States, physical compulsion looked too much like slavery, so were not permitted to employers as tools of enforcement. So it was abolitionism that prohibited physical compulsion to labor, not free labor ideology itself.

labor define the central unresolvable conflict within free labor law; that between liberty of person and liberty to contract.[15]

All English and American common law courts developed rules for interpreting and enforcing contracts where the terms the parties wrote for themselves were missing, unclear, or where the meaning of the terms was the source of dispute. However, some features were the same throughout the states in the industrializing North. American courts could have expanded the relatively egalitarian law governing the relationship between independent contractors and principals to extend to all employment contracts. Instead, courts and treatise writers conceptualized the employment relationship as essentially hierarchical and opted to import the principles of master and servant into the employment relationship.

The decision to enter an employment contract had to be voluntary to satisfy the requirements of free labor ideology but, once created, the common law of master and servant filled in the details where the contract was silent or ambiguous, determined what provisions should be enforced as a matter of policy, and provided employers and employees with remedies for non-performance. As a result, employment law gave employers the authority and control that had accompanied a master's property interest in his servant. Further, it gave to the employer all the remedies the common law had given to masters for disobedient servants.

According to Tomlins, employment contracts had a disciplinary and authoritarian character that no other contracts possessed. Tomlins cites the importation of enticement to the employment relationship as the hallmark example. Enticement was a trespass that occurred when an outsider interfered with the property interest a head of household possessed in his wife,

---

[15] Steinfeld, 259-265.

child, servant or slave. Introducing this concept into a species of contract most clearly demonstrated that the employment relationship, though no longer grounded in status, would nevertheless remain hierarchical in nature.[16]

Courts were explicit that the authoritarian and hierarchical features of the master and servant relationship were good for the social organization of work. Employees would learn the importance of honoring their contracts and would learn the discipline the capitalist workplace required. Within the hierarchy of work, courts also implicitly enforced a hierarchy of work categories. Wages were not just for labor performed, but for a thing produced. Those work categories in which the laborer produced a thing of tangible value; a carpenter, seamstress or blacksmith, for example, were held in higher esteem than unskilled or menial labor.

If a worker contributed his labor to a work process, but did not himself or herself produce any tangible work product, wages were paid as a reward for the worker's loyalty. Domestic and agricultural workers fell within the category of worker who received wages as much for his or her loyalty to the process as for the labor he or she performed.[17] They were not only paid less, but their ability to collect wages was connected to their display of loyalty. Agricultural laborers were more easily conceptualized as appropriately tied to the land and thus to the household of the landowner, especially in cases where the agricultural laborer lived on the farm. As a result, northern courts continued to enforce year-long labor contracts and continued to interpret them as "entire" contracts all the way up to the Civil War.[18]

---

[16] Tomlins, *Law, Labor, and Ideology in the Early Republic*, 283-284.

[17] Schmidt, 20. Tomlins, 278.

[18] Tomlins, 235. Schmidt, 20-35.

According to the doctrine of "entirety," which both English and American courts recognized, courts interpreted employment contracts to require workers to perform their contracts in full before the employer became obligated to pay wages. A worker who entered a contract for a term could lose all the value of his work if he were discharged or quit his employment before the end of the contract term. This remedy was called forfeiture. The contracting parties could include a provision for interim payments. But if they did not, the doctrine of entirety would impose the interpretation that the agreement to excluded interim payments. This legal doctrine could work great hardship on an unskilled worker. In response, some states applied the *equitable*, as opposed to *legal,* remedy of *quantum meruit* which required the employer to pay the worker for the value the employer received from the worker's efforts.[19]

Labor law and policy varied throughout the North because opinions about the nature of wage labor varied, as did opinions about the nature of different kinds of work. Although they did so in dialogue with one another, the various court decisions and legislative enactments created competing regimes of free contract in the United States during the nineteenth century. The contradictions within the law of free contract remained throughout the antebellum period and persisted even after the end of the Civil War.

During the nineteenth century, the antislavery movement promoted a free labor ideology of self-ownership as the morally and politically superior alternative to slavery. Southern slaveowners were unpersuaded. Indeed, they developed a proslavery ideology that held slavery to be the more humane system. Slaves occupied a position within the domestic hierarchy and received the protections of their master even in their infancy or old age when they were unable to

[19] Tomlins, 273-278. Steinfeld, 291-297.

labor productively. The so-called free labor system produced an impoverished, permanent working class that received none of the protection and affection of the domestic sphere that slaves enjoyed.

The slave state organization of labor, grounded on the proslavery ideology of hierarchy and social order, also included elite whites' authority to control non-elite whites and free blacks. Unemployed, unconnected, adults were a problem for states in both the North and South but for different ideological reasons. In the North, free labor ideology held that work was a virtue. Those who refused to participate in the labor market were immoral and should be compelled to work through laws prohibiting vagrancy and begging. In the South, social order required everyone to be under the authority of a propertied, white, householder. Southerners used poor laws and apprenticeships to bind poor adults and children to a head of household who could support them in exchange for their labor.[20] Despite the ideological differences, North and South shared a common belief that everyone should work and that work should take place under the supervision of civic society.[21]

North Carolina had a predominantly agricultural economy throughout the antebellum period. However, unlike states in the North, contracts for agricultural wage labor essentially did not exist in antebellum North Carolina. That is not to say that no one performed unskilled farm labor for hire. Rather, North Carolinia law placed such labor into legal categories other than contract. The work of slaves, who performed virtually all the agricultural labor on plantations, fell into the body of law governing masters and slaves. On smaller farms, the landowner and his family performed the bulk of the labor themselves, occasionally purchasing or renting a slave or

---

[20] See Chapter 3.

[21] Schmidt, 53-92.

two in times of need, for example, when a young wife left the fields because of pregnancy and infant care.[22] Household workers other than slaves fell within the common law categories of husband and wife, parent and child, guardian and ward, master and apprentice.

Tenants and croppers could also perform both skilled and unskilled agricultural labor. Though the work of a "cropper" might have resembled wage labor, the law regulating both tenants and croppers grew out of the common law of landlord and tenant. A tenant, according to the common law, owned an estate in the property he leased. He owned what he produced and paid rent to the landlord. Even where the tenant agreed to pay a portion of what he produced as rent, the tenant owned and controlled his crops. The landlord acquired no right to the crop until after the tenant divided it and paid the landlord his share.[23]

A cropper, on the other hand, did not own the product of his labor. The crops he produced belonged to the landlord until the land owner divided them and paid them over to the cropper at the end of the year. A croppers's relationship to his landlord resembled wage labor more than true tenancy. However, whatever agreement a cropper had with his landlord would have been interpreted and enforced under the common law rules governing the landlord and tenant relationship, not contract.[24]

From the summer of 1865 through the end of the year, the North Carolina constitutional convention met to recommend constitutional change and the General Assembly passed legislation to reconstruct the state on terms acceptable to the federal government. In the

---

[22] Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995), 82-84.

[23] Harold D. Woodman, *New South-New Law: The Legal Foundations of Credit and Labor Relations in the Postbellum South,* The Walter Lynwood Fleming Lectures in Southern History (Baton Rouge: Louisiana State University Press, 1995).

[24] *Ibid.*

meantime, the Union army and the personnel of the Freedmen's Bureau, continued to maintain order in the state. Without a functioning agricultural economy everyone would suffer, especially the formerly enslaved. To ensure a crop for the following year, the Freedmen's Bureau imposed year-long employment contracts on both freedmen and planters neither of whom was eager to contract with each other.[25]

Historian James D. Schmidt, explains that Freedmen's Bureau personnel had absorbed a popular understanding of free labor law that they applied in their efforts to reconstruct southern labor relationships. As discussed above, free labor law was not uniform even across the states that had been developing a free labor jurisprudence for half a century. Bureau agents had a variety of tools for creating and enforcing contracts, all of which could find support in one of the many strands of common law principles. The year-long agricultural labor contract was one such tool.[26]

According to Donald Neiman, the Bureau could have allowed the freedmen to work for landowners for wages without entering year-long contracts. This option would have given the freedmen greater mobility and freedom to bargain for higher wages, but risked that they would abandon their labor at a critical stage in the growing process causing landowners to lose their crops. The landowners could sue. But since most freedmen had little money to pay damages that was an empty remedy. Similarly, the landowner's right to keep the back wages of the absent worker would not be adequate where a planter lost his entire crop because he did not have

---

[25] Nieman, 160-185.

