Slave Contracts and the Thirteenth Amendment

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CONTENTS

INTRODUCTION 1009
I. THE SLAVE-CONTRACT PROBLEM 1011
II. LEGAL BASES FOR ENFORCING SLAVE CONTRACTS 1012
A. Avoidance Through Legislative Means 1013
B. Avoidance Through Judicial Means 1016
III. *OSBORN V. NICHOLSON* AND THE THIRTEENTH AMENDMENT COUNTERARGUMENT 1020
IV. CONTRACTS FOR SLAVES BY SLAVES 1025
CONCLUSION 1028

INTRODUCTION

The Thirteenth Amendment—the commandment that "neither slavery nor involuntary servitude . . . shall exist within the United States"—did not truly eradicate incidents of slavery. This is hardly a controversial point. The postwar emergence of the Black Codes—laws meant to confine African Americans' ability to rent, travel, and live as free humans would expect to—ensured that slavery's conditions continued unabated.[1] The Amendment itself permits slavery to exist "as a punishment for crime whereof the party shall have been duly convicted."[2] Still, did the

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1. *See* ERIC FONER, RECONSTRUCTION 199–201 (1988) (describing Black Codes); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29–33 (1871) (reproducing Mississippi's Black Codes).

2. U.S. CONST. amend. XIII, § 1. Of course, I am hardly the first person to note this point. For an analysis of the "punishment for crime" clause and its contemporary relevance, see Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607 (2008).

Thirteenth Amendment not abolish the most fundamental characteristic of chattel slavery—the ability to trade in and profit from the bodies of other humans? Surprisingly, the answer is no. Even after emancipation, slavery remained lucrative business in the form of antebellum contracts for slaves. More surprisingly, most courts, and ultimately the U.S. Supreme Court, permitted sellers of slaves on contract to recover the debts owed to them. The Thirteenth Amendment no longer permitted commerce in flesh, but humans continued to have monetary value.

Why should we care about this seemingly esoteric episode in our legal history? Did the post-bellum viability of slave contracts have any real effect upon the freedmen? Lawsuits between old slave traders did not diminish the way in which the freedmen carried themselves in the world. If the remnants of slavery remained, that had nothing to do with these commercial disputes. The Thirteenth Amendment had done its work by freeing the slaves; contract law could sort out the paper remnants.

This is the view of the only work to thoroughly assess the interaction between the slave-contract cases and the Thirteenth Amendment, Professor Andrew Kull's thought-provoking study from two decades ago.[3] This Symposium provides an opportune moment to push back on that view and to suggest that the Thirteenth Amendment could have—and indeed, should have—prevented enforcement of slave contracts. I do so not only with a fresh analysis of the known slave-contract cases, but also by discussing a case that has been entirely unnoticed until now—one in which the purchaser was himself a former slave attempting to free his family. In this context, the consequence of enforcing the debt was literally to re-enslave the buyer. Contrary to the Supreme Court's ultimate conclusion, it is incorrect that "[n]either the rights nor the interests of those . . . [held] lately in bondage [were] affected" by the decision to enforce a slave contract.[4] Far from being purely "private" agreements, these instruments had a deep influence on the world beyond the parties.

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3. Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493, 530–32 (1994). Only one other author has devoted significant attention to the slave-contract cases. In two pieces, Diane J. Klein assessed the cases in a manner more sympathetic to nonenforcement than Kull's approach. Diane J. Klein, *Naming and Framing the "Subject" of Antebellum Slave Contracts: Introducing Julia, "A Certain Negro Slave," "A Man," Joseph, Eliza, and Albert*, 9 RUTGERS RACE & L. REV. 243 (2008); Diane J. Klein, *Paying Eliza: Comity, Contracts and Critical Race Theory—19th Century Choice of Law Doctrine and the Validation of Antebellum Contracts for the Purchase and Sale of Human Beings*, 20 NAT'L BLACK L.J. 1 (2006). These articles address the slave-contract cases from the perspectives of conflict of laws and critical race theory. Professor Kull's article remains the only published piece to grapple with the Thirteenth Amendment implications of the slave-contract cases.

4. Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 663 (1872).

In short, this Article aims to fill in a missing chapter in Thirteenth Amendment history, one that contributes to our understanding of why the Amendment has not played more of a role in our constitutional law. In the slave-contract cases, a provision that positively enacted a great natural-law principle—the freedom of man—succumbed to the sacredness of personal property rights. An Amendment that promised a revolution in federal-state relations could not overcome the entrenched principles of local commercial law. This outcome was not inevitable, though, as the opinion of one iconoclastic judge, Henry Clay Caldwell, shows. We do well to examine this history—actual and alternative—as we consider the Amendment's position in today's legal landscape and the possibilities it contains.

I. THE SLAVE-CONTRACT PROBLEM

The typical form of slave paper was a run-of-the-mill promissory note—the buyer's guarantee to pay the seller sometime in the future, often secured by the purchased slaves themselves. There was nothing extraordinary about such agreements in the slaveholding states, but they caused a unique problem when sellers sought to enforce them after the Civil War. The Thirteenth Amendment banned slavery, and the Fourteenth Amendment voided all claims "for the loss of . . . any slave."[5] Yet appeals to the courts for payment on a slave contract appeared both to vindicate slavery and to compensate a former slave owner. How were courts to reconcile the Reconstruction Amendments with what had previously been a common commercial transaction?

From one perspective, courts asked to enforce slave contracts faced a practical policy choice: which party was to bear the loss? One way or the other, someone had to eat the value of the slave property embodied in the paper. Emancipation had caused the buyer to forfeit his slave. Should he forfeit the purchase price to boot? Or should the loss be split between buyer and seller by refusing to permit the seller the money owed to him? The quantity of these contracts made the loss-spreading question even more vexing. Although the value of slaves in the form of postwar slave contracts is not certain, slave contracts were common. Courts in every former Confederate state, and even in some Union ones, faced remorseful buyers who sought to be relieved of their slave debt. Especially given the enormous value of slaves—one historian has estimated it to be eighty percent of the gross national product in 1860, equivalent to $9.75 trillion

5. U.S. CONST. amend. XIV, § 4 ("[N]either the United States or any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.").

in today's dollars[6]—we can be fairly certain that this legal battle threatened the ruin of either sellers or buyers as a class.[7] Courts adjudicating slave-contract disputes were thus the final decisionmakers in a scuffle over the scraps of antebellum wealth.

