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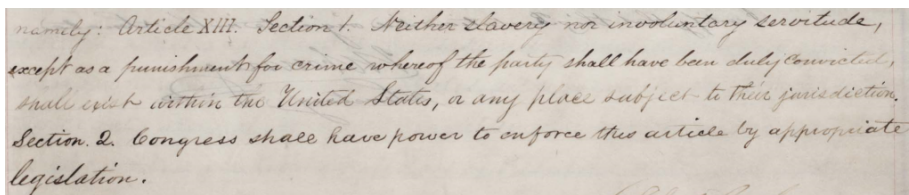
Litigating Emancipation: Legacies of Slavery in the Post-Emancipation United States

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December 2015 marks the 150th anniversary of the adoption of the Thirteenth Amendment to the United States Constitution. After decades of sectional conflict and four years of Civil War, “neither slavery nor involuntary servitude” would thereafter “exist within the United States.” This achievement was certainly significant, but it is important to consider what it did not include: directions for navigating the deconstruction of America’s “peculiar institution.” This omission left unresolved the status of freed people and provided no instructions for removing the lasting legacies of slavery from law or society. What would freedom mean for emancipated African Americans? Who would bear the financial cost of emancipation? How would the nation truly eradicate slavery from its law books, political institutions, and social structures?



Text of the Thirteenth Amendment to the U.S. Constitution.

While the Thirteenth Amendment emancipated the slaves, it did not abolish slavery. The vestiges of slavery remained embedded in American legal and social institutions well beyond 1865. Consequently, rather than conceiving of the Thirteenth Amendment as the end of slavery

in America, I argue that we ought to think of it as a beginning. It was the first step of a long legal *process* of abolition in which the many entrenched facets of slavery could be examined, contested, and potentially eliminated.

Individual Americans, both white and black, helped facilitate this endeavor, and nowhere is this clearer than in legal records. From 1865 to 1875, during the period known as Reconstruction, Southern state supreme courts heard nearly seven hundred cases related to slavery, while hundreds more were decided in lower courts. Litigants tested what black freedom would mean for their personal finances, how the relationships between whites and blacks would be newly defined, and how former-slave status would affect newly-won citizenship.

In some cases, the lingering implications of slavery involved only white Southerners. For instance, many contracts for the sale and hire of slaves remained unsettled at the time of emancipation. When ultimately contested in court, judges overwhelmingly enforced them. Even after the slave property no longer counted as property at all, the debt would not be forgiven. Such were the circumstances in the North Carolina case of *Harrell v. Watson*, in which the state supreme court compelled Meredith Watson to pay the outstanding \$1000 he owed to Stanley Harrell for the slave boy he purchased in 1864. The case was not settled until 1869, at which point the slave in question had been a free person for four years. Ownership of black bodies had ceased, but the value assigned to them remained intact. Those unlucky enough to owe debts for slaves remained bound by their commitments, while some enslavers were allowed to wring additional profit from it. In this way, the business of bondage continued, even if enslavement itself did not.

However, it was black litigants – the former slaves themselves – who initiated cases that shaped the legal meaning and limits of their newly won freedom, and who challenged all Americans to confront the lasting consequences of generations of enslavement. In *Whitesides v. Allen*, for instance, freed woman Jane Allen forced the Kentucky Court of Appeals to consider the meaning and legitimacy of family for former slaves. Jane claimed she married Daniel Allen prior to their emancipation. They had three children while enslaved, Fanny, Hardin, and Lucinda. When Daniel died intestate in 1868, his mother and siblings (also former slaves) took possession of his property, preventing Jane and her children from living there. These relatives claimed to be Daniel’s legitimate family and rightful heirs to the land. Jane and Daniel were never lawfully married, they asserted, because slave unions had not been legally recognized; they were customary at best. Thus, Jane’s children, born as slaves, were bastards in the eyes of the law. As such, they had no claim to their father’s estate.

This complicated case was one of many that forced justices across the Southern states to confront a difficult problem: whether or not a former slave’s past remained relevant in the post-slavery present. Could former slave status be held against newly

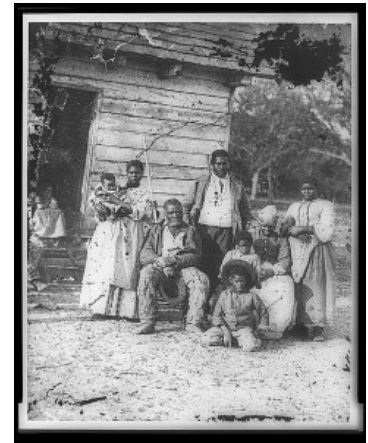
freed persons? Would the customs of slavery be incorporated by the courts or rejected outright? Judges faltered when presented with such cases precisely because they had never encountered anything like them. The need to facilitate the transition of four million people from property to citizen was literally unparalleled. Judges had only imprecise legal tools to use, and often had to force old precedents to fit new, previously unimagined conditions. In some instances, they managed to clarify and even strengthen the rights of freed people. In others, they retreated to the comfort of pre-emancipation jurisprudence, doing little to address the needs of litigants or to excise slavery's remnants from American law.

Ultimately, it was remarkable testimony that shaped the outcome in *Whitesides v. Allen*. Jane and Daniel's enslaver, Hiram Barkley, testified that he had witnessed the union and confirmed they lived as man and wife. He also substantiated that Daniel was the father of their children, who had also once been his property. This was enough for the Kentucky Court of Appeals to establish Jane and Daniel's children as rightful heirs. In 1874, *nine years after the formal end of slavery*, the court rendered its verdict. Though Daniel and Jane had not been legally married, the customary slave marriage met Kentucky's legal standard for legitimating their children after the fact. The court protected the Allens' children while simultaneously denying the legitimacy of their marriage.

In other similar cases, slave pasts were not so easily reconciled. Some children were deemed bastards and incapable of inheriting. Couples married while slaves were charged with adultery and fornication for failing to formally wed. In more extreme cases, freed people found themselves legally wed to persons not of their choosing. Because there were no established rules for handling the issues associated with being a *former* slave, verdicts varied from state to state, depending largely on the judges serving on a particular court, rather than on settled legal principles.

In the end, the results of post-emancipation slave cases were mixed. Some verdicts left elements of the peculiar institution intact, while others revealed a judicial commitment to overcoming it. Nevertheless – and whatever the outcome – slavery remained a relevant part of judicial proceedings, despite emancipation.

On this anniversary of the Thirteenth Amendment's adoption, cases like *Harrell v. Watson* and *Whitesides v. Allen* should serve as important reminders of the limitations of state-enacted emancipation, of the difficulties associated with ending slavery, and of the critical importance of individual action in resolving them. State courts decided remaining slave cases within a decade of the end of the Civil War, but they did so in ways that left some elements of the peculiar institution intact. Along with a political retreat from securing equal citizenship for freed people, this helped facilitate the institutionalization of racial segregation, the abject denial of rights, and most troubling of all, extreme forms of violence and state-sanctioned brutality that came to mark the years following Reconstruction. Though emancipation freed African Americans from bondage in 1865, abolition was, and continues to be, a much more formidable project. It has required Americans to struggle with the meaning of black freedom and the promise of legal and social equality. That struggle continues.



Four generations of a family on a plantation in Beaufort, South Carolina (1862). Image source: [Library of Congress](#)



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