[26] Schmidt, 145. See also, Paul A. Cimbala and Randall M. Miller, *The Freedmen's Bureau and Reconstruction: Reconsiderations*, Reconstructing America Series (New York: Fordham University Press, 1999).

enough hands at a critical time. In any event, cash was scarce in the post-war south, which made this option unworkable.[27]

Another option, the one that most freedmen preferred after Freedmen's Bureau Assistant Commissioner, Whittlesey informed them they would not gain access to land ownership, was to rent land.[28] This gave them a measure of independence and security. Most planters were opposed to renting land to freedmen. The Bureau ultimately declined to support this option because, according to Neiman, the Bureau's Commissioner, O. O. Howard, believed it would have been "an intolerable interference with the right of individuals to use their property as they see fit."[29]

The third option was the year-long agricultural labor contract. Howard believed that labor contracts would provide both landowners and freedmen lessons in fair labor practices and the importance of honoring contractual obligations. To promote both parties' understanding that contracts had to be honored for the free labor system to work, Howard allowed and even encouraged two deviations from the common law. He allowed workers a first lien on the crop so that they would be ensured of getting paid their wages. However, he also allowed planters to specifically enforce their labor contracts.[30] At the end of 1865, Howard was not pleased with how southerners performed under the year-long labor contracts. Employers were so closely

---

[27] Nieman, 160-185.

[28] The United States acquired a great deal of property due to confiscations during the war. Property that could be shipped north and sold, was. Before confiscated land could be sold it had to pass through legal proceedings to secure title in the new owners. Johnson's pardon policy during Presidential Reconstruction put the land back in the hands of the former owners. Neiman, 46-53. Mark L. Bradley, *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina* (Kentucky: The University Press of Kentucky, 2009), 88-89, for Whittlesey informing freedmen there was no U.S. land for sale.

[29] Neiman, 159.

[30] Neiman, 60-61.

supervising workers that none of the parties to the relationship was learning the fundamentals of free labor. Some assistant commissioners suggested doing away with the long term contracts because the purported benefit to the freedmen, that their employers had to pay them during slow work times, was an empty one. When the Freedmen's Bureau and the army began handing over jurisdiction to state courts, freedmen bound by contracts would be unlikely to recover unpaid wages. They would not be able to afford the cost of litigation and were less likely to face a friendly forum. If the newly free workers were not bound by a contract, they could leave if an employer mistreated them, which afforded them some independence and negotiating leverage. Howard decided that on balance it would be more effective to continue the long-term contracts. There was no trust among workers and employers. Without a written agreement there would be no order. He believed both sides remained capable of absorbing the lessons of free labor. Once these lessons had been learned the contracts would no longer be needed and labor arrangements could revert to the more free labor oriented "at-will" employment arrangements of the North.[31]

Howard's view of the freedom of employment arrangements in the North was rosier than the reality. It was true that by the start of the Civil War, long-term labor contracts had fallen out of favor in the North, but that was not because employers no longer had need of coercive methods to induce worker performance. While labor contracts ensured an employer sufficient labor when needed, they also committed him to pay wages to workers he might not need during a downturn in his business. In the industrial - as opposed to the agricultural - labor context, employers no longer wanted or needed lengthy employment contracts. Instead, northern industrial employers devised an assortment of worker rules that courts enforced as though they

[31] Neiman at 156-160.

were bargained-for contract terms that made quitting a job costly to the worker. For example, notice requirements coupled with a lag between when employers paid wages and when the workers performed the labor made it possible for employers to keep weeks of wages when a worker left without advance notice.[32] Still, to a free labor advocate such as Howard, the opportunity to labor under a contract instead of slavery was a lesson in freedom.[33]

At the same time that the Freedman's Bureau was organizing the agricultural labor force for the crop years 1865 and 1866, North Carolinians were holding their state constitutional conventions and electing their first post-war General Assembly. The question of the social organization of work after emancipation was just one aspect - albeit a significant one - of determining the status of the freedmen in North Carolina society. The fact of emancipation did not change the cultural assumptions former masters held about blacks and their proper status in civic society. Elite whites were all but incapable of imagining free blacks as anything other than a permanent laboring class. At the same time, they believed blacks would not work unless compelled and were constitutionally inclined toward dishonesty and petty crime. Under slavery, masters had exerted the kind of control over blacks they believed made good social order possible. Under freedom, the state would have to pass legislation that exerted equal control or chaos would result.[34]

Freedmen, on the other hand, believed that their former masters could not be trusted to deal fairly with them. They understood that for the foreseeable future they would provide most

---

[32] Steinfeld, 290-292.

[33] Nieman, 45, notes in some areas of the south planters would drive away a portion of their black labor force once the crop was planted because there was far less work to do until harvest, thus avoiding the obligation to pay wages when demand for labor was low.

[34] Neiman, 39-40.

of the labor of the state, but they demanded fair treatment and legislation to ensure it. An address drafted by a convention of freedmen held simultaneously with the 1865 North Carolina constitutional convention stated:

> Our first and engrossing concern in our new relation is, how we may provide shelter and an honorable subsistence for ourselves and families. You will say work; but without your just and considerate aid, how shall we secure adequate compensation for our labor? If the friendly relations which we so much desire shall prevail, must there not be mutual co-operation? As our long degradation cannot add to your comfort, make us more obedient as servants, or more useful as citizens, will you not aid us by wise and just legislation to elevate ourselves?. . . [We ask for] such encouragement to our industry as the proper regulation of the hours of labor and the providing of the means of protection against rapacious and cruel employees, and for the collection of just claims. . .[35]

To the formerly enslaved, any new labor arrangements required that they labor under reasonable conditions and be paid a living wage.

During the second session of North Carolina's first post-war General Assembly, the legislature developed its version of the South's notorious Black Codes. The legislature appointed a three person commission to draft a code to define the "exact legal status of the freedmen." On January 23, 1866, the commission presented its report to the General Assembly. The Black Code addressed a number of issues related to the legal status of the freedmen, including what labor system would replace slavery. The Black Code assumed that the formerly enslaved would remain laborers, and that they would not work without coercion. The regulations, therefore, centered on methods for controlling blacks and compelling them to some form of labor. These methods included provisions that tied blacks to the land. For example, as previously discussed, the Black Code contained provisions for apprenticing black children whose parents "do not

---

[35] *Convention of the Freedmen of North Carolina, Official Proceedings* (Raleigh 1865). North Carolina Collection. University of North Carolina.

habitually employ their time in some honest, industrious occupation." The former masters of these children had first claim to apprentice them.[36] The Code contained a vagrancy provision. Although the provision in the North Carolina Black Code was facially race neutral and not unlike vagrancy laws in northern states, it appeared within the Code designed for the regulation of freedmen. Its obvious purpose was to control freedmen and only incidentally to encompass whites.

The Code also permitted landowners to pay agricultural laborers in kind rather than in money. This permitted landowners to compensate their workers in nothing but food, clothing and shelter, which kept them bound to the land and impoverished. Finally, the General Assembly included a provision prohibiting employers from enticing or harboring servants. The threat of being sued by another planter greatly inhibited a planter's willingness to hire workers who had done exactly what free labor tenets prescribed - move to where labor conditions were more favorable.[37]

William Cohen, in his study of black mobility in the Reconstruction South, examined the seeming paradox of the coexistence of laws designed to tie blacks to the land and to a particular employer, and the fact of significant black mobility around the south. He found that post-war southern labor laws restricted the movement of blacks, but only selectively. Employers only used the coercive laws when they were convenient and efficacious, much as Tomlins found industrial employers did in the antebellum north. Despite the doctrinal similarity between southern and northern labor laws, their application to blacks coming out of slavery gave them an

---

[36] Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham: Duke University Press, 1985), 39-45.

[37] Alexander, p 45-47.

entirely different character than the same laws applied in the North. Moreover, while northern employers were primarily interested in controlling access to the labor of its workers, southerner labor laws controlled not only access to the labor of the formerly enslaved, but also served to keep them in a caste-like status within North Carolina society.[38]

In large part in response to the Black Codes enacted in former slave states, including North Carolina, the United States Congress enacted the Civil Rights Act of 1866, which neutralized racially discriminatory laws, and called into question facially neutral laws that were being applied in a discriminatory fashion. Because North Carolina's Black Code prohibited blacks from testifying against whites in violation of the Civil Rights Act of 1866, the Freedmen's Bureau continued to regulate and adjudicate matters between blacks and whites in the state, including labor relations, until the end of 1868. Until 1868 North Carolina civil courts had yet to take a significant role in shaping the labor law of the state's post-war order.