Quite outside of this practical quandary, slave contracts posed a great moral problem: did the decision to order payment for slaves not sanction the law of slavery? Private agreements for slaves were clearly valid at the time of their making, yet emancipation had wrecked the foundation on which they were based. How could courts reconcile these contract claims with a brand new Constitution—one that finally recognized the freedom of the nation's black men and women?

The answers to these questions, for most jurists, were determined by neither practical considerations nor moral reasoning. They were determined by the forms of the law. Courts consistently applied conventional concepts of commercial law to find that the slave seller was entitled to payment. Startlingly, most courts failed to consider that the Thirteenth Amendment might have something to say about how the issue should be handled. Even some judges who declined to enforce the contracts limited their reliance on the Thirteenth Amendment, instead reaching their conclusions though typical legal arguments and forms. The overall result was a lost opportunity to secure the rights of freedmen. Yet some courts did find the contracts to perpetuate slavery. Their opinions offer a different version of history, one whereby the Thirteenth Amendment provides a substantive guarantee of freedom.

II. LEGAL BASES FOR ENFORCING SLAVE CONTRACTS

As the Alabama Supreme Court set about deciding whether to enforce slave contracts, it noted the novelty of the issue: "It is in vain to look for authorities in such cases as this, as there never was, before the occurrence of such an event as the recent emancipation of the slaves in this country."[8] The decisions of high courts throughout the South belied the hollowness of this rhetoric. Courts had ample precedent to follow. Principles of antebellum constitutional, common, and commercial law—not the Reconstruction Amendments—supplied the legal grounds for deciding most slave-contract cases. By relying on these older authorities,

6. David Brion Davis, *Foreword: The Rocky Road to Freedom: Crucial Barriers to Abolition in the Antebellum Years*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT xvi (Alexander Tsesis ed., 2010).

7. Contemporary courts understood the gravity of the question in the same way. As the South Carolina Supreme Court put it in a case involving the descendants of John C. Calhoun, "The case before us is of interest to the community, from the large amount of debt which will be affected by the decision." Calhoun v. Calhoun, 2 S.C. 283, 291 (1870).

8. Fitzpatrick v. Hearne, 44 Ala. 171, 175 (1870).

courts almost universally upheld existing debts for slaves.[9] There were two distinct circumstances in which the question of enforcement came before judges. In the first, state legislatures attempted to strip courts of jurisdiction to hear suits brought by sellers asking for enforcement. In the second, buyers argued that slave contracts were unenforceable by their very nature.

A. Avoidance Through Legislative Means

As a condition of readmission to the Union, Congress required former Confederate states to hold conventions for the passage of new state constitutions.[10] Only after Congress approved the resulting document would the state be permitted representation at the federal level. One of the key items on the conventions' agendas was debt forgiveness—including forgiveness for debts owed on slave contracts. Six states produced, and Congress subsequently approved, constitutions prohibiting judicial enforcement of slave contracts.[11]

What were the motives of the men who passed these provisions? Some certainly objected to the idea that the courts of a free state should be available to provide a remedy to former slave owners.[12] Others, however, sensed in the elimination of slave debt the opportunity to provide compensation that the Fourteenth Amendment otherwise prohibited.[13] Indeed, nullification of the contracts might be the worse outcome from a moral standpoint. The buyers had bet on slavery in its final hours, and forgiving their debt could serve as nod to those who held fast to the South. Perhaps nowhere is the ambiguity of the situation made clearer than in a correspondence between Gideon Pillow, a Confederate general

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9. Professor Kull has contended that it was right to apply pure commercial law to the cases and that they were correctly decided on that basis. *See* Kull, *supra* note 3, at 531 ("[T]o decide the case in favor of the buyer of slaves, whatever the grounds on which the court denied the seller's suit, was, as a matter of commercial law, to decide it wrong."); *id.* at 532 ([T]o give [nullification arguments] practical effect would have involved the nation in a political revolution that Reconstruction did not envision."). To void slave contracts through the Thirteenth Amendment, he argued, would have disturbed settled legal rules and imposed a brand of retroactive justice that the political forces of the time could not achieve. *See id.* ("A retroactive revision of property relations is easily within the province of political justice, forming the basis for all confiscation and reallocation problems, but no such revision was attempted by the Thirteenth Amendment."). Though this Article disputes Professor Kull's conclusion, his piece is a nuanced and enlightening treatment that explains why it was not self-evident to Reconstruction actors that nullifying slave contracts was the correct move. I am indebted to his thorough analysis of the problem.

10. For general background on the conventions, see FONER, *supra* note 1, at 316–33.

11. The six states were Alabama, Arkansas, Florida, Georgia, Louisiana, and South Carolina (with the caveat that Alabama's provision was an ordinance rather than an amendment to the state constitution). For the text of these provisions, as well as proposed provisions that failed, see Kull, *supra* note 3, at 533–38.

12. *See id.* at 522–23.

13. *See id.* at 523–24.

and one of the largest slaveholders in Arkansas and Tennessee, and Senator Charles Sumner, the Radical Republican stalwart. Sumner had just proposed a bill stripping federal courts of jurisdiction to hear suits seeking enforcement of contracts for slaves. Pillow sent his thanks; he was being sued for $109,000 in slave debt.[14] As Pillow's enthusiasm indicates, the question of whether to enforce may have been a moral wash.[15]

When it came time to test the nullification measures in courts, judges had little to do with these real-world ambiguities. Their reasoning was almost purely legal, and it was based not on express policy considerations but rather on a technical question of constitutional law: did any state in the Confederacy actually secede? Clearly, sellers argued in seeking enforcement, the nullification measures abrogated slave contracts and violated the Contracts Clause of the Constitution.[16] Buyers responded, however, that the abrogation was permissible for two reasons. First, the states were outside the Union when they devised the ban on slave-contract enforcement—in other words, they were not actually "states" subject to the prohibition of the Contracts Clause. Second, because Congress approved the state constitutions—or "dictated" their terms, as one court put it[17]—and because the Federal Constitution did not prevent Congress from impairing the obligation of contracts, there was no wrongdoing on the part of the states.