The United States Congress passed the Reconstruction Act of 1867 requiring the former Confederate states to extend the suffrage to black men, to hold constitutional conventions to write new constitutions and to ratify the Fourteenth Amendment. Black suffrage produced a Republican electorate in North Carolina. It was this electorate that selected the Republican Supreme Court that decided *Haskins v. Royster*.

On January 1, 1871, John Haskins, a Person County, North Carolina plantation owner, entered into a year-long agricultural labor agreement with Thomas Eastwood, Sam Wilkerson and Jim Wilkerson and his family. The agreement consisted of two separate documents. The first document named Haskins as the first party to the agreement and Eastwood and Sam

---

[38] William Cohen, *At Freedom's Edge: Black Mobility and the Southern Quest for Racial Control 1861-1915* (Baton Rouge: Louisiana State University Press, 1991).

Wilkerson as the second parties to the agreement. The terms of the agreement specified which fields on Haskins' plantation Eastwood and Sam Wilkerson would farm and what they should plant. It also specified what portion of each crop the parties would receive. The agreement required Haskins to provide Eastwood and Sam Wilkerson with all the tools necessary for farming and a team of two horses. Although Eastwood and Wilkerson would employ the horses, Haskins retained the authority to determine proper care of these valuable living assets at all times. Eastwood and Wilkerson were responsible for the maintenance and upkeep of the tools. Finally, Eastwood and Sam Wilkerson agreed to feed all Haskins' livestock and to cut and haul wood for entire the plantation.

Eastwood and Sam Wilkerson agreed to "farm four and one half hands." In addition to their own labor, they were to "work" Elice Wilkerson as a full hand, Harriet and Lawyer Wilkerson together as one hand, and Horace Wilkerson as a half hand." Eastwood and Sam Wilkerson agreed to "work faithfully all the year and cause their hands to do the same." The workers had to follow Haskins instructions at all times because Haskins retained "the privilege of discharging them at any time he may think proper." Haskins also claimed the prerogative to discharge any of the hands if he judged them to be insolent or disrespectful to himself or any member of his family. Any hand Haskins discharged forfeited all his or her labor and was required to leave the plantation immediately. The shares he or she would have been paid were to be retained by Haskins. The fact that Haskins' arbitrary discharge of a productive worker would result in a greater burden to the remaining workers did not compel Haskins to increase the remaining workers' shares - only his own.

The agreement required the workers to feed and clothe themselves at their own expense. If Haskins advanced any of the hands provisions or money to get through the year, Haskins was entitled to retain a portion of their crop shares sufficient to repay Haskins "at a fair neighborhood cash price for said crops."

The second document was ostensibly an agreement between Eastwood and Sam Wilkerson on one side and Jim Wilkerson on the other, although the document was clearly intended for Haskins to secure the labor of Elice, Harriet, Lawyer and Horace Wilkerson through Jim Wilkerson. It is unclear exactly the relationship, if any, between Sam and Jim Wilkerson. But the document refers to the hands Jim provided to Eastwood and Sam Wilkerson as Jim's family. The document also suggests that Haskins may have furnished Jim Haskins' family some kind of housing on the plantation. According to this second document, Jim Wilkerson agreed to "give up the . . . hands wholely to the Said Eastood and Wilkerson," agreeing further that he would not meddle or interfere with the hands in any way or he would forfeit the shares the hands were to draw. Even though the agreement was ostensibly between Eastwood and Sam Wilkerson, Haskins drafted it and stated at the end of the agreement that he would "hold [it] for his own benefit and the benefit of the above name parties." Eastwood and the Wilkersons signed the agreements with their mark.

About two months after executing their labor agreements with Haskins, the workers left to work for Fabian Royster who presumably offered them better terms. After the workers left, Haskins brought suit in Superior Court in Person County alleging that Royster enticed his workers away and asked for $2000 in damages. Neither the historical nor the legal record

reflects why Haskins chose to sue Royster instead of the workers who breached their contract with him, but it is not difficult to guess.

Standard contract principles would have required Haskins to recover from the workers whatever damages he incurred because of the breach of their agreement with him. But the workers obviously had little or no money to pay damages. In addition, the workers left sometime between January and the beginning of March, which would have been the least labor-intensive period of the year. So Haskins' actual damages would have been slight. Haskins' only other option was to sue the person who hired them away, but under what theory?

A litigant can only ask for what the law provides. In his complaint, a plaintiff must describe the injury he received and the consequences that should follow in the language of existing legal categories.[39] Haskins may no longer have been a slave owner, but he was the head of a household and a plantation owner. He thus almost certainly believed he did or should retain some of the incidents of mastery. Though the impoverished laborers he engaged to work his land could no longer be his slaves, Haskins no doubt believed they were some species of servant. In his experience, the law prevented outsiders from interfering between masters and their servants. Making a case against Fabian Royster, the man who hired the Eastwood and Wilkerson crew, gave Haskins a defendant with the means to pay damages as well as a legal claim that resonated with the antebellum law and culture of mastery.

Thus, Haskins couched his complaint in the language of master and servant. His complaint alleged that the workers "bound themselves to serve the plaintiff as laborers. . ." on his farm for the year 1871. His complaint also alleged that Royster "did unlawfully entice, persuade,

---

[39] Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All.'" *The Journal of American History* 74, no. 3 (December 1987): 1013.

and procure" the workers to "unlawfully leave the service of the plaintiff." Haskins notably did not specify what principle of North Carolina law made it unlawful for Royster to hire away his workers. Rather, he simply described the contract between himself and his workers as one for bound service.[40]

John Haskins filed his complaint in the Superior Court of Person County during its fall term in 1872. Superior Court Judge Albion Tourgée, decided the case in the Spring of 1873. Tourgee was a Radical Republican carpetbagger, who moved from Ohio to North Carolina in 1865, and became deeply involved in North Carolina politics and law in 1867. North Carolina's 1868 constitutional convention selected Tourgee to serve on a three-person committee to convert all of North Carolina's laws, both statutes and common law rules, into a single written code. The committee managed to draft a well-regarded code of civil procedure before it was disbanded in 1873 by the newly-elected, Conservative-controlled General Assembly.[41]

Tourgée also supported legislation in North Carolina combining law and equity so that a single court could hear both types of complaints. Common law courts and courts sitting in equity have long parallel histories, especially in England where they originated. Common law pleading requirements were strict and could lead to harsh results, for example in the case of entire contracts discussed above. If a litigant could not squeeze his facts into a tightly defined

---

[40] While the anti-enticement statute enacted as part of North Carolina's Black Code was still good law at the time of *Haskins v. Royster,* it is not clear why he did not rely on it in his complaint. One possibility, though somewhat unlikely, is he was simply unaware of its continued existence. Another possibility is that he may have believed the Republican-dominated Supreme Court would not look with favor on a claim grounded in a provision of the state's Black Code. The more likely explanation is that the common law was more authoritative in nineteenth century legal culture than a recently enacted statute. It was simply more persuasive to show that a legal principle was deeply embedded in the legal culture of the state than it was to show a recent legislature had approved the innovation.

[41] In 1868 Tourgee was elected Superior Court Judge for the Seventh Judicial District. He remained committed to egalitarian principles throughout his life, even representing Homer Plessy *Plessy v. Ferguson* 163 U.S. 537 (1896). He, nevertheless, enjoyed the grudging respect of the overwhelmingly conservative North Carolina Bar for being the author of principled and well-reasoned legal opinions as a judge. Otto Olsen, *Carpetbagger's Crusade.*

common law category of compensable harm, he could not recover. However, a court sitting in equity or one empowered to apply equitable principles could adjust the legal outcome to avoid harsh or unfair results. Again, in the case of entire contracts, some American courts alleviated the harsh *legal* outcome of forfeiture by applying the *equitable* principle of *quantum meruit* to allow partial recovery in cases where one party to a contract had bestowed some benefit on the other, even if he hadn't fully performed under the contract. In the United States the same judicial personnel could typically sit in both law and equity, just not at the same time. Under Tourgée's leadership, North Carolina was among the first states to combine law and equity, but eventually each of the states of the United States adopted this change.

Judge Tourgée used his combination of legal and equitable authority to decide the case as a question of law without submitting it to the jury. He determined that "the two men could not be bound by such an inequitable agreement."[42] Because there was no enforceable contract between Haskins and the workers, they were free to work for whomever they pleased. Thus, Royster was not liable to Haskins for enticement. Haskins appealed to the North Carolina Supreme Court.