This rather clever argument succeeded only in Georgia, abetted by Congress's decision to strike a number of debt-forgiveness provisions from the state's proposed constitution while leaving its slave-contract prohibition intact.[18] The United States Supreme Court deflated it once and for all in *White v. Hart*.[19] The Court held that the state constitution, far from being dictated by Congress, was "voluntary," and even had it not been, Congress had no authority to approve a state measure that vio-

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14. *See id.* at 506. The correspondence is more fully related in CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE 860 n.289 (1971).

15. *See* Kull, *supra* note 3, at 530 ("Depending on the viewpoint of the observer, the nullification of slave debts was thus either the last tribute due to loyalty, or the last exaction of a Bourbon class, advanced in the name of its final representatives. Inevitably it was both at once, besides being (in the eyes of others still) the final vindication of longstanding abolitionist doctrine on the illegality of slavery by natural law.").

16. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."). Some jurists sought a way around this conclusion by drawing a distinction between a state's authority to regulate its courts' jurisdiction and its authority to impair contracts. *See* Jacoway v. Denton, 25 Ark. 625, 660 (1869) (McClure, J., dissenting). However, the prevailing view was that to strip individuals of a judicial forum to enforce their contracts was to impair the obligations of the contracts themselves.

17. Shorter v. Cobb, 39 Ga. 285, 303–04 (1869).

18. *Id.* at 305; White v. Hart, 39 Ga. 306, 307 (1869).

19. 80 U.S. (13 Wall.) 646 (1871).

lated the Federal Constitution.[20] To the notion that the state had seceded from the Union, the Court held that for the duration of the war the states' "rights under the Constitution were suspended, but not destroyed."[21] Thus perished the theory that nullification of slave contracts fell outside the Contracts Clause.[22]

The real flaw of *White v. Hart* was not so much its take on whether a state could leave the Union—a serious and nuanced question in the jurisprudence of the time[23]—but rather that it entirely ignored the Thirteenth Amendment. The Court failed to distinguish contracts involving subject matter such as bonds—another context in which the legality of secession arose—from those involving human bondage. Even had a state no ability to leave the Union, the question remained whether the state constitutional provisions were an appropriate means of enforcing the Thirteenth Amendment's prohibition of slavery. Chief Justice Salmon Chase, at least, believed that they were.[24] Few, however, stopped to consider how the Reconstruction Amendments might have altered the original Constitution's Contracts Clause. Even those judges who believed the state provisions to be constitutional appeared more concerned with fairness toward the contracting parties than with the postwar status of the freedmen.[25] By relying upon the Contracts Clause to require enforce-

20. *Id.* at 649.

21. *Id.* at 651.

22. The Court's rationales in *White v. Hart* might be questioned. It seems absurd to claim that states taking up arms against the federal government remained part of the Union during conflict—a point that several contemporary jurists acknowledged. *See, e.g.*, Texas v. White, 74 U.S. (7 Wall.) 700, 737 (1869) (Grier, J., dissenting) ("This is to be decided as a *political fact*, not as a *legal fiction*. This court is bound to know and notice the public history of the nation. If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States."). In the face of this reality, *White v. Hart* had to rely on a semantic distinction between territories, which Congress would "admit to the Union" as new states, and the reconstructed antebellum states, which under the Reconstruction Acts would not be "readmitted to the union" but instead would be "entitled" or "admitted to" representation in Congress. *Hart*, 80 U.S. at 652. The language of the Reconstruction Acts apparently proved that the States of the Confederacy never left. Nevertheless, the result was consistent with the Court's precedents on postwar problems such as the validity of confederate bond debt. *See Texas*, 74 U.S. at 726 (holding that Texas continued as part of the Union even after secession); *see also* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 460–63 (1982) (discussing importance of holdings in *Texas v. White* and *White v. Hart* to the Radical Republicans' program).

23. *See* Herman Belz, *Deep-Conviction Jurisprudence and* Texas v. White: *A Comment on G. Edward White's Historicist Interpretation of Chief Justice Chase*, 21 N. KY. L. REV. 117, 123–30 (1993) (discussing importance of the question and its resolution in *Texas v. White*).

24. *Osborn*, 80 U.S. at 664 (Chase, C.J., dissenting) ("[C]lauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.").

25. *See* McElvain v. Mudd, 44 Ala. 48, 81 (1870) (Peters, J., dissenting) ("The seeming injustice of [enforcing the contract], appears from the fact, that the appellant will be made to pay quite eight thousand dollars, in legal funds, to the appellee, for property in persons, now citizens of the

ment, the cases ending in *White* obscured the conflict between old and new constitutional orders that was inherent in the slave contract cases.[26]

B. Avoidance Through Judicial Means

The conflict between old and new was more clearly at issue in a series of cases squarely arguing that the destruction of slavery also destroyed antebellum contracts for slaves. In these cases, the question was not whether a state had power to nullify contracts, but rather whether the very nature of the contracts rendered them unenforceable. The argument came in three forms, each based in commercial law: First, that the end of slavery violated warranties that sellers had given as to the quality of their slaves. Second, that the end of slavery caused a "failure of consideration" that relieved buyers of their obligations under the contract. And third, that the end of slavery rendered slave contracts void as against public policy.

The weakest of these arguments posited that emancipation voided the seller's warranty that the slave would be a "slave for life." Such warranties were boilerplate—default language included in almost all slave contracts. They meant that the slave at the heart of the contract was not free or physically damaged at the time of sale. They did not guarantee that the slave would remain enslaved for the duration of his life or that slavery would never come to an end.