The issue on appeal was whether Fabian Royster injured John Haskins in some compensable way when he hired Thomas Eastwood and the Wilkersons away from Haskins' plantation. The case presented three specific legal questions to the North Carolina Supreme Court. The first was whether there was an enforceable agreement between Haskins and the workers. If so, what kind of relationship did it create among them? Finally, if the agreement

---

[42] 70 N.C. at 601. Olsen, *Carpetbagger's Crusade*, 181.

was enforceable did the law that governed the agreement prohibit a third party from encouraging breach of the agreement?

But the case also presented a more general question regarding what policies should govern the social organization of agricultural labor in the state. As Justice Reade in dissent put it, "[u]nder the new regime, much of the labor of the country is performed under contract. This is the first case which has been before us in which the incidents of the relation of employer and laborer have been under discussion, and will probably be looked to as a precedent."[43] Having little of its own law or custom to draw on for labor relations in the context of emancipation, the court looked to the developments taking place in the northern states. The common law contained a variety of strains from which courts could choose rules of decision to apply in novel situations. The lawyers in this case, the majority opinion, and the dissenting opinion presented an array of common law principles from which the Court could choose in deciding each of the questions the case raised.

The agreement at issue had two controversial aspects. The first was the degree to which Eastwood and all the Wilkersons ceded authority and control to Haskins over both the terms of their work and their personal conduct. The second was that the agreement gave Haskins the sole ability to determine whether the workers performed their labor in a satisfactory manner or whether any of the workers' behavior constituted insolence or disrespect toward Haskins or his family triggering his contractual authority to administer a devastatingly harsh punishment for breach of either of these standards.

---

[43] 70 N.C. at 621.

The lawyers and Justices quickly dismissed any notion that the agreements at issue were leases or that Haskins was a landlord to Eastwood and the Wilkersons. They agreed they were dealing with a contract. The lawyers and judges next had to determine whether the contract was enforceable, which required an inquiry into what kind of relationship the contract created. As discussed above, the common law filled in details in contracts where the parties failed to do so or were unclear in their intentions. Those common law details could be very different for different kinds of contracts. Nothing in the agreement itself indicated whether the parties believed they had created a master and servant relationship, a landlord and cropper relationship, or whether the agreement was between a principle and independent contractors.

Even if the parties had categorized their agreement, the Court was not required to agree with their description if it thought a different category fit better. However, the Court was somewhat constrained to decide the case on the terms under which it had been litigated in the court below. Haskins' complaint described his agreement with Eastwood and the Wilkersons in terms of bound service so the Court had to address whether such a contract was enforceable.

On the question of whether North Carolina law permitted contracts creating a master and servant relationship, William A. Graham answered with a resounding "yes" in his brief on behalf of Haskins. Graham was an architect of white supremacy in North Carolina and refused to accept that blacks would ever occupy anything but a dependent status in North Carolina society. In response to an invitation to speak at a Freedmen's Convention held in Raleigh in October 1866, Graham, instead delivered an open address. In the address, Graham discouraged the freedmen from expending too many resources on education. He reminded them several times that they were a people who would live by their labor. Learning to labor faithfully and well was

something parents could teach their children at home at no expense. To Graham, blacks were appropriately defined as a subordinate, uneducated laboring class.[44]

In *Haskins v. Royster* he argued that master and servant relationships had existed in the common law since antiquity and there was no reason competent adults could not agree to enter into such a relationship by voluntary contract. He also proclaimed that croppers were servants under North Carolina law, so that categorical distinction was without meaning. Graham noted that it might be difficult at times to determine whether the parties intended to create a landlord and tenant relationship or master and servant relationship, but in this case it was easy because "[t]he direction and control of the whole operations of the year are vested in the plaintiff, with stringent securities, not only for obedience, but for correct and respectful behavior towards him and his family, of all which he is made the judge."[45] In other words, the very terms that caused Judge Tourgée to adjudge the agreement so inequitable as to be unenforceable, were the terms that Graham claimed created the voluntary master and servant status relationship.

The brief of Haskins' other attorneys, McCorkle and Bailey, followed Graham's logic but added the justification that "[s]ociety cannot long exist without grades, and the relation of master and servant springs from the earliest and always continuing needs of society, without reference to the character of government."[46] According to McCorkle and Bailey, status and hierarchy were not only consistent with freedom and free contract, but natural features of it. It may be tempting to dismiss these positions as entirely inconsistent with a regime of free labor. But in fact they

---

[44] *Convention of the Freedmen of North Carolina, Official Proceedings* (Raleigh 1865). North Carolina Collection. University of North Carolina.

[45] 1874 N.C. LEXIS 295, 5. Page citations to the arguments of counsel are to the LexisNexis *Academic* digitial version.

[46] *Ibid.*

reflect the positions of early nineteenth century treatise writers and courts that described the hierarchical nature of free labor employment relationships in salutary terms.

Justice William B. Rodman, writing for the majority, skirted the issue as to precisely what kind of contract was at issue. He addressed the enforceability of the underlying agreement to bolster Haskins‘ claim for enticement, but made clear that Haskins' claim against Royster did not depend on the existence of an enforceable contract between Haskins and his workers. Rodman claimed, as a matter of abstract principle, that enticement could arise out of contract instead of the property interest a master has in his servant. But he also cited to a host of cases relating to contracts for personal services and void versus voidable contracts to claim that the underlying contract need not be enforceable, especially where the enticement was malicious. Justice Reade in dissent broke through Rodman's confusing recitation of precedent by stating plainly that "it is a rule of common sense, that what one may lawfully do, another may advise him to do."[47] So what explains Rodman's tortured path toward supporting Haskins' claim against Royster?

It was not only Haskins who was acculturated into a world where it was dishonorable and wrong to entice away the servants of another. Rodman's opinion demonstrated that he remained committed to a social order centered around the household that conceptualized work as remaining within the domestic hierarchy. According to Rodman:

> There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man, under whatever professions of philanthropy or charity, to sow discontent between the head of a family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making, or self interest...[48]

---

[47] 70 N.C. 607, 620.

[48] *Ibid.,* 612.

At the same time Rodman considered himself committed to free labor. He simply imported some of the cultural assumptions and legal incidents of property ownership in another person into an ostensibly free contract. But Rodman didn't invent this intellectual move. He borrowed it from the 1871 Massachusetts Supreme Court decision in *Walker v. Cronin*.[49]

In *Walker v. Cronin*, the Massachusetts Supreme Court was engaged in the process of developing the tort of tortious interference with a contractual relation. This tort, or civil wrong, evolved out of the prohibition against enticement and fit better than enticement within a labor system grounded in free contract. Tortious interference allowed employers to retain a zone of protection around their workers without the unsavory aspect of owning property in another person. The two main differences were, first, the interference had to be malicious. No malicious intent was necessary with enticement, just knowledge that the servant, wife, or child belonged to another. The other difference was that the injured party had to allege and prove economic damage. It was not enough to simply claim that the interfering party had committed a trespass and let the judge or jury determine the dollar amount of damages based on magnitude of the violation. According to the Massachusetts Supreme Court, this new tort or civil wrong applied not just to contracts creating a master and servant relationship, but "to all contracts of employment, if not to contracts of every description."[50]

Rodman continued to see wage labor as a form of service. Even if no specific law provided a remedy against one employer enticing away the workers of another, it still felt wrong. Haskins' lawyers cited to the well-known equitable principle *Ubi jus ibi remedium* - "where there is a right there is a remedy." Rodman applied it to the employment relationship in North

---

[49] 107 Mass. 555 (1871).

[50] 107 Mass. 555, 567.

Carolina because he could not conceive of blacks and poor whites in anything close to terms of equality. While his position may have been driven by white privilege more than class privilege, he used the same analytical tools that northern industrial employers were developing to retain their authority and control over their industrial workers.

Even though Rodman's decision did not depend on the enforceability of the underlying contract, he acknowledged that agreements such as the one at issue were not good models for the future. He even acknowledged that the agreement could "suggest an intent . . . to take some improper advantage, and to exact from the employees a degree of personal deference and respect, beyond that civil and courteous deportment which every man owes to his fellow in every relation in life."[51] But absent fraud or duress in entering the contract, the court could not "inquire whether the reward agreed to be paid to a workman is the highest that he might have got in the market, and to declare the contract void, or to make a new one if it thought not to be the highest. . . That would be an assumption inconsistent with their freedom."[52] In other words, under North Carolina law personal liberty had to give way to contract liberty.