Postwar courts had no problem adopting this interpretation of slave warranties. The Florida Supreme Court, for example, rested its decision on the distinction between insurance against loss, which the parties could have agreed to separately, and a basic warranty as to the nature of the slave at sale. Had the parties wished to warrant against the end of slavery, the Court stated,

> they would doubtless have been more explicit in making known that intention than by adopting a stereotyped formula, which had been in use under an entirely different condition of things for more than two hundred years. Such an intention, clearly manifested by the terms used, would have imparted to the instrument rather the character of

State, who had been declared enfranchised by the nation, and whose emancipation the nation was most solemnly pledged to make good; and yet, get comparatively nothing of value for his money."); Shorter v. Cobb, 39 Ga. 285, 304 (1869) ("[I]t would be alike rigorous and unjust to hold that creditors were the only class whose property was *insured* against the contingencies and losses incident to the war; that a bond, note, or mortgage was the only property too sacred to be touched, and too secure to be affected during the general wreck of fortunes, and ruin of families.").

26. *See* Jacoway v. Denton, 25 Ark. 625, 645 (1869) ("A change of Constitution can not [sic] release a State from a contract made under a Constitution which permits it to be made.").

> a "policy of insurance" than that of an ordinary *warranty* of title and of continuous possession.[27]

Courts considered agreements for slaves made at such a late date to be "risking contracts,"[28] gambles that slaves would still have value at the end of the Civil War. As a matter of commercial law, the doctrine of eminent domain was sufficient to resolve the warranty issue in favor of the seller. Time and again, courts reasoned analogically that, just as a seller of land does not guarantee against future government confiscation, so too did the buyer bear the risk that the government would end the institution of slavery.[29]

A separate theory, closely related to the warranty claim, argued that the end of slavery caused the contracts to suffer from "failure of consideration." This argument depended in large part on the date of slavery's end: at what point did it become illegal to contract for slaves? The *Emancipation Proclamation Cases*,[30] a Texas decision, was exemplary of the way courts treated this question. In this particular case, the contracts had been made after the Emancipation Proclamation but before the end of hostilities between the North and South. The majority's opinion was dedicated to a refutation of the Emancipation Proclamation's legal force. A mere war measure, it was no authority for freedom of its own accord. In the court's view, only a decisive cessation of hostilities could confirm slavery's end, and only slavery's end could make a contract for slaves illegal: "Until slavery was abolished, no feature of it was destroyed. Owners of slaves had all the rights of property therein, and the one not the least in importance is its vendible quality."[31] For the Texas Supreme Court, the Emancipation Proclamation was about timing, not about the broader meaning of freedom.

The dissent to the *Emancipation Proclamation Cases*, penned by Andrew Jackson Hamilton, relied less on exegesis of the Proclamation's legal power and more on the realities that it represented for slave owners. Even if the Proclamation could not free the slaves instantaneously, its effect was to declare decisively that slavery was contrary to the policy of the legitimate government. How, then, could a court now support a contract that ran against that policy? "The question here," wrote Hamilton,

> is not as to the moment in time when the former slaves in Texas actually obtained their freedom by events of the war; but it is whether

27. Walker v. Gatlin, 12 Fla. 9, 14–15 (1867).

28. *McElvain*, 44 Ala. at 55.

29. *See, e.g.*, Calhoun v. Calhoun, 2 S.C. 283, 303 (1870); *Walker*, 12 Fla. at 15–17; Scott v. Scott, 59 Va. 150, 176–77 (1868) (Moncure, J., concurring).

30. Hall v. Keese, 31 Tex. 504 (1868).

31. *Id.* at 526.

> now the courts will aid in carrying out and enforcing contracts against the public policy of the government, pronounced in the most solemn form as both sovereign and belligerent in a great civil war.[32]

Hamilton's dissent was a species of the final major theory against enforcement: that slave contracts were void based on public policy. But whereas Hamilton had tried to ground the public policy argument on the foundation of the Emancipation Proclamation—and indeed, he would have upheld slave contracts made prior to its issuance[33]—other judges adopted a broader public policy argument. In Louisiana, the only state whose courts consistently nullified slave contracts, judges mixed castigation of slavery's morality with somewhat more legalistic analysis in the vein of Hamilton's opinion. For instance, in *Wainwright v. Bridges*, Louisiana's foundational slave-contract case, the court opined that slavery was a relic of "barbarous ages."[34] It had persisted in American culture as a matter of expediency, but "the moral conscience of men no longer permitted them to sustain slavery as a thing of right."[35] This broader point made, the court went on to hold that slave contracts were abolished along with slavery itself: "The fiat of the sovereign is potent to release the contracting parties, as well as potent to set the bondman free. Its sweep is general, and its wisdom does justice to all."[36]

These passages indicate that judges who refused to enforce slave contracts relied primarily on freewheeling application of principles of justice. Their opinions contained little exegesis of common law, statute, or the Constitution. Most courts, however, were eager to combat a mode of thought that did not rely on pure legal reasoning. As the Tennessee Supreme Court succinctly put it, "[w]ith the morality of slavery we have nothing to do, but simply to announce the laws of property as we find them in reference to contracts of this character."[37] In sum, the strategy of courts that enforced slave contracts was to adhere to established common

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32. *Id.* at 553 (Hamilton, J., dissenting).

33. *Id.* at 552–53 ("As to the executed contracts of this sort, however reprehensible they may be, it is a matter of no concern to the courts of the country or to the laws of the land, provided the persons who were bought and sold have in fact obtained their freedom.").

34. Wainwright v. Bridges, 19 La. Ann. 234, 238 (1867).

35. *Id.*

36. *Id.* at 240.

37. Lewis v. Woodfolk, 61 Tenn. 25, 53 (1872); *see also* McElvain v. Mudd, 44 Ala. 48, 52 (1870) ("I do not propose to go into an elaborate discussion of the abstract right, or morality of the institution of slavery, as it existed in this country before the date of said proclamation. To do so, I am persuaded will accomplish no good purpose, and, most probably, we would come out of the discussion but little wiser, and, I think, certainly no better than when we entered upon it."); Jacoway v. Denton, 25 Ark. 625, 636 (1869) ("[W]e must act as rational men; we must accept the law as it was and now is with imperfections; we must examine slavery as it was; we must consider the nation, the State and the people as they were, not as we think they should have been; and in this view only can we arrive at a correct conclusion and duly appreciate the rights of the parties to this suit.").

law precedents. The principles of commercial law that demanded enforcement were deeply rooted in Anglo-American legal thought—so firmly rooted, in fact, that judges could cite seventeenth-century English cases to support the proposition that a buyer bears the risk that the government will take property.[38]

Ancient authority did not precisely parallel the problem of slave contracts, of course. Slavery had always posed special legal puzzles of its own, given the dual nature of the slave as both property and human being, and questions that defied conventional analysis continued to arise in the slave-contract cases. For example, to enforce the contracts, courts were required to draw a conceptual distinction between the slave as tangible property—a sort of property that was now illegal—and the monetary value of the slave memorialized on paper. A decision against enforcement also posed a unique problem of judicial administration. Was there any limitation on these suits? If slave contracts were invalid only because slavery was immoral, a party who bought a slave on contract in 1830 had just as valid a claim that his bargain was null as the buyer who completed his contract in 1863.[39] Blatant sympathy for slavery played a role in the judicial calculus as well. In their most candid moments, judges excoriated the non-enforcement theory as a regrettable attack on the Southern past.[40]

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38. Scott v. Scott, 59 Va. 150, 176–77 (1868) (Moncure, J., concurring) (citing Paradine v. Jane, [1647] EWHC KB J5).

39. *See* Henderlite v. Thurman, 63 Va. 466, 479 (1872) ("The purchaser of a slave long before the war may with equal propriety claim an abatement of the purchase money, upon the ground of a failure of title and consideration by act of the government. If he has already paid, he would, for the same reason, be equally entitled to recover back such share or proportion of the purchase money as would compensate him for the loss sustained.").

The caveat, of course, is that a fully executed contract for slaves did not require the intervention of the courts. Such reasoning was a facile way for judges to avoid the core issue: should the judiciary lend its authority to the enforcement of contracts based upon a discredited form of property? In the twentieth century, the U.S. Supreme Court, through the Equal Protection Clause, rejected attempts to use the judiciary as a means of enforcing private discrimination. *See* Palmore v. Sidoti, 466 U.S. 429 (1984); Shelley v. Kraemer, 334 U.S. 1 (1948). Similarly, nineteenth century judges might have declined to permit private parties to enforce slave contracts in a judicial forum—though this would have required the additional step of concluding that slave contracts ran afoul of the Thirteenth Amendment. For an argument that *Shelley* should have been decided on Thirteenth Amendment grounds, see Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 483–91 (2007).

40. *Henderlite*, 63 Va. at 477 ("The proposition [that the contract is against public policy] involves, in my judgment, an admission derogatory to our whole previous history. Notwithstanding the institution was recognized as lawful and constitutional by both State and Federal government, was sustained by public sentiment, was interwoven with the entire framework of society, and was believed by men eminent in wisdom and piety to be in accordance with the principles of religion, humanity, and justice; notwithstanding all this, because it has been destroyed by paramount force, we are expected not only to give it up without a murmur, but to surrender all our previous convictions, to yield our faith and consciences to the keeping of others, and henceforth to believe that slav-

Regardless of these nuances, the established forms of the common law provided an easy answer to pleas for relief, and postwar courts clung to these forms when faced with slave contracts. Had they inquired into the meaning of the new Constitution and the Thirteenth Amendment—and few state judges did—they would have found the issue vastly more complicated.

III. *OSBORN V. NICHOLSON* AND THE THIRTEENTH AMENDMENT COUNTERARGUMENT

To gain a different view of how to treat slave contracts, we must exchange the state courts for the federal circuit courts—specifically the Eastern District of Arkansas. In that forum arose *Osborn v. Nicholson*,[41] which would eventually put a decisive end to the slave-contract controversy. *Osborn* involved a $1,300 debt for a twenty-three-year-old slave named Albert, contracted on the eve of Fort Sumter in March 1861. These facts did little to distinguish it from the numerous other slave-contract cases of the era. Yet *Osborn* is remarkable for two reasons. First, Judge Henry Clay Caldwell's circuit court decision is the most clearly realized opinion against enforcement, not to mention one of the few to justify that outcome based on the Thirteenth Amendment.[42] Second, the Supreme Court's opinion reversing Caldwell and enforcing the contract presented a starkly different view of freedom and personal rights—and provided an early example of the postwar Court's tendency to favor established interests over freedmen and other exploited people.[43] Read together, these two writings illustrate alternative visions of the Reconstruction Constitution and the Thirteenth Amendment's place within it.

A biographical sketch portrays Henry Clay Caldwell as a man who "saw the law as an instrument of substantive justice."[44] Caldwell's *Osborn* opinion—a jeremiad against the slave states' rejection of natural liberty and a prophecy for freedom under the Reconstruction Constitution—certainly supports this characterization. The opinion's decisional

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ery was wrong in itself—a curse upon our country—a moral leprosy which corrupted the life-blood of the nation.").

41. Osborn v. Nicholson, 18 F. Cas. 846 (C.C.E.D. Ark. 1870) (No. 10,595), *rev'd*, 80 U.S. (13 Wall.) 654 (1872).

42. Caldwell's opinion is most certainly flawed. It is a rather baggy document that relies excessively on analogy to other cases. But it is difficult to express how effective the opinion is when it breaks free of legalistic form, particularly in the final five pages.

43. *See, e.g.*, FONER, *supra* note 1, at 529–31 (discussing U.S. Supreme Court's retreat from the Reconstruction Amendments).

44. Richard S. Arnold & George C. Freeman, III, *Judge Henry Clay Caldwell*, 23 U. ARK. LITTLE ROCK L. REV. 317, 317 (2001).

basis is something entirely different than what we see in the state cases, including those that forgave the debt. Caldwell's refusal to enforce was not founded on "failure of consideration" or on a technical parsing of the state's power to abrogate slave contracts under the Contracts Clause. And while the opinion as a whole might be accurately characterized as a public policy argument, Caldwell's position, unlike other public policy arguments, was fully informed by the substantive implications of the Thirteenth Amendment.