Justice Reade, in his dissenting opinion took issue with the idea that a contract could create a master and servant relationship. He pointed out, accurately, that master and servant was a clearly defined common law legal category with specific requirements for how it could be created and what the incidents of the relationship were. Blackstone's common law described three types of servants within the master and servant category. The first was the menial servant. These servants were household laborers. The relationship was created when the master hired the servant. Reade agreed with Graham that "this is an ancient servitude, embracing duty, subjection

[51] 70 N.C. 601, 610.

[52] 70 N.C. 601, 607.

and allegiance on the part of the servant, and superiority and power on the part of the master," but disagreed that such a relationship existed between Haskins and Eastwood and the Wilkersons.[53] Another type of servant was the apprentice. Indenture agreements approved by courts created master and apprentice relationships. Eastwood and the Wilkersons were clearly not apprentices. The third category of servant in Blackstone's common law were laborers hired for a term who did not live within the domestic household and who were not tradesmen or professionals. This kind of servant notably did not exist in the North Carolina because English statutes, which had no application in North Carolina, created them. After Justice Reade "divested the case of the supposed character of master and servant [he then considered it as], a contract between the parties."[54]

Analyzing the agreement in terms of contract principles, Reade found that Haskins' complaint did not allege damages that were a consequence of the breach. Contract law was about economic relationships, economic injury, and economic remedies. The purpose of damages in the case of contract was to put the injured party in the same economic position he would have been if the breach had not occurred. The injured party's personal aggrievement was not part of the damage calculation. The right to exclude others that was the hallmark of property ownership and that encompassed the prohibition on enticement, did not belong to the jurisprudence of contract.

Reade also argued that there was fraud at the point of entering the agreement in contrast to Rodman's assumption that there was not. The workers were ignorant, poor and dependent. Haskins lawyers argued that the inequitable distribution of power in the agreement evidenced the

---

[53] 70 N.C. 601, 614.

[54] 70 N.C. 601, 615.

parties' intent to enter into a master and servant relationship and Rodman implicitly agreed. Reade, on the other hand, argued the extremely unequal distribution of power on the two sides of the contract evidenced the presence of fraud or duress in the creation of the agreement.

In addition, Reade echoed the arguments that took place in the antebellum period in the non-slave states regarding how much freedom a person could contract away before the service being contracted for became involuntary servitude. Reade argued that it would be obviously against public policy for Eastwood and Wilkerson to contract to become Haskins' slaves. Yet the contract at issue was worse than slavery. The common law imposed a duty on masters to feed, clothe, and house their servants. The contract at issue gave Haskins all the power and privilege of a master without providing Eastwood and the Wilkersons with any of the protections to which servants were entitled.

Finally, Reade argued the remedy prescribed by the agreement was against public policy. The agreement gave Haskins the unfettered right to discharge any or all of the workers if they failed to perform to suit him. If so discharged, they forfeited all their labor. If that were not sufficiently inequitable, the agreement also permitted Haskins to discharge any worker and cause him or her to forfeit his labor if Haskins judged that worker to be insolent or disrespectful. According to Reade, "no one can read the contract without being satisfied that the best interest of society forbid that it should be enforced or in any way countenanced in the Courts. It bears upon its face the evidence that the plaintiff intended to get the labor of these men and discharge them and keep their earnings."[55]

---

[55] 70 N.C. 601, 619.

Justice Rodman and Justice Reade articulated the same unresolvable tension between personal liberty and contract liberty that bedeviled legislators and jurists in the antebellum North. Rodman, a Republican who had served with Tourgée on the code commission that had drafted the North Carolina Code of Civil Procedure, favored liberty of contract, which at the same time limited personal freedom.[56] E.G. Reade, who was a delegate to the planter-led constitutional conventions of 1865 and was appointed to the North Carolina Supreme Court that same year, wrote the opinion that favored personal liberty over contract liberty.[57]

The North Carolina Supreme Court remanded Haskins' case back to the Superior Court of Person County for trial. Judge Tourgée had been replaced by a man named McKay who presided over the trial of the matter. The jury found for Haskins, an outcome all but predetermined by the Supreme Court's ruling on the issue of enticement, but awarded him only $450 instead of the $3000 he sought.[58]

Free labor, like freedom itself, was a concept with many possible meanings. The common law courts of the North had been developing free labor law for three quarters of a century by the time the North Carolina Supreme Court entered the debate, and had not achieved a clear consensus. The burgeoning labor movement in the North in the second half of the nineteenth century met with increasingly harsh resistance in northern courts, preventing any such consensus. As complicated as free labor law was in the north, it was even more complicated in the south as states moved from labor based in slavery and mastery to free labor based in contract.

---

[56] Olsen, *Carpetbagger's Crusade,* 193.

[57] Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Women in American History (Chicago: University of Illinois Press, 1997), 29.

[58] *Haskins v. Royster,* Supreme Court Original Cases, 1800-1900. North Carolina Division of Archives and History. Raleigh.

The coercive aspects of employment contracts took on a wholly different cast when applied in the context of emancipation, so much so that the same measures that northern courts sanctioned in the North looked liked a continuation of slavery in the South.

At the same time that the states were trying to integrate and define free labor within their respective common law legal systems, the nation was renegotiating its understanding of fundamental law in light of the Thirteenth and Fourteenth amendments to the United States Constitution. On the one hand, the renegotiation of fundamental law had important implications for how the states could reconstruct their labor relationships under the new regime. On the other hand, the renegotiation of fundamental law did not take place in a doctrinal vacuum. The simultaneous developments in the common law constituted an important aspect of the context in which the renegotiation of fundamental law took place.

From one perspective, the legal doctrinal conflict between personal freedom and contract freedom existed from the beginning of the American nation. Most of the doctrinal refinement in employment relationships took place in the North, because the South turned more steadfastly toward slavery after the Revolutionary era. The South remained in dialogue with the North on most other common law matters. Thus, at the end of the Civil War it was not surprising that the Republican-dominated North Carolina Supreme Court would look for assistance from northern courts to establish and develop their own free labor law.

But the North Carolina Supreme Court could not end its inquiry by determining simply which common law principles were good law and policy for the state because the Thirteenth and Fourteenth amendments to the United States Constitution had entered the conversation in an entirely new and more thoroughgoing way. *Haskins v. Royster* shows how the development of

private law and the development of the meaning and application of the newly ratified Reconstruction amendments were part of an ongoing exchange of ideas, rather than a top-down process of constitutional exegesis by the Supreme Court.

Conclusion

The legal history of Reconstruction tends to place the federal government at the center. The standard narrative focuses on federal efforts to impose on the South a new legal order of equality and universal individual rights. The success or failure of Reconstruction depends to a large degree on the extent to which the protection of civil and political rights became federalized. This literature tends to give the federal judiciary a larger role than it actually had. The Thirteenth and Fourteenth Amendments to the United States Constitution instantly and fundamentally changed both the foundational national law and the structure of federal-state relations. Certainly the federal government, led by Republicans in Congress, created the blueprint for profound change in the nation's legal order. But the bulk of the work of reconstructing the nation's legal system after the Civil War took place at the state and local level within an intellectual framework governed by the common law.

Contemporary American legal culture still bears the imprint of the common law. Legal matters are settled in an adversary proceeding on a case by case basis. Many of the rules of evidence and procedure still used in both state and federal courts are common law rules only slightly modified by statute. But the common law as a form of governance gave way to an increasingly formalized system based on legislation, administration and constitutionalized concepts of abstract individual rights. This is not a story of declension. Common law "freedom"

quite easily co-existed with slavery and coverture, among myriad other unfreedoms.[1] However, the paradigm shift that resulted in the change from common law governance to the modern liberal and administrative state was accompanied by a loss of historical context that has made understanding Reconstruction legal and constitutional change difficult.

Supreme Court Justice and legal luminary Oliver Wendell Holmes, Jr., taught twentieth century legal thinkers to see the common law as a form of politics. Holmes' view, which still holds much sway even today, obscures the historical context in which the dramatic change in American law and constitutionalism that occurred during the Civil War and Reconstruction took place. Taking common law governance seriously as a discourse about good social order and examining the role of law in promoting the general welfare restores some of that context.[2]

One very important aspect of historical context that is lost when we do not take common law governance seriously is the relative importance of constitutional law in the antebellum period. Nineteenth century Americans did not generally conceive the Constitution as the source of their rights. Rather, they saw their rights as emanating from pre-constitutional sources, such as the common law, natural law, and even religious tenets. The Constitution did not contain the kind of rights that ordered the social, political and economic lives of individuals.