Caldwell made two major points in the course of his opinion. He began by drawing a distinction between "natural" law and "municipal" or "positive" law. He reasoned that slavery was a violation of natural law and supported only by the positive law of the states. Abolition of positive slave law destroyed not only the property right in slaves but also the remedy by which that right could be enforced:

> It was only by virtue of the slave code of the state, that the plaintiff ever could have maintained an action in any court on this contract. The common law would afford him no remedy, and the statute giving the remedy, having been repealed by article 13 of amendments, of the constitution of the United States, he is without remedy.[45]

In this vision—very much rooted in the antislavery thought of the antebellum era—the Thirteenth Amendment serves the remedial purpose of restoring the law to its natural state. Because natural law did not respect the right of the slave owner,[46] its forms could not justify the enforcement of slave contracts once positive law had been swept away.[47]

Caldwell might have rested his opinion entirely on this interaction between natural and positive law. But his second point went further—he analyzed the Thirteenth Amendment as a provision with a substantive force of its own. To be sure, the Thirteenth Amendment contained notions of natural law that Caldwell relied on elsewhere in his opinion. The Amendment, he wrote, was passed "for the purpose of restoring the

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45. *Osborn*, 18 F. Cas. at 850.

46. For a discussion about the interaction between natural law, positive law, and slavery, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 8–30 (1975).

47. Caldwell used similar reasoning to uphold Arkansas's constitutional prohibition on enforcement. Because it was completely within the power of the states to abolish slavery under the old Constitution, slaveholding states could sanction abolition without violating the Contracts Clause. *See Osborn*, 18 F. Cas. at 852 ("Now if slave property was excepted from the operation of [the commerce] power, on the ground that the power over that subject was exclusively with the several states, upon which principle of logic or rule of construction can it be claimed that the constitution of the United States throws its protecting shield over the slave dealer, and the contracts growing out of that traffic?"). Caldwell pointed out that the state's authority over slavery was so great that it was justified to destroy the marriage contract between Dred Scott and his wife once Scott was taken from freedom and brought back to slavery in Missouri. If the state power over slavery could be used to destroy a marriage contract, then certainly it could be used to destroy a contract for slaves. *Id.* at 851.

slaves to their natural rights, and conforming the institutions and laws of the republic and of the several states to the immutable law of eternal justice, and making the fact conform to the theory upon which our form of government is based."[48] But when viewed alongside the Fourteenth Amendment, the Thirteenth Amendment not only restored natural law, but also established its own positive law of freedom:

> The effect of these amendments cannot be limited to the mere severance of the legal relation of master and slave. They are farreaching in their results. Under them the former slave is now a citizen, possessing and enjoying all the rights of other citizens of the republic. Can any one doubt that it was the object and purpose of these amendments to strike down slavery *and all its incidents*, and all rights of action based upon it?[49]

By focusing on citizenship and the incidents of slavery, Caldwell suggested that the Thirteenth Amendment was a substantive embodiment of liberty with which slave contracts could not be reconciled.

In the most evocative part of his opinion—indeed, the most vivid passage to appear in any of the slave-contract cases—Caldwell provides his interpretation of the Thirteenth Amendment in an even more tangible form:

> [T]his court, in the trial of [a claim for breach of a slave warranty], must inquire into the mental and physical condition of a citizen of the republic, with a view of ascertaining his value as a chattel. And it may chance that the subject of this inquiry is a juror or officer of the court, and indeed it might occur that the judge on the bench would be the subject of such an inquiry. The mind revolts at the trial of such an issue. *It would be giving full force and effect to one of the most obnoxious features of the slave code.* It would be placing the free man, who may be the subject matter of such a suit, in an attitude before the court and the country that no free government will permit, jealous of the rights and honor of its citizens, and whose policy is to instill into their minds a love of country and its free institutions. The government that would permit its free citizens to be thus degraded in the interest of slavery and slave traders, would be unworthy of the name of a free republic.[50]

With this passage, Caldwell turned the warranty argument, so easily dismissed by other courts, on its head. On this view, the warranty in a slave contract was more than boilerplate. It provided a license to inspect a freedman in exactly the same fashion as if he had been a slave. Cald-

48. *Id.* at 854–55.
49. *Id.* at 855 (emphasis added).
50. *Id.* (emphasis added).

well's scenario, even if fanciful,[51] provided a powerful argument that slave contracts were incidents of slavery barred by the Thirteenth Amendment. By contrasting slavery's incidents to citizenship rights, Caldwell provided a more concrete basis for decision than the fuzzier notions of natural law and public policy. A citizen could never be the subject of contract. How then could a freedman?

The Supreme Court, with only Chief Justice Chase dissenting, refuted every aspect of Caldwell's reasoning. It rejected the notion that slavery was law only in jurisdictions where supported by statute: "Being valid when and where it was made, [the contract] was so everywhere."[52] In the Court's view, slaves had long been "covered by the same protection as other property."[53] Eradication of the positive law of slavery did not eradicate the common law of contract. Given that slaves were a legal form of property when the contract was made, the question of enforceability was governed by the principles of contract law. The most relevant analogy was to eminent domain. Just as the buyer of real property bore the risk that the government would convert it to public use, so too the buyer of a slave bore the risk that the government would eliminate slavery as a valid form of property.[54] In short, much of the language upon which the Court based its opinion could have been lifted from one of the many state decisions on the issue.

Had the Court stopped there, the opinion would have been notable mainly for its unique posture. It did not stop there, however. Instead, it explained why the case implicated due process—that of former slaveholders. By the time of the Thirteenth Amendment, the Court explained, the right of the seller to his payment had become "legally and completely vested."[55] The real danger of Caldwell's ruling was that refusal to enforce a vested contract right would "take away one man's property and give it to another. . . . [T]he deprivation would be without due process of law. This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."[56] In short, the Court went beyond the proper application of common law rules to announce a philosophy of natural liberty and substantive justice—one completely at odds with Caldwell's.[57]

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51. In fact, after the Civil War, juries did sometimes decide whether certain slaves had been "defective" under a warranty. *See* Trimble v. Isbell, 51 Ala. 356, 358 (1874).

52. Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1872).

53. *Id.* at 661.

54. *Id.* at 659.

55. *Id.* at 662.

56. *Id.* (internal quotation marks omitted).

57. *See id.* at 663 ("Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy,-as the obligation here in question was

Indeed, this is the very sort of substantive due process argument that the Court would use to protect economic rights well into the twentieth century.[58]

The *Osborn* case is important not simply for ending the slave-contract dispute, but for presenting two opposing visions of the postwar constitutional order. In the Court's view, the Reconstruction Amendments did little to alter the relationship between the individual property owner and the state. For sure, they forbade slavery and compensation for the loss of slaves. But where these specific prohibitions did not speak, the individual retained the extent of his property interest. Natural law was relevant only insofar as it required protection of a private, vested right—even if that right found its roots in slavery.

For Caldwell, the issue was more complex. The Reconstruction Amendments did not merely abolish slavery—they altered the entirety of the constitutional structure. Though the antebellum Constitution would have given the seller a remedy, the new Constitution demanded a different result.[59] Most fundamentally, the Thirteenth Amendment ensured that individual property interests would no longer take precedence over the liberty rights of freedmen as a class. Caldwell saw his role as to decide whether "the good of the community at large is taken to be of more importance than the claim of the individual."[60] That decision was not based on Caldwell's own predilections. Rather, it was moored to the Thirteenth Amendment, which showed that "slavery is condemned in all its features."[61] Indeed, Caldwell appears to be the first judge to have read the Thirteenth Amendment as an affirmative prohibition on the relics of slavery.

But Caldwell's broader view was not to be the law. Under the Court's interpretation of the new Constitution, the decisive question—answered as soon it was asked—was whether enforcement carried freedmen back into literal slavery. As the Court saw it, "[n]either the

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valid when executed, *sitting as a court of justice*, we have no choice but to give it effect." (emphasis added)).

58. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 17–25 (2007) (tracing development of the concept of civil rights from Reconstruction to the New Deal).

59. Osborn v. Nicholson, 18 F. Cas. 846, 854 (C.C.E.D. Ark. 1870) (No. 10,595) ("These amendments are the work of the sovereign people of the United States. There are no technical rules to obstruct or prevent their full operation presently on all persons, matters, and things within their scope. Obligation of contracts and vested rights, based on slavery, cannot be set up to impede or restrain their operation. And no one can escape from their operation by the cry of the 'constitution as it was.'").

60. *Id.* at 855.

61. *Id.*

rights nor the interests of those held lately in bondage [were] affected" by enforcement of a slave contract.[62]

IV. CONTRACTS FOR SLAVES BY SLAVES

To the trained legal mind, the Supreme Court's reasoning in *Osborn* has a satisfying logic. In the field of law, there is nothing especially problematic about separating the right to a thing from the possession of the thing itself. The slave had her freedom—the use of her own body—and that was as it should be. But why should that freedom affect in the least a disembodied right to the slave's labor? As Professor Kull has argued, there was a certain dissonance in making the seller bear the loss of the slave. Refusal to enforce the slave contracts made emancipation retroactive to sellers, who by a temporal trick lost the value of their property even where it had remained valid in law.[63] Morally satisfying as voiding the contract may have been, it could not make emancipation retroactive to the slaves themselves, who of course remained in bondage until the end of the war.

This reasoning is complicated, however, if we consider a particular type of contract that has eluded the attention of scholars: one where the buying party was himself a former slave purchasing freedom for his family. In such cases, enforcement of the contract had an opposite temporal effect than it did when the parties were exclusively white. Rather than simply vindicating the white seller by refusing to make emancipation of his slave retroactive, enforcement carried forward the shackles of slavery well beyond the institution's expiration date. In a very real sense, a freedman forced to make good on his antebellum agreements was still chained to his master. And this realization forces us to reconsider the assumption that freedmen were unaffected by being the subject of an antebellum contract between whites.

Consider *Andrews v. Page*.[64] In December 1857, Henry Page, a free man of color and owner of 321 acres of land,[65] made an agreement with William B. Andrews, a Tennessee slave owner. In exchange for a $3,200 bill of sale, Page received three slaves: Page's wife, Dilly, and Page's

62. *Osborn*, 80 U.S. at 663.

63. *See* Kull, *supra* note 3, at 494 ("Nullification . . . pushed back the effective date of emancipation as between these buyers and sellers, denying to the seller the fruit of his favorable bargain and relieving the buyer from the consequences of his unfavorable one.").

64. Andrews v. Page, 50 Tenn. (3 Heisk.) 653 (1871).

65. Page possessed equitable title to all but thirteen acres of the land. Record of Prior Proceedings, Andrews v. Page, 50 Tenn. (3 Heisk.) 653 (1871) (on file at Tennessee State Library and Archives, Manuscript Section, box 2404). An equitable titleholder enjoys use and possession of land but does not have actual ownership. BLACK'S LAW DICTIONARY 1214 (9th ed. 2009) (defining "beneficial owner").

children, Bill and Britt. When the note came due in January 1861, Page was nowhere to be found. Andrews placed an attachment on Page's property, but the Civil War's intervention prevented him from carrying it out. During the war, Page died working on a sawmill, leaving his family to live on the land. Though the war freed Page's family, it had not freed Page of his obligation to Andrews. Andrews thus sought to take the Page property in satisfaction of the note.

The resulting opinion of the Tennessee Supreme Court is a remarkable illustration of how the vestiges of slavery continued to loom over freedmen after the Civil War. The court expressly declined to decide the case on the basis of the Thirteenth Amendment, or to inquire whether Page freed his family when he purchased them.[66] It did not address whether the contract was valid or whether the Civil Rights Act of 1866 prohibited attachment.[67] Instead, it decided the case under the law of slave marriages. Because that law recognized that Page and Dilly had entered into a valid marriage while enslaved, and because a postwar statute ratified that law, Dilly was entitled to a dower interest in the property.[68]

That a freedwoman could take her former owner to court and win a judgment in her favor may seem a startling result. But, at least in Dilly Page's case, success was deceptive. The court never considered the possibility that the contract might have been invalid because made for slaves—or that the purchaser was not a coequal white slave owner, but rather a husband and father purchasing his wife and children.[69] Through dower, Dilly would be able to keep part of her land.[70] But it would only

66. *Andrews*, 50 Tenn. at 658 ("The rights of the parties can not be determined upon the constitution and laws as they now exist, but are to be ascertained under the constitution and laws as they existed . . . at the time of the death of Henry Page, in 1864."). *Cf. Osborn*, 18 F. Cas. at 854 ("It must not be forgotten that this question must be determined under the constitution of the United States, as it stands now.").