In recent years historians have uncovered some of the lost historical context of the common law enabling them to offer new interpretations of seminal Supreme Court decisions

---

[1] Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism,* Cambridge Historical Studies in American Law and Society (New York: Cambridge University Press, 2011), 283 and William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Studies in Legal History (Chapel Hill: The University of North Carolina Press, 1996), 246.

[2] Parker, *Common Law, History, and Democracy in America,* Novak, *The People's Welfare,* and Kathleen S. Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America*, The Johns Hopkins Series in Constitutional Thought (Baltimore: The Johns Hopkins University Press, 2007) for Holmes's influence on the continuing perception of the common law as collapsing into politics.

interpreting Reconstruction legal change.[3] For example, Michael Ross's biography of Supreme Court Justice Samuel F. Miller, the author of the majority opinion in *The Slaughterhouse Cases*, describes a jurist who supported blacks in their civil rights and right to safety, but who was also concerned that propertied elites would use the new authority of the Fourteenth Amendment to prevent states and municipalities from regulating to protect their people from the worst effects of industrialization, increasing economic inequality, and the concentration of capital into the hands of the few. Thus, he upheld the Louisiana law challenged in *The Slaughterhouse Cases* as a legitimate expression of the long-standing common law principle that permitted regulation for the public good.[4]

New Orleans was a filthy city in the nineteenth century. During its occupation, the Union army issued orders to curb some of the worst practices of the city's residents, which resulted in a significant reduction in the incidence of disease. Animal slaughter was one of the most noxious industries in New Orleans or anywhere else for that matter. New York City led the way in regulating this industry for the sake of public health. Louisiana attempted to follow New York City's example. Because the state had limited public funds, it granted a monopoly to a private

---

[3] Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, (New York: Cambridge University Press 2011) uncovers a previously unconsidered legal principle which she calls the doctrine of state neglect. According to Brandwein, Republicans grappling with how to deal with the problem of state inaction in the face of widespread, unpunished Ku Klux Klan violence against blacks and white Unionists developed a theory that the state officials who failed or refused to prosecute crimes against blacks that they would prosecute if committed against whites, were engaged in official action that the federal government could regulate. Brandwein looks at federal, rather than common law prosecution of Klan violence, but she approaches her study with the same purpose of understanding Reconstruction era constitutional doctrine in the common law context in which it existed that this dissertation undertakes. In recovering the lost federal jurisprudence of state neglect, she is able to explain the seemingly contradictory Supreme Court decisions regarding the rights of black Americans during Reconstruction. Sullivan, *Constitutional Context*, examines married women's property rights in an effort to understand the rights-claiming opportunities women's rights activists foreclosed when they turned against the common law and toward abstract, individual, constitutional rights. She finds that the common law might have offered a kind of contextualized set of rights that took into account the culturally determined role of women as wives and mothers. While she does not claim that the contextualized rights of the common law would have yielded greater freedom or better conditions for women, she does argue that constitutional rights claims did not represent the only avenue for positive legal change.

[4] Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press) 2003. 83 U.S. 36 (1873).

corporation to operate a slaughtering facility away from the center of the city, where all butchers were required to locate their operations. The butchers paid a fee to the corporation for use of the facilities, but otherwise were unrestricted in practicing their trade.

Justice Miller had been a physician before he became a lawyer. He studied the treatment of cholera as part of his medical training. His adopted home, Keokuk, Iowa, was also home to a large hog raising and slaughtering industry. Miller possessed extensive knowledge of the slaughtering business and the diseases it could cause. To Justice Miller, the Louisiana legislature's efforts to deal with this problem were completely reasonable and entirely within the traditional police authority of the state. The arguments of the white butchers' lawyers did not change his position, especially since they came from an unreconstructed Confederate, John A. Campbell.[5] Campbell had been a United States Supreme Court Justice at the start of the Civil War. He resigned to join Confederacy. During his tenure on the U.S. Supreme Court he concurred in Chief Justice Taney's *Dred Scott* opinion. He believed state Republican-led governments had to be destroyed at all costs.

Justice Miller's opinion in the *Slaughterhouse Cases* has long been regarded as the Supreme Court's first step toward the dismantling of Reconstruction. But Ross demonstrates Miller's abiding concern that if all the privileges and immunities of citizenship that existed in common law and custom fell within federal regulatory authority his conservative fellow Justices, especially Stephen J. Field, would use that power to prevent states from regulating corporations and financial interests to protect their citizens from their predatory practices. Field's dissent in *The Slaughterhouse Cases,* in which he praises the virtues of free labor, was an appeal to

---

[5] Ross, *Justice of Shattered Dreams*, 198.

constitutionalize the inviolability of contracts necessary to free labor law. According to Ross, Miller believed that if the Supreme Court adopted Field's position "state legislatures that attempted to address the problems associated with industrialization, urbanization, and the concentration of capital would have to adjust their legislation to the views of conservative justices. Every piece of state regulatory legislation would be scrutinized by a Supreme Court that jealously guarded the interests of the propertied classes."[6] Miller continued to have faith in the ability of states to protect the rights of their citizens, both black and white. So did Louisiana's Republican state political leaders. They fought back hard for their right to continue to regulate for the welfare of the people of the state without the risk of being overturned by the Supreme Court under the authority of the Fourteenth Amendment as would in fact happen many times later in the nineteenth century.[7]

Uncovering the common law context that dominated legal culture in the nineteenth century repositions the role of the constitutional law and the Supreme Court in relation to American legal culture. The dominance of the common law persisted through the Civil War and Reconstruction constitutional change. By the end of the nineteenth century constitutional law and abstract, universal, individual rights displaced the common law and its contextualized concept of rights, but one cannot understand the constitutional change of the last third of the nineteenth century without understanding the common law context in which it existed.

In modernist thought, legislation is legitimate the moment it is enacted by a democratically elected law-making body. In common law thought, the opposite is true. Law becomes law when it proves itself over the course of time. Legislation is suspect in common law

---

[6] Ross, 206.

[7] *Ibid*, 208.

thought for the very reason it is legitimate in modernist thought - because a democratic majority created it. To the common law thinker, majorities are transient and do not necessarily have the long-term needs of society in mind when they act. Legislation that dramatically changed the common law was not law, it was fiat.[8]

Reconstruction constitutional change dramatically changed the common law. The states may have ratified the Thirteenth and Fourteenth Amendments, but it was up to local legal actors to give this dramatic legal change legitimacy by weaving it into the existing common law order. This dissertation attempts to give the common law context its rightful place at the center of the narrative of legal and constitutional change. The Union army began the process of integrating emancipation into the law of North Carolina in its military commission trials of civilians. The Union army attempted to restore social order in North Carolina and to include the formerly enslaved in that social order on the basis of freedom.

When General Schofield gave legal legitimacy to black families he destabilized the antebellum household structure. Former slaveholders could barely tolerate the loss of their mastery over the adults they formerly held as slaves. They could not abide giving up their right to control black children. When they sought to virtually re-enslave large numbers of black children through apprentice laws that had their antecedents in antebellum law, the Freedmen's Bureau and the Union army asserted the newly enacted federal Civil Rights Act of 1866 to stop them. When the North Carolina Supreme Court considered the problem of apprenticing black children in *In re Ambrose*, it did not mention the Civil Rights Act of 1866 even as it overturned the apprenticeship indenture at issue. Instead, the Court reached back into common law

---

[8] Parker, 279-283.

principles of due process and determined that black children had the right to notice before being apprenticed. Historians have criticized the Court for its weak response to the virtual re-enslavement of children embodied in the post-war apprentice process, but if one considers the common law context in which the case arose, the Court's decision seems more canny than tepid.[9]

Contemporary historians consistently view the language of the Civil Rights Act of 1866 as having greatly expanded the reach of federal protection over civil rights, and seek an answer to the question why it did not achieve its potential.[10] But the Civil Rights Act of 1866 was a product of nineteenth century legal culture - a culture suspicious of central authority and codification, a culture than did not typically enact even state statutes of general application.[11] The Civil Rights Act of 1866 only had the potential to expand drastically federal power if one assumes a legal culture and a federal judiciary that did not then exist. The rhetorical and political significance of the Civil Rights Act of 1866 was enormous. Its effect on the possibilities for litigation much less so. Nevertheless, the statute's rhetorical and political significance created the potential for incremental common law change. In declining to base its decision explicitly on the Civil Rights Act of 1866 - opting instead to draw on antebellum common law traditions - the North Carolina Supreme Court gave the Civil Rights Act of 1866 a legitimacy it would not have had standing on its own authority.

---

[9] Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Women in American History (Chicago: University of Illinois Press, 1997) and Karin L. Zipf, *Labor of Innocents: Forced Apprenticeship in North Carolina 1715-1919* (Baton Rouge: Louisiana State University Press, 2005) both criticize the meekness of the Court's decision.

[10] Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (New York: Oceana 1985).

[11] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009).

Most historians understand that the liberty of contract doctrine the U. S. Supreme Court articulated in *Lochner v. New York* was based in antebellum free labor ideology.[12] But its long history in the common law is not nearly as well-recognized. Free labor contract law contained an unresolvable tension between liberty of person and liberty to contract. This tension persisted through the Civil War in the North and became a problem for southern states after emancipation.

In *Haskins v. Royster* the North Carolina Supreme Court entered the debate over where the balance between these two competing principles should lie. *Haskins v. Royster* followed the trend that had begun in the North, specifically Massachusetts, to find the scales tipping in favor of the liberty to contract. However, even in so doing, the North Carolina Supreme Court did not abandon concerns for the good order. It condemned the oppressive contract at issue, but stopped short of ruling it unenforceable.

At about the same time that the North Carolina Supreme Court was considering *Haskins v. Royster,* the United States Supreme Court was deciding the *Slaughterhouse Cases*. Justice Field, in dissent, tried but failed to import the liberty of contract principle into constitutional law through the Fourteenth Amendment. Within a quarter of a century, however, the Supreme Court in *Lochner* would constitutionalize the liberty of contract doctrine by essentially the same jurisprudential method that failed in *Slaughterhouse.* Much of what Justice Miller feared would happen if the Fourteenth Amendment became available to overturn state police power measures came to pass.

The change in liberty of contract principle between its 1874 articulation in *Haskins v. Royster* and its 1905 articulation in *Lochner* exemplifies the change in rights discourse that

---

[12] Howard Gillman, *The Constitution Beseiged*: *The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993; repr., Durham: Duke University Press, 2001). 198 U.S. 45 (1905).

occurred during the Reconstruction and post-Reconstruction periods. In *Haskins v. Royster* community concerns received consideration even if they do not ultimately prevail. In *Lochner*, liberty of contract functioned as a trump that shut down any other considerations that were not equally constitutionally compelling.

By the end of the nineteenth century, a paradigm shift in American legal culture had occurred. Common law governance had given way to constitutionalism. Antebellum developments in legal culture had begun the process of change. The push toward greater uniformity, clarity and predictability that gave rise to recurring, unsuccessful, codification movements did produce an increasing hierarchy in the court systems. State legislatures began to pass laws that applied uniformly throughout the entire state, which was an unprecedented shift toward centralization. Elite lawyers pushed for greater uniformity and formality in the law. Novak describes a general "upward shift" in decision-making power.[13] The Civil War and Reconstruction imposed seismic change on what had previously been an incremental process. However, the Civil War and Reconstruction still played out in an existing context. The shift away from common law governance was not linear and was not inevitable. Recovering the intellectual world of common law governance increases our understanding of Reconstruction legal change.

---

[13] Novak, *The People's Welfare*, 241.

Bibliography:

PRIMARY SOURCES

Civil Action Papers, Person County. North Carolina Division of Archives and History. Raleigh.

Convention of the Freedmen of North Carolina, Official Proceedings (Raleigh 1865). North Carolina Collection. University of North Carolina.

Du Ponceau, Peter Stephen. "A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States: Being a Valedictory Address Delivered to the Students of the Law Academy of Philadelphia, at the Close of the Academic Year, on the 22d April, 1824." *Making of Modern Law* (1824). http://galenet.galegroup.com.ezproxy.cul.columbia.edu/servlet/MOML?af=RN&ae=F103356951&srchtp=a&ste=14 (accessed January 9, 2013).

Hopkinson, Joseph. "Considerations on the Abolition of the Common Law in the United States." Philadelphia,1809. *The Making of Modern Law*. http://galenet.galegroup.com.ezproxy.cul.columbia.edu/servlet/MOML?af=RN&ae=F104962877&srchtp=a&ste=14 (accessed January 9, 2013)

Lieber, Francis. *Instructions for the* New York, 1863. http://galenet.galegroup.com.ezproxy.cul.columbia.edu/servlet/MOML?af=RN&ae=F102425901&srchtp=a&ste=14>

Records of the U.S. Bureau of Refugees, Freedmen, and Abandoned Lands. RG 105. National Archives. Washington, D.C.

Records of the Office of the Judge Advocate General (Army) 1792-1981; Court Martial Case Files, 12/1800 – 10/1894; Record Group 153; National Archives Building, Washington, D.C.

Scott, Robert Nicholson, *The War of the Rebellion: a Compilation of the Official Records of the Union and Confederate Armies.* United States War Department. 1892. Google e-book. (Washington D.C. 1892)

Supreme Court Original Cases, 1800-1900. North Carolina Division of Archives and History. Raleigh.

PUBLISHED SOURCES

Books

Alexander, Roberta Sue. *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67.* Durham: Duke University Press, 1985.

Amar, Akhil Reed. *America's Constitution: A Biography*. New York: Random House, 2005.

Bardaglio, Peter W. *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Studies in Legal History. Chapel Hill: The University of North Carolina Press, 1995.

Bradley, Mark L. *Bluecoats and Tarheels: Soldiers and Civilians in Reconstruction North Carolina.* Kentucky: The University Press of Kentucky, 2009.

Brandwein, Pamela. *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth.* Durham: Duke University Press, 1999.

Brandwein, Pamela. *Rethinking the Judicial Settlement of Reconstruction*. Cambridge Studies on the American Constitution. New York: Cambridge University Press, 2011.

Bynum, Victoria E. *The Long Shadow of the Civil War: Southern Dissent and its Legacies*. Chapel Hill: The University of North Carolina Press, 2010.

Bynum, Victoria E. *Unruly Women: The Politics of Social and Sexual Control in the Old South*. Gender and American Culture. Chapel Hill: The University of North Carolina Press, 1992.

Cimbala, Paul A., and Randall M. Miller, *The Freedmen's Bureau and Reconstruction: Reconsiderations*. Reconstruction America Series. New York: Fordham University Press, 1999.

Cohen, William. *At Freedom's Edge: Black Mobility and the Southern Quest for Racial Control 1861-1915.* Baton Rouge: Louisiana State University Press, 1991.

Crow, Jeffrey J., Paul D. Escott, and Flora J. Hatley. *A History of African Americans in North Carolina*. 2nd ed. Raleigh: Office of Archives and History, North Carolina Department of Cultural Resources, 2002.

Curtis, Christopher Michael. *Jefferson's Freeholders and the Politics of Ownership in the Old Dominion.* Cambridge Studies on the American South. New York: Cambridge University Press, 2012.

Edwards, Laura, F. *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*. Chapel Hill: The University of North Carolina Press, 2009.

Edwards, Laura, F. *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Women in American History. Chicago: University of Illinois Press, 1997.

Escott, Paul D. *Many Excellent People: Power and Privilege in North Carolina, 1850-1900*. The Fred W. Morrison Series in Southern Studies. Chapel Hill: The University of North Carolina Press, 1985.

Escott, Paul D., ed. *North Carolinians in the Era of the Civil War and Reconstruction*. Chapel Hill: The University of North Carolina Press, 2008.

Evans, William McKee. *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear*. Athens: The University of Georgia Press, 1995.

Farmer-Kaiser, Mary. *Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation.* New York: Fordham University Press, 2010.

Fehrenbacher, Don E. *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective*. New York: Oxford University Press, 1981.

Fleming, Walter, L., ed. *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time*. 1906. Reprint, Whitefish, Montana: Kessinger Publishing, 2006.

Foner, Eric. *Reconstruction: American Unfinished Revolution 1863-1877.* The New American Nation Series. New York: Harper and Row, 1988.

Fox-Genovese, Elizabeth. *Within the Plantation Household: Black and White Women of the Old South*. Gender and American Culture. Chapel Hill: University of North Carolina Press, 1988.

Franklin, John Hope. *The Free Negro in North Carolina 1790-1860*. 1943. Reprint, Chapel Hill: University of North Carolina Press, 1995.

Glenn, H. Patrick. *On Common Laws.* Oxford: Oxford University Press, 2005.