67. *Andrews*, 50 Tenn. at 656.

68. *Id.* at 670–71.

69. *See id.* at 658 ("Dilly presented a petition for rehearing, in which she alleged that Harry had not purchased her for the purpose of making her his slave, but as a wife, and to make her a free woman."). The case does not indicate whether Page himself had once been Andrews's slave, or whether he had always been free. My research has shown that Page was born around 1788 in Virginia. SMITH COUNTY, TENNESSEE, CENSUS OF 1850, at 164 (Thomas E. Partlow ed.) (on file at Tennessee State Library and Archives). One explanation for Page's move—perhaps the best explanation, considering that the natural path of migration for a free black prior to the Civil War was northward rather than southward—is that a master or slave trader transported him to Tennessee.

70. My estimation is that she would get to keep 107 acres. Dower typically protected one-third of the husband's real property, and *Andrews* explicitly held that the property over which Henry Page held equitable title would be included. *Andrews*, 50 Tenn. at 670–71. Of course, this seems like a rather large chunk of land. But the amount of land is not really relevant to my argument—the point remains that Dilly's former owner could strip her of over two hundred acres of land because her slave status was enshrined in a contract.

be a part. Andrews was entitled to satisfy the debt Henry Page contracted for Dilly's freedom from the rest.[71] Furthermore, the Page children were unprotected, because the court awarded Andrews a remainder in the property that was subject to dower.[72] Unless the debt could be repaid, no future generation of Pages would enjoy this land.

The Thirteenth Amendment emancipated Dilly Page and forbade that she ever again be treated as property. But it did not prevent her former owner from continuing to extract value from her. In one sense, Henry Page's contract was no different than numerous other contracts for slaves—Andrews acquired the contract right when slave property was legal, and abolition of a slave's status as property did not also abolish the right. Yet Page's contract also had a key difference—it permitted Dilly's former master to take land that would rightfully be hers but for her prior status as a slave. Enforcement meant that Dilly was not truly free from her obligations to her master. This was most certainly not, as the Supreme Court wrote in *Osborn*, a situation where "[n]either the rights nor the interests of those . . . lately in bondage [were] affected."[73]

By showing the freedman not as abstract "consideration" for money, but instead as a live human being, *Andrews v. Page* forces us to reassess enforcement's broader implications for emancipation. It is true that very few slave-contract cases placed upon freedmen the sort of real burden that enforcement caused Dilly Page. There is no evidence that courts were awash in claims by whites against their former slaves. But this single agreement alone brings the entirety of the slave-contract edifice into sharp relief. Enforcement of every one of these contracts hinged on an assumption that former slaves were less than fully free. If slave contracts could be enforced, freedmen retained something of their character of property—even if expressed as "vested rights" instead of tangible ownership. This was not a harmless attitude in an era where a major aspiration of the moneyed Southern class was to retain the labor relations that prevailed during slavery.[74]

Andrews v. Page provides a different perspective on the slave-contract problem—one in which it is much easier to see slave contracts as an outcropping of slavery that should have been barred under the Thirteenth Amendment. For freed slaves such as Dilly Page, who still owed money on the purchase price of their freedom, the authority of the master

71. *Id.* at 671.

72. *Id.*

73. Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 663 (1872).

74. *See* FONER, *supra* note 1, at 428 ("Equally important among the aims of violence was the restoration of labor discipline on white-owned farms and plantations. In a sense, the Klan sought to take the place of both the departed personal authority of the master and the labor control function the Reconstruction state had abandoned.").

and his entitlement to take their property represented a direct return to the law of slavery. These contracts re-imposed the legal incidents of slave status. Perhaps these implications were not so obvious in the run-of-the-mill dispute between white buyers. Yet, some visionaries, such as Caldwell, saw them. The failure of his fellow jurists to join him marks perhaps the first missed opportunity for courts to embrace the Thirteenth Amendment's possibilities.

CONCLUSION

The past has a powerful hold on legal minds. Reconstruction-era judges, as much as any, were eager to "roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made."[75] The slave-contract cases are consistent with that rule. As Aviam Soifer has said of the post-bellum period, "the most private and individualistic legal categories seemed quickly and convincingly to overcome all others. Contract law triumphed in the legal imagination and permeated popular belief."[76] In an era that elevated the formal power to contract above all, perhaps it is not so remarkable that most judges had nothing to say about the freedmen upon which litigants' contractual rights were based.

What is remarkable is the lengths to which most courts went to ignore the Thirteenth Amendment when asked to enforce contracts for slaves. The Amendment marked a positive enactment of the natural-law prohibition on slavery. Yet the Supreme Court ignored this positive law in favor of natural-law principles forbidding truncation of property rights. The Amendment promised a revolution in the relationship between the federal government and the states—one that permitted the federal government to wipe away the sort of state-law contract doctrines that countenanced enforcement of slave contracts. Yet when the Supreme Court enforced the federal Constitution against the states, it gave the Contracts Clause, not the Thirteenth Amendment, primacy of place. At worst, these attitudes could actually re-enslave freedmen. Though Henry Clay Caldwell probably did not have the likes of Dilly Page in mind when he ruled, he understood that slave contracts, even if once legal, could not exist in the world the Thirteenth Amendment had made. Traditional forms of adjudication could not answer everything. As we contin-

75. Hall v. United States, 92 U.S. 27, 30 (1875). In this case, the Court concluded that a former slave could not assert a contractual claim over cotton seized by the U.S. Army during the Civil War because slaves had no legal ability to contract.

76. Aviam Soifer, *Contract, Status, and Promises Unkept*, 96 YALE L.J. 1916, 1941–42 (1987).

ue to test the Thirteenth Amendment's role in modern law, that is an approach worth heeding.