Hadden, Sally E. *Slave Patrols: Law and Violence in Virginia and the Carolinas*. Harvard Historical Studies. Cambridge: Harvard University Press, 2001.

Hall, Kermit L. *The Magic Mirror: Law in American History*. New York: Oxford University Press, 1989.

Harris, William C. *William Woods Holden: Firebrand of North Carolina Politics*. Baton Rouge: Louisiana State University Press, 1987.

Horwitz, Morton J. *The Transformation of American Law 1780-1860*. Studies in Legal History. Cambridge: Harvard University Press, 1977.

Hyman, Harold M. *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*. Sentry ed. (Boston: Houghton & Mifflin 1975).

Hyman, Harold M. and William M. Wiecek. *Equal Justice Under Law: Constitutional Development 1835-1875.* New American Nation Series. New York: Harper and Row, 1982

Johnson, Guion Griffis. *Ante-bellum North Carolina: A Social History*. Chapel Hill: University of North Carolina Press, 1937.

Kaczorowski, Robert J. *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876.* New York University School of Law Linden Studies in Legal History. New York: Oceana, 1985.

Kaczorowski, Robert J. "The Inverted Constitution: Enforcing Constitutional Rights in the Nineteenth Century." In *Constitutionalism and American Culture: Writing the New Constitutional History,* edited by Sandra F. Vanburkleo, Kermit L. Hall, and Robert Kaczorowski, 29-63. Lawrence: University Press of Kansas, 2002.

Kenzer, Robert C. *Enterprising Southerners: Black Economic Success in North Carolina 1865-1915*, Charlottesville: University Press of Virginia, 1997.

Kramer, Larry D. *The People Themselves, Popular Constitutionalism and Judicial Review*, New York: Oxford University Press, 2004.

Kreitner, Roy. *Calculating Promises: The Emergence of Modern American Contract Doctrine*. Stanford: Stanford University Press, 2007.

Litwak, Leon F. *North of Slavery: The Negro in the Free States, 1790-1860.* Chicago: University of Chicago Press, 1961.

McCurry, Stephanie. *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country*. New York: Oxford University Press, 1995.

Miller, Wilbur R. *Revenuers and Moonshiners: Enforcing Federal Liquor Law in the Mountain South, 1865-1900.* Chapel Hill: University of North Carolina Press, 1991.

Nelson, William E. *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830.* Athens: University of Georgia Press, 1994.

Nieman, Donald G. *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks 1865-1868*. KTO Studies in American History. Millwood, New York: KTO Press, 1979.

Novak, William J. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Studies in Legal History. Chapel Hill: University of North Carolina Press, 1996.

Novak, William J. "The Legal Transformation of Citizenship in Nineteenth-Century America." In *The Democratic Experiment: New Directions in American Political History,* edited by Meg Jacobs, William J. Novak, and Julian E. Zelizer, 85-119. Princeton: Princeton University Press, 2003.

Olsen, Otto H. *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée*. Baltimore: Johns Hopkins Press, 1965.

Parker, Kunal M. *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism.* Cambridge Historical Studies in American Law and Society. New York: Cambridge University Press, 2011.

Posner, Richard A. *The Federal Courts: Challenge and Reform*. 2nd ed. Cambridge: Harvard University Press, 1996.

Ranney, Joseph A. *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law.* Westport, Connecticut: Praeger Publishers, 2006.

Raper, Horace, ed. *The Papers of William Woods Holden*, vol. I 1841-1868. Raleigh: North Carolina Division of Archives and History.

Ready, Milton. *The Tar Heel State: A History of North Carolina*. Columbia: University of South Carolina Press, 2005.

Reid, Richard M. *Freedom for Themselves: North Carolina's Black Soldiers in the Civil War Era*. Civil War America. Chapel Hill: The University of North Carolina Press, 2008.

Schmidt, James D., *Free to Work: Labor Law, Emancipation, and Reconstruction, 1815-1880.* Studies in the Legal History of the South. Athens: University of Georgia Press, 1998.

Schwartz, Marie Jenkins. Marie. *Born in Bondage: Growing Up Enslaved in the Antebellum South*. Cambridge: Harvard University Press, 2000.. *Born in Bondage: Growing Up Enslaved in the Antebellum South*. Cambridge: Harvard University Press, 2000.

Scott, Rebecca J. "The Battle Over the Child: Child Apprenticeship and the Freedmen's Bureau in North Carolina." In *Growing Up in America: Children in Historical Perspective,* edited by N. Ray Hiner and Joseph M. Hawes, 193-207. Chicago: University of Illinois Press.

Stanley, Amy Dru. *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation.* New York: Cambridge University Press, 1998.

Steinfeld, Robert J. *Coercion, Contract, and Free Labor in the Nineteenth Century.* Cambridge Historical Studies in American Law and Society. NewYork: Cambridge University Press, 2001.

Stoner, James R. *Common-Law Liberty: Rethinking American Constitutionalism*. Lawrence: University Press of Kansas, 2003.

Sullivan, Kathleen S. *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America*. The Johns Hopkins Series in Constitutional Thought. Baltimore: Johns Hopkins University Press, 2007.

Tomlins, Christopher L. *Law, Labor, and Ideology in the Early Republic*. New York: Cambridge University Press, 1993.

Tsesis, Alexander. *The Thirteenth Amendment and American Freedom: A Legal History.* New York: New York University Press, 2004.

Tushnet, Mark V. *Slave Law in the American South: State v. Mann in History and Literature*. Landmark Law Cases in American Society. Lawrence: University Press of Kansas, 2003.

Vorenberg, Michael. *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*. Cambridge Historical Studies in American Law and Society. 2001. Reprint, New York: Cambridge University Press, 2004.

Watson, Harry L. *Liberty and Power: The Politics of Jacksonian America*. New York: Hill and Wang, 1990.

Woodman, Harold D. *New South-New Law: The Legal Foundations of Credit and Labor Relations in the Postbellum South.* The Walter Lynwood Fleming Lectures in Southern History. Baton Rouge: Louisiana State University Press, 1995.

Zipf, Karin L. *Labor of Innocents: Forced Apprenticeship in North Carolina 1715-1919*. Baton Rouge: Louisiana State University Press, 2005.

Zuber, Richard L. *North Carolina During Reconstruction*. Raleigh: North Carolina Division of Archives and History, 1996.

Journal Articles

Edwards, Laura F. "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation." *Law and History Review* 14, no. 1 (Spring 1996): 81-124.

Finkelman, Paul. "Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism." *The Supreme Court Review* 1994 (1994): 247-294.

Forbath, William E. "Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution," *Stanford Law Review* 46, no. 6 (July 1994): 1771-1085.

Franke, Katherine M. "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages." *Yale Journal of Law and Humanities* 11(Summer 1999): 251-309.

Harris, William C. "Lincoln and Wartime Reconstruction in North Carolina, 1861-1863," *North Carolina Historical Review*. 63, no. 2 (April, 1986): 149-168.

Hartog, Hendrik. "The Constitution of Aspiration and 'The Rights That Belong to Us All.'" *The Journal of American History* 74, no. 3 (December 1987): 1013-1034.

Holden-Smith, Barbara. "Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania.*" *Cornell Law Review* 78 (1992-1993): 1086-1151.

Jones, Catherine. "Ties That Bind, Bonds That Break: Children in the Reorganization of Households in Postemancipation Virginia." *The Journal of Southern History* 76 (February 2010): 71-106.

McCain, Paul M. "Magistrates Courts in Early North Carolina." *The North Carolina Historical Review* 43, no. 1 (January 1971): 23-30.

Miller, Perry. "The Common Law in Jacksonian America." Proceedings of the American Philosophical Society 103, no.3 (June 1959) http://www.jstor.org/stable/985477 (accessed April 6, 2008).

Note. "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort. *Harvard Law Review*. 93, no. 7 (May, 1980) http://www.jstor.org/stable/1340608 (accessed March 2012): 1510-1539.

Sandoval-Strausz, A.K., "Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America." *Law and History Review*. 23 (Spring 2005): 53-94.

St. Clair, Kenneth E. “Judicial Machinery in North Carolina in 1865.” *North Carolina Historical Review* 30 (1953): 415-435.

Wiecek, William. “The Reconstruction of Federal Judicial Power, 1863-1875.” *American Journal of Legal History* 13, no. 4 (October 1969): 333-359.

UNPUBLISHED DISSERTATION

St. Clair, Kenneth Edson, “The Administration of Justice in North Carolina Reconstruction, 1865-1876.” PhD diss., Ohio State University, 1